Informal expert paper:

Fact-finding and investigative functions of the office of the Prosecutor, including international co-operation

Contents

I. Introduction

1. The regime governing international co-operation in the fact-finding and investigative functions of the Office of the Prosecutor is complex and raises legal and practical questions essential to the effective functioning of the International Criminal Court.

2. With a view to contributing to timely reflection on this critical matter, and in order to prepare some ideas on potential solutions for the consideration of the Prosecutor, a consultative process among a select group of experts was initiated by the Director of Common Services of the ICC in January 2003. The group was invited to prepare a written analysis of those potential problems in the international co-operation regime particularly relevant to the fact-finding and investigative functions of the Office of the Prosecutor.

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II. General observations

Experiences of the ad hoc *Tribunals*

4. Subject only to the limits prescribed by the Statute, unrestricted access to all forms of evidence by the ICC Prosecutor and the full co-operation of States is vital to the successful and fair functioning of the International Criminal Court.

5. The experience of the *ad hoc* Tribunals has proved that even with its far-reaching powers based on Chapter VII of the UN Charter (expressed *inter alia* through Article 29 of the ICTY Statute and Article 28 of the ICTR Statute, Rule 7*bis* (b) in conjunction with Rule 39(iii), and Rule 54*bis* of the ICTY Rules of Procedure and Evidence), the Prosecutor of the Tribunals has had to surmount reluctance and even opposition from some States in order to ensure their co-operation. It has mainly been diplomatic support from key governments, the Security Council and the European Union that has ensured the co-operation of reluctant States with the Tribunals.

6. The Tribunals have had to deal with restrictions imposed on the powers of the Prosecutor to interview witnesses by national officials' threat to use national security legislation to prosecute those willing to testify before the Tribunal. There have been attempts to treat the Prosecutor's requests for documents as requests for physical access to records that require search warrants, etc. In some instances, States have refused to provide assistance on the pretext that the State does not have a special domestic law on co-operation with the Tribunal. Even where such legislation exists, other States have adopted a restrictive construction of it (for instance, by refusing to countenance co-operation with the ICTY-OTP by any other official organ other than those expressly mentioned in the law on co-operation itself).

7. The Prosecutor of the ICC, whose powers are significantly weaker than those of his *ad hoc* Tribunals' counterpart, is likely to encounter similar unwillingness of States to co-operate. Such lack of co-operation from States could render the Prosecutor incapable of proceeding with critical investigations. While recognising that, in such circumstances, *political* support from States Parties will be vital, this paper addresses some *legal* means available to the ICC Prosecutor to enhance the efficiency of prosecutions through international co-operation.

8. The ICC Prosecutor will be able to undertake investigative steps on the territory of a State largely through that State's co-operation. This limitation upon the Prosecutor's powers, while adopted as a compromise in the diplomatic negotiations, may ultimately impede the effectiveness of investigations. In order to reduce the impact of this limitation, it will frequently be necessary for the Prosecutor to negotiate access to a State's territory and where necessary, try and obtain the maximum benefit possible from the provisions of the Statute through their liberal interpretation and application in practice.

9. In addition to the powers explicitly attributed to him in the Statute, the ICC Prosecutor may on occasion invoke implied powers, i.e. the powers that are essential to the performance of the Prosecutor's duties, but which are not spelled out in the Statute or Rules. However, the actual success of this approach will depend, initially, on its acceptance by States and ultimately by the ICC Chambers. Indeed, the Prosecutor will have to be extremely cautious in invoking implied powers since, in contrast to the *ad hoc* Tribunals' legal frameworks, the ICC Statute and Rules set out and regulate in detail the powers of the OTP. Invoking implied powers might therefore be more likely to be regarded as *ultra vires*. Indeed, even before the *ad hoc* Tribunals, the doctrine of implied powers has been resorted to only infrequently in its case law. Nevertheless, the *effet utile* doctrine may be utilised

wherever there is a perceived risk that a particular interpretation would ensure that the ICC Prosecutor's *express* powers could be stultified.

10. Furthermore, Article 51(2) of the ICC Statute offers the Prosecutor the option of proposing amendments to the Rules. The experience of the *ad hoc* Tribunals illustrates that Rule-amendment has been a fruitful source of extension of the Tribunal's powers, both express and implied (for example, Rule 59*bis*, which enabled arrest warrants thenceforth to be transmitted by the Prosecutor to "appropriate international bodies", thus facilitating the arrest and transfer of Tribunal indictees by peacekeeping forces in the field). This avenue offers an alternative to a claim of implied powers which could sometimes be taken advantage of, although difficulties in winning broad ASP support for a given amendment may sometimes make this untenable.

Some organisational measures

11. The structure of the Office of the Prosecutor (OTP) in the first year budget does not expressly refer to a unit that will deal with matters related to State co-operation. It seems important that from the very beginning, the Prosecutor is assisted by staff with extensive expertise in this field.

12. The Prosecutor should develop various tools that will assist with State co-operation. In addition to the formal communication of information, a list of actual contact persons should be maintained as these relationships develop, in order to enhance the effectiveness of consultations and communications with States. This list should cover not only State Parties but also non-State Parties with which the OTP may be dealing in particular matters or generally, as well as contacts within international organisations.

13. In particular, contact information may contain such details as phone-, mobile, fax numbers, e-mail addresses as well as the languages spoken. This may also require some follow up work, as well as regular updating, by the Registrar (which the OTP may wish to encourage) as States Parties may not have provided sufficient contact information.

14. The experience of the ad hoc Tribunals shows that it is important to maintain predictable channels of communication with both States and external bodies, as well as mutually-agreed standard operating procedures pursuant, *inter alia*, to Memoranda of Understanding (MOUs, see below). This is necessary in order both to foster mutual trust and to ensure that the willingness of cooperative States and entities to assist is preserved. To this end, the OTP, while taking into account the need for flexibility and an individualised structure for requests for assistance, should prepare some standard forms or guidelines to ensure a consistent approach to different types of requests for assistance.

15. The Prosecutor should develop efficient access to and knowledge of all pertinent extradition treaties and other relevant legal assistance treaties, such as mutual legal assistance treaties, so that when conflicts seem to arise, he can examine the relevant international agreements as quickly as possible. A data bank of extradition and other legal assistance treaties should be developed for the Prosecutor. The Prosecutor may wish to benefit from existing data bases of this nature held by international organisations such as the United Nations Office of Drugs and Crime in Vienna and the Commonwealth Secretariat in London.

16. It is also important that the Prosecutor knows all (enacted and draft) national legislation which implement the Statute. These laws offer not only useful information as to the appropriate channels of communication, but also provide the basis from which one may infer whether certain States are prepared to offer more assistance than they are presently required to provide under the Statute. Moreover, these acts amount to important subsequent practice in the application of the ICC Statute and can, to some extent, stand as an interpretative tool of that instrument, including with respect to the scope of powers of the Prosecutor.

The Prosecutor should be prepared to offer advice to receptive governments, in light of existing examples and best practice (from the OTP's viewpoint), on how best to structure implementing and other relevant legislation for the efficient operation of the Court, including the principle of complementarity. Such advice should, however, be carefully considered so that it does not prejudice the Prosecutor's ability to subsequently request co-operation or any later determination of the State's compliance with the obligations under the Statute.

17. Subject to the requirements of consistency with the overall object and purpose of Part 9, Memoranda of Understanding may be negotiated as a useful supplement to implementing legislation in the area of state co-operation (see below).

18. It is important that various databases referred to above and elsewhere in this paper are carefully designed so that it can be used for different purposes and for long time. It may be useful to separate public and confidential information. The public information would be accessible for all organs of the Court and the defence. This public database may be compiled and maintained by both the OTP and the Registry. Considering the limited resources, a step-by-step and selective approach may be employed, which may also reduce the initial resources required for keeping the database updated.

III. Preliminary examination

19. Pursuant to Article 15 of the Statute, prior to commencement of an investigation, the Prosecutor must, when acting *proprio motu*, conduct a preliminary examination. It is only upon the subsequent application to and authorisation by the Pre-Trial Chamber that the OTP may proceed to the commencement of an investigation.

20. In conducting the Article 15 preliminary examination, the Prosecutor needs to analyze the seriousness of the information received (Article 15(1)) and determine whether there is a reasonable basis to proceed with an investigation (Article 15(2)). To this end, the Prosecutor must consider, in accordance with Rule 48 and Article 53(1), whether there is a reasonable basis to believe that a crime has been or is being committed, (b) that the crime is within the Court's jurisdiction, (c) that the case is or would be admissible under Article 17, and (d) that the interests of justice would be served by the investigation. The Prosecutor needs access to sufficient information in order to meet these objectives.

21. According to Article 15(2), the tools available to the Prosecutor at this stage include: received information; additional information from States, organs of the UN, intergovernmental or non-governmental organizations or other reliable sources and 'written or oral testimony' received at the seat of the Court (whereby the ordinary procedures for questioning shall apply and the procedure for preservation of evidence for trial may apply pursuant to Rule 47). Although apparently limited in scope, the sources described under this rule are potentially rich in terms of the information they may in practice be able to provide. Moreover, there is arguably no reason to restrictively interpret the type of non-governmental or governmental organization that may and should be approached by the ICC Prosecutor under this provision. Flexibility and creativity should be employed in this regard, depending on the type of information sought.

Applicability of Part 9 of the Statute

22. While the Prosecutor may seek assistance in gathering the necessary information from State Parties, other States and international organisations, neither the Statute nor the Rules provide expressly for the application of Part 9 co-operation obligations of States Parties at this stage, nor are there any other specific powers set out for gathering the information from the sources listed in Article 15(2). This gives rise to two possible interpretations.

Narrow interpretation

23. Under narrow interpretation of Part 9, it is only once a 'reasonable basis' has been found by the Pre-Trial Chamber under Article 15(4) (or by the Prosecutor under Article 53(1)) that an 'investigation' would commence and at that point Part 9 would become available to the Prosecutor in accordance with Article 54(2) with the resulting obligations for the States Parties under Articles 86 and 93. Consequently, the measures taken before an authorisation (during what Article 15(6) refers to as a 'preliminary examination') are not (and should not be seen as) measures within a formal 'investigation'. The Prosecutor's task at this stage should rather be seen as a basic fact-finding mission necessary to establish only a "reasonable basis" with respect to the criteria outlined above; this ought to be reflected both in the measures to be taken and in the standards set by the Pre-Trial Chamber for finding a "reasonable basis" and authorising an investigation.

Broad interpretation

24. The broad interpretation would hold that Part 9 of the Statute does in fact apply to the preliminary examination under Article 15, putting a wider array of powers at the Prosecutor's disposal as well as a greater obligation on States. This argument would rest on an interpretation of the obligation of States Parties to cooperate fully with the Court under Article 86, arguing that there should be no distinction between pre-authorisation examination and post-authorisation investigation for purposes of the application of Part 9. Alternatively, it would argue teleologically for a general obligation for States to cooperate based on Article 86. Indeed, the States Parties are expected to be committed members of the ASP, performing in good faith their obligations to uphold the Statute. With this interpretation it would be argued that the Prosecutor could rely during the pre-authorisation stage upon co-operation under Part 9, although the restrictions set forth in Article 15(2) would still apply.

Preferred interpretation

25. The narrow interpretation is easier to reconcile with Article 15(2) than the broad interpretation, not least because it corresponds to the desire of States, during the negotiations, to limit the investigative powers of the Prosecutor prior to obtaining judicial authorisation in the case of *proprio motu* investigations. At the same time, the arguments supporting the broad interpretation are open to the counter-arguments that Article 86 specifically refers to co-operation in the 'investigation and prosecution of crimes', and that Article 15(3) (when read in French ['ouvrir'], Spanish ['abrir'] and Russian ['vozbudit¡'], as well as English) implies that investigations are not opened until Pre-Trial Chamber authorisation has been obtained. The 'linear approach' (see below) - whereby the 'reasonable basis' finding that triggers notice to States under art. 18 would, in the case of *proprio motu* proceedings, be the finding of the Pre-Trial Chamber under Article 15(4) - is fully consistent with this view.

26. At the same time, the practical consequences of adopting the narrow view of the applicability of Part 9 should be addressed. Specifically, it should be asked whether the narrow interpretation may adversely affect the Prosecutor's ability to ensure States' co-operation in obtaining information essential for the determination of whether to seek authorisation. Under Article 15(2) the Prosecutor can certainly "seek" information from States, including information that needs to be gathered through use of the measures outlined in Article 93. Many State Parties can be expected to assist the Court with such information regardless of the application of Part 9, though some may have technical difficulties in obtaining the necessary court orders to gather evidence before an investigation has commenced. With other States (for example a territorial state where there has been no regime change) it is likely that obtaining co-operation will be a problem whether or not the Prosecutor is relying on Part 9.

27. While the broad interpretation is therefore of marginal utility where it is needed most (i.e. in the case of the reluctant State), the narrow interpretation has an important procedural advantage for the Prosecutor. Because the narrow interpretation construes the Prosecutor's preliminary examination as pre-investigative, it also enables the Prosecutor to proceed without notice to States required by Article 18 and the subsequent procedural blocks that would normally arise. The broad approach, on the other hand, would necessarily involve notice to States that might be inclined to use every procedural means at their disposal to hamper the Prosecutor's work. Thus, and in particular where the key governments involved are likely to resist the OTP's work, the narrow approach could have real advantages for the expeditious commencement of the Prosecutor's work.

28. The absence of Part 9 co-operation powers requires a facilitative interpretation, and maximum use, of the fact-finding measures contemplated for the preliminary phase by Article 15(2) (see below). Broad means of gathering the necessary information (through open source information, reports of NGOs and IGOs, interviews of refugees conducted by organisations or cooperative States) would have to be utilised, while at the same time arguing to the Pre Trial Chamber that authorisation under Article 15(4) should be available on a low threshold given the applicable 'reasonable basis' test and the references throughout Article 15 to a requirement for "information". In this argument the Prosecutor may choose in fact to refer to the non application of Part 9 to bolster the position that clearly the intention must have been to require a different level and form of information than the kind of evidence required at the formal stages of the investigation and prosecution.

29. Overall, the narrow interpretation, joined with a facilitative interpretation of the Article 15(2) powers, allows the Prosecutor to put off the potentially hampering effects of arts. 18 and 19 for as long as possible, without sacrificing the co-operation of those states and entities that are in any event disposed to cooperate.

Receiving Information and Testimonies Related to Alleged Violations and Admissibility

30. The Prosecutor may seek assistance from UNHCHR, UNHCR, the ICRC, NGOs and others, present in the field, for preliminary witness identification/screening functions or other types of information that may be relevant to the assessment at this stage. ICC field offices, set up with consent with the relevant State, may also be indispensable for co-operation with these organisations in the field. Such identification activities should be as broad as possible to allow an early and vigorous start to the investigation, while maintaining that these activities are necessary ancillary functions of the preliminary examination, and are not part of the investigation as such. Agencies additional to those which deal with refugees and internally displaced persons (to include, for instance, bodies involved in financial tracking) may also yield useful results, whether at this stage or subsequently.

31. Article 15(2) requires that written or oral 'testimony' should be received by the Prosecutor at the seat of the Court. Given that the Prosecutor may seek information from States and other entities listed under Article 15(2) and the fact that the limitation applies only to 'testimony' received by the Prosecutor, there would appear to be nothing barring the Prosecutor from asking States or organizations to obtain information from potential witnesses as part of 'seeking information', including through obtaining voluntary written statements. Arguably, the Prosecutor may also be able to directly obtain information from witnesses as 'other reliable sources', with the State's consent provided these do not amount to that 'testimony' which must be taken 'at the seat of the Court'.

32. As discussed in the previous section, different views can be taken as to whether the Prosecutor's gathering of information at the pre-authorisation stage constitutes an 'investigation' or not and, thus, whether co-operation under Part 9 is available. Irrespective of the conclusion, however, it is clear that a difference is foreseen (and expected) in the activities of the Prosecutor pre- and post-authorisation. Hence, it seems prudent at this stage to exer-

cise caution in terms of field offices and other investigative activities (such as interviewing witnesses) within the territory of States even with State consent, in order to avoid the impression that an investigation has begun without proper authorisation.

33. Moreover, while obtaining information at this stage, it should be borne in mind that this information will need to be adduced at the Article 15 hearing in the Pre-Trial Chamber. It would thus be useful if the information received was in a form that would be admissible at any confirmation hearing (Article 61) and trial if the Prosecutor later decides to use it as evidence (see also Rule 47). In particular, when the Prosecutor considers that there is a serious risk that it might not be possible for the testimony to be taken subsequently, the Prosecutor may request the Pre-Trial Chamber to appoint a counsel or a judge from the Pre-Trial Chamber to be present during the taking of the written testimony under Article 15(2). However, given the differing standard and purpose of the Article 15 hearing and the limited ways in which information can be gathered at this stage, it may not be possible to obtain it in an admissible form for subsequent proceedings. In any event and particularly if the evidence may be used at later stages, matters of confidentiality and witness protection should also be addressed as necessary.

34. One pressing issue at the preliminary examination stage will be the protection and preservation of information pending authorisation for the commencement of an investigation. In this regard, the Rules of Procedure and Evidence mandate that the Prosecutor shall protect the confidentiality of the received information and testimony or take "any other necessary measures" (Rule 46). In this regard, the supporting material (Article 15(3)) should be submitted to the Pre-Trial Chamber as a confidential attachment to the request for authorisation.

IV. Fact-finding, investigation, and admissibility procedures under Articles 18 and 19

General provisions

35. The principle of complementarity is, needless to say, a cornerstone of the Statute and the Prosecutor may need to investigate a State's investigative and prosecutorial conduct in order to determine whether the situation should remain under the jurisdiction of that State or whether jurisdiction should instead be assumed by the ICC. This may be called for at different stages of the proceedings and the Prosecutor will need to obtain relevant information for the determination of the issue. It may require setting up a "complementarity monitoring team", which would include staff with relevant skills, for monitoring national courts' proceedings where this is feasible considering possibly lengthy domestic proceedings and other circumstances. The Prosecutor may also seek assistance from NGOs' court monitors with necessary qualifications and training.

36. The Prosecutor's relationship with the State exercising jurisdiction under complementarity will be critical to facilitating ultimate resolution to the issue, whether the situation remains within the purview of the State alone or whether the Prosecutor seeks approval from the Pre-Trial Chamber to commence his own investigation.

37. The Prosecutor may need to ask detailed questions to individuals in a national system and thus the degree to which there is a cooperative arrangement established may determine how successful the Prosecutor is in discharging his responsibilities. The standards set forth in Article 17 are unambiguously legal standards. Nevertheless, there may need to be political discussions and arrangements undertaken in order to facilitate decisions based on those legal standards.

38. Although this requires a determination *in casu*, (rendering relatively detailed information necessary), but the Prosecutor will also need more general background information and States may also wish to submit information of a more general nature (Rule 51).

Article 15

39. Both the Prosecutor and the Pre-Trial Chamber must, to the extent possible, assess issues of admissibility (and jurisdiction) in relation to an authorisation under Article 15. It is clear from the Statute, however, that this assessment is of a preliminary nature and does not prejudice any subsequent determinations (Article 15(4)). There is no opposing at this stage and the burden to seek information relevant to such an assessment rests squarely with the Prosecutor.

40. Even if the negotiations clearly showed a general intention not to allow States to challenge the admissibility of a case at this stage, a dialogue with the State in question (if possible) will frequently be advantageous.

Article 18

41. Issues of admissibility will have to be considered for the purpose of the proceedings under Article 18 and here the determination will be even more decisive. While the State seeking deferral will have to provide information and the Prosecutor may request additional information from that State (Rule 53), the Prosecutor may wish to also seek information from other sources. This will have to be done under a serious time constraint.

42. It is not clear from Article 18(2) whether the notification to States under this Article shall take place before or after authorisation of the Pre-Trial Chamber – i.e. when does the Prosecutor 'initiate an investigation' under Articles 13(c) and 15? One may also ask how an authorisation of the investigation under Article 18(2) relates to the authorisation under Article 15(4). However, the negotiations (of the Rules of Procedure and Evidence, in particular) show that delegations favoured a 'linear approach' to Articles 15, 18 and 19 and, thus, that the proceedings under Article 18 shall take place only upon authorisation according to Article 15(4). Further, a proposal to integrate the proceedings was rejected. A linear approach would also place state referral cases (Article 13(a)) and *proprio motu*-cases (Articles 13(c) and 15) on an equal footing.

43. Also in case of a deferral, the Prosecutor will have to follow up the national development of the case in question and a State Party may be obliged to submit periodical information on its progress (Article 18(5)). In this case, however, it is hard to claim that the Prosecutor is conducting an 'investigation' of a crime and it is very doubtful that the Prosecutor has recourse to any measures of co-operation under Part 9. Hence, the State's own information and information from external sources may be the only material available as a basis for a review of a deferral according to Article 18(3).

Article 19

44. With the linear approach outlined above, which is also supported by Article 18(7), challenges to the admissibility of a case (or the Prosecutor's request for a ruling on this issue) according to Article 19 will always be done at a stage when Part 9 co-operation has become available to the Prosecutor. However, investigations are normally suspended pending the outcome of such challenges (Articles 19(7) and (8)), and Part 9 itself is of doubtful use in the Prosecutor's assessment of admissibility (see above). Again, however, other arrangements may be necessary vis-à-vis non-States Parties.

Provisional investigative measures

45. In spite of a deferral to a State's investigation or a request for authorisation under Article 18 and the suspensive effects of a challenge to the jurisdiction of the Court or the admissibility of a case according to Article 19, the Prosecutor may seek authorisation for provisional (investigative) measures (Article 19(8)). The Prosecutor's request shall be considered *ex parte* and *in camera* on an expedited basis (Rules 57 and 61).

46. In case of a deferral, such measures must be "necessary investigative steps for the purpose of preserving evidence where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence may not be subsequently available" (Article 18(6)). An authorisation for provisional measures is also required 'pending a ruling by the Pre-Trial Chamber' (on authorisation for the investigation). The linear approach means that Part 9 co-operation is available for provisional measures in the interim. While slightly more uncertain, an 'investigation' should also be considered commenced for provisional measures explicitly authorised by the Chamber in spite of a deferral (insofar the authorised measures are concerned), and thus Part 9 co-operation would apply.

47. In case of a challenge, the available measures are more extensive and also include the taking of a statement or testimony from a witness, completion of the collection and examination of evidence already initiated, and preventing a suspect under an arrest warrant from absconding (in co-operation with the relevant States) (Article 19(8)). Since the 'investigation' should only be considered suspended to the extent that provisional measures are not authorised, Part 9 co-operation would be available to the Prosecutor regarding such authorised measures. Moreover, orders and warrants ordered by the Court prior to the challenge continue to be valid (Article 19(9)) and States Parties continue to be obliged to fulfil requests based on such orders and warrants in accordance with Part 9.

V. Investigation

48. Two stages in the OTP's activities are envisaged. At the initial stage, when violations on humanitarian law are still being committed, the situation on the ground may often not permit investigations on the territory of the State of the conflict. At this stage, investigation teams principally commence interviewing those witnesses who are available outside the zone of the conflict (mainly refugees), although local and international non-governmental organisations may frequently continue to monitor abuses and gather information, with local NGOs, in particular, often having local knowledge, language skills, and established relationships with victims' communities. Deployment of peacekeeping forces or abatement of the conflict may thereafter permit sufficient security of an investigation on the territory of the State of the conflict. At this stage, investigative units may, within the terms of the Statute, commence investigations on the territory of the alleged violations, including interview of witnesses, examination of crime scenes, exhumations, search and seizures, etc. The ability and willingness of these peacekeepers also to apprehend persons indicted by the Court is also likely in time to become a key issue (see below).

49. The OTP will have to ensure safety and security of its team members through liaison with appropriate persons in the field. In this regard, as the ad hoc Tribunals' experience shows, the OTP will rely on the assistance and co-operation of international bodies, such as peacekeeping forces, and local authorities, such as the police. When it deems necessary, a request for assistance may contain reference to Article 48 of the Statute and the Agreement on Privileges and Immunities as to the immunities of the OTP investigators. Ratification of this Agreement is proceeding slowly. There is a need to urge ratification or resort to alternative 'bilateral' agreements where ratification is not possible. In case of a security threat from State officials, it might be necessary to make a reference to the Convention on the

Prevention and Punishment of Crime against Internationally protected Persons, including Diplomatic Agents (1973). This Convention entails a number of obligations for the contracting parties, which may be others than the ICC States parties. Whilst confidentiality will generally be of prime importance, consideration will also have to be given to the length of notice these bodies require in order to make their necessary preparations to assist the OTP.

The relationship between the Prosecutor and State authorities under the ICC Statute – The basic features

50. Apart from the failed State scenario, which is covered by Article 57(3)(d) and which will be dealt with separately, the duties of States Parties to assist the Prosecutor in the exercise of his or her investigative functions are essentially contained in Part 9. The interpretation of the concrete duties enshrined in this Part should be guided by the overarching obligation fully to cooperate contained in Article 86, which alludes to the recognised interpretation rule of *effet utile*. The latter rule may also be of use when it comes to concretise the openly-worded compromises which Part 9 contains wherever delegations were unable to reach agreement in detail.

51. Part 9 creates co-operation regime for the gathering of evidence and for the arrest and surrender of persons. Article 86 of the Statute obliges State Parties to cooperate fully with the Court in its investigations and prosecutions. State Parties are obliged to comply with requests for the types of assistance listed in Article 93(1), sub-paragraphs (a)-(k), and with any other type of requested assistance unless it is prohibited by the law of the State Party (Article 93(1)(l)). While State Parties will use procedures of national law in meeting the request, under Article 88, importantly, a State Party must have procedures under national law for all the listed types of assistance. The only qualification to the obligation is the modification requirement in Article 93(3) and the process for national security information set out in Article 72. In addition to the general obligation to comply with the request, Article 99(1) requires that the request be executed in the manner specified therein unless that is prohibited by law. This allows the Prosecutor to specify not only what is required in terms of evidence gathering but the way in which it will be carried out. This request process under Part 9 should be the starting point for evidence gathering for the Prosecutor unless the situations outlined below relating to Article 99(4) arise or where there are other exceptional circumstances.

52. Despite the obligations of Part 9, it can be anticipated that there will be problems with its application on a practical level, in particular in the early stages. In addition to possible problems with wilful non-compliance, the most pressing problem may arise from States not having adopted implementing and other relevant legislation, leaving the State without the requisite powers to respond to the Courts requests. In order to better anticipate problems in this regard it would be useful for the OTP to seek copies of implementing and other relevant legislation from State Parties; information which would also help with the framing of requests.

53. The Prosecutor should be aware of the manner in which some States may wish to interpret Article 97 of the ICC Statute. The duty to consult embodied by this provision could be seen as a justification for submitting grounds for refusal other than those set out in the Statute. In this respect, one could think of the accusation that a certain exercise of powers by the Prosecutor is *ultra vires* the Statute. Taking account of the drafting history, especially the inclusion of certain grounds for refusal as a compromise in the Statute as well as the references to domestic law, the Prosecutor may stress the self-contained character of the co-operation regime in as much as possible. The Prosecutor should thus be cautious that use of Article 97 does not result in watering down the co-operation regime. On the other hand, it may be in the direct interest of the Prosecutor and in the spirit of Article 97 to accept pro-

posed alternatives by the requested State, if hereby the requested assistance will be obtained.

54. As far as requests for co-operation under Part 9 are concerned, the Prosecutor may directly communicate with States Parties (Rule 176(2)). For this purpose the OTP will want to have in its database an up-to-date list of any channel of communication designated by a State Party under Article 87(1)(a), including on a practical level precise contact information and the same type of information with respect to the transmission of requests via the diplomatic channel (see *Some Organisational Matters* section above).

55. Of particular importance is the interpretation to be accorded to Article 99(1), which sets out the principles that will govern execution of requests for assistance under Part 9. While Article 99(1) provides that requests are to be executed in accordance with the national law of the requested State, it importantly also provides that the request should be carried out in the manner specified in the request unless there is an actual prohibition in law against doing so. The Prosecutor should take full advantage of this exhortation, setting out in each request the manner in which the request should be executed, including with the direct participation of his staff and, if appropriate, defence counsel. For example, the Prosecutor could set out in the request that he wishes investigators within his office to be notified about when the witness interviews will take place in order to be able to attend the interviews and to pose the questions directly to the witnesses. Under the provisions of Article 99(1), the requested State cannot refuse to carry out the request in that manner unless they can demonstrate an actual positive prohibition of such questioning under domestic law. It would thereupon not be sufficient to point to a usual practice or even the legislated procedures that are used for domestic proceedings. The State would need to point to an actual prohibition at law.

Application of Article 93

56. The Prosecutor will want to use the provisions of Part 9 to maximise his ability to directly gather relevant evidence. While Part 9 creates a regime that is dependent upon the co-operation of State Parties, there is still considerable scope for direct participation by the OTP in the execution of requests for assistance particularly when one bears in mind analogous practices under inter-State co-operation regimes.

57. Although Article 93 may be intended for use for requests for traditional rogatory commissions, meaning the requested State performs investigative acts at the request of and on behalf of the trial forum, an alternative use is not excluded. Taking account of the cardinal rule of interpretation of treaties, *i.e*. the ordinary meaning of the text, Article 93(1)(l) can serve as the basis for a request by the Prosecutor for on-site investigations. The wording of this provision does not rule out the duty of provision of passive assistance. Article 93 is also arguably compatible with States Parties voluntaristically assuming more extensive obligations than those strictly mandated by Part 9, such as by granting the OTP staff full powers to carry out investigative functions within its territory *via* MOUs or other ancillary instruments (see below). Indeed, passive (forthcoming) assistance may also be provided outside of formalised mechanisms of co-operation, i.e. no formal request for legal assistance would be necessary and could be easier for some States to accept than an MOU. In general terms, it seems that the whole process of encouraging both States Parties and non-parties to act proactively without awaiting a formal request of the Prosecutor will become an important diplomatic initiative for the OTP.

58. Thus, and although in the Article 93 scenario, the requested State will retain the ultimate control over the execution of the *request*, the Prosecutor can influence significantly the procedure for the execution of requests and in particular the level of participation of the OTP. In particular, the Prosecutor can frame the request for assistance so as to seek maximum involvement of officials from the OTP in the execution process. As another example

the request can specify that OTP officials wish to interview directly-named witnesses or that they wish to be present during the execution of a search warrant. Once again, this would be limited only by a prohibition under domestic law to such participation by the OTP, in accordance with Article 99(1). Indeed, in inter-State co-operation practice, treaty provisions framed in the terms of Article 99(1) are frequently applied to allow the authorities of a requesting State Party to participate in the execution of requests in this manner. The Prosecutor should use this tool to the greatest extent possible and should be very explicit in its requests for assistance in order to permit itself the maximum latitude and so as to avoid the need to renew requests in light of new questions and to ensure the admissibility of the evidence in the subsequent proceedings.

59. To comply with a request under Article 93(1), the State concerned may use the procedures under its national law including, in particular, its implementing and other relevant legislation. Although the lack of such procedures does not constitute a ground for refusal (Article 88), it may create a practical *obstacle*. Problems of that kind should thus be anticipated by the Prosecutor to the greatest extent possible. To that end, the compilation of State implementing and other relevant legislation mentioned above will be of great assistance. It is also commended that the Prosecutor engages in a dialogue with State Parties to ensure that the procedures which the respective national legal frameworks require for full co-operation with the Prosecutor are in place. As a first step, and if necessary in coordination with parallel initiatives in this regard ongoing in the Registry, the OTP could seek to collate existing national implementing and other relevant legislation and identify co-operation-friendly "best practice" examples for as wide a reception as possible. Ultimately, the OTP should maintain a complete database of implementing and other relevant legislation.

60. The database referred to under the previous heading will also be useful in light of any information, including that regarding the information, a requested State may require under Article 96(2)(e). The latter has the potential to operate as an obstacle to speedy co-operation, or, even worse, as an incentive for *avoiding* obligation of co-operation under Article 93(1). Therefore, it appears of great importance that Article 96(2)(e) be interpreted in the same spirit as with Article 91(2)(c). Furthermore, in its dialogue with States Parties referred to in the previous heading, the OTP should stress the need for the most liberal interpretation of information requirements so that only the minimum information necessary to obtain the relevant measures under domestic law will be required under Article 96(2(e).

61. In addition to the specific types of assistance listed in Article 93, the Prosecutor will want to keep in mind Article 93(1)(l) *which* is a "catch all" provision allowing for requests for other types of assistance provided they are not prohibited under national law. The Prosecutor may wish to employ this clause in seeking unusual types of assistance such as DNA samples or interception of communications with the understanding however that States have more flexibility with regard to these unlisted types of assistance and the assistance may not be possible because of prohibitions under national law.

62. Under Article 93(3), a requested State Party may invoke an existing fundamental legal principle of general application in order to render a request conditional or to ensure that it is otherwise modified. Although the openly-worded term "existing fundamental legal principle of general application" will have to be applied in light of the relevant national jurisdiction, it is important to stress, that it must be given an autonomous meaning and that it will have to be authoritatively defined by the competent ICC judges in case of controversy. Weighty reasons based on the *travaux preparatoires* and the *effet utile*, however, point to a narrow construction, this provision was included solely to address situations where the execution of a request for assistance would violate fundamental principles of a legal system. The Prosecutor needs to bear in mind that because issues such as the extent of the protection against self-incrimination or family incrimination and the application of privileges were yet to be determined (they were subsequently dealt with in the rules), many States

were concerned that they might receive a request requiring them to breach a protection or privilege of this nature. Given the protections now accorded under Rules 73, 74 and 75, it is unlikely that the Prosecutor will present a request that will raise the kind of issue contemplated under Article 93(3). It is critical that if the provision is invoked the Prosecutor requires the State to clearly demonstrate all the requirements of the provision; i.e. a) that there is a legal principle involved (as opposed to a policy or practice); b) that it is fundamental in the sense of constitutional or of an entrenched nature protecting important values; c) that it applies generally to domestic cases and all foreign requests and is not of unique application to the ICC; and d) that it is pre-existing and is not a new provision. In order to assess the merits of the invocation of Article 93(3) in each case, OTP staff will have to familiarise themselves with the legal landscape of the requested State. Preferably, this can be achieved through the consultation processes between the ICC and the State as envisaged in the Statute, but there may also occur instances where the OTP would have to seek external assistance, e.g. in the form of independent legal opinions.

63. Under Article 93(4) a State may, in accordance with Article 72, deny a request for assistance on national security grounds. The Prosecutor will have the difficult task of setting the tone in highly sensitive national security disputes. It seems that the reference to the "relevance" to the national security issue in Article 93(4) shall be read in conjunction with Article 72 which refers to "prejudice" to the national security.

64. The smooth execution of a formal request may at times be facilitated by prior informal consultations. In any event, Article 97 requires consultations with States Parties when there is a problem which may impede or prevent the execution of a request for co-operation. The Prosecutor should be deeply engaged in using Article 97 on behalf of the Court to arrive at practical solutions to such problems. The solutions may often be innovative in nature which is acceptable to the extent that they will withstand the scrutiny of the competent Chambers. The Article 97 authority is likely to become a daily exercise of authority by the Prosecutor. The consultations should not, however, convey the impression of the Prosecutor's readiness to have the duties under Part 9 be watered down in practice. Indeed, in this regard, the preambular paragraph of Article 97 itself could be recalled; namely, that the emergence of issues impeding or preventing the execution of a request shall result in prompt consultations with the Court *in order to resolve the matter*. "Resolution" in this context ought to be interpreted in the light of States Parties' general obligation of co-operation under Article 86 so as to ensure that any purported resort to "national security" concerns does not *ipso facto* and automatically debar any meaningful co-operation with the Court.

65. As mentioned above, in some cases, and particularly where the authorities of the State where the investigative measure is to be executed are alleged to be involved in the crime in question, it will be undesirable, if not impossible, to leave the execution of the investigative measure under the control of the requested State. In this case the Prosecutor will wish to execute the investigative measure directly.

Application of Article 99(4)

66. Article 99(4) gives the Prosecutor the authority to execute a request directly without the submission of the request to the State Party through the procedure outlined in Article 93. However, this Article is limited in application to measures that can be carried out without the need for a court order or judicial authorisation and was intended in particular to allow the Prosecutor to interview witnesses directly and if necessary outside the presence of the authorities of the State. The Article also imposes some requirements for its application.

67. As noted earlier, the Prosecutor may well be able to obtain direct access to witnesses on a voluntary or compelled basis under Article 93 by specifying this in the request for assistance. If, however, the Prosecutor is concerned only with voluntary witnesses and he

anticipates problems with direct access under a request submitted in the normal course, it would be advisable to rely on the Article 99(4) process to conduct the interview. Article 99(4) should also be used in all cases where the Prosecutor determines that the witnesses will be constrained in any way in terms of the information they will provide as a result of any authority of the State being present at the interview. This would include situations where witnesses are afraid of any state authority because of the trauma resulting from their experiences.

68. The approach to the application of Article 99(4) will depend on whether the request is to be executed in the territorial State and there has been a determination of admissibility, or within another State. In the case of the latter – the non-territorial state - the Prosecutor may wish to establish a standard procedure for notifying the State in question of his intention and initiating the necessary consultations. To ensure maximum use of Article 99(4), the Prosecutor should clearly distinguish this process from a normal request under Article 93 by submitting an entirely different type of document to the State in question. Instead of a request it would be appropriate for the Prosecutor to send perhaps a Notice under Article 99(4) of his intention to directly execute a request. While the Prosecutor is required to consult with the requested State, he should take steps to ensure that the process is not delayed because the State fails to respond to the Notice. It would be advisable for the Prosecutor to set a deadline for the consultations and indicate that in the absence of a response by that time the Prosecutor will presume that the State has no concerns to raise and that the consultations are thus concluded.

69. In terms of the information provided in the notice, it may depend on the particular circumstances as to the level of information the Prosecutor will provide. For example, if there are any concerns that witnesses will be interfered with if identified, the Prosecutor may wish to make only general reference to the interview of relevant witnesses in the requested State. As the Article 99(4) process is a distinct one, the Prosecutor does not have to provide all of the information required in a request and therefore can use his discretion to decide on the appropriate detail in each case.

70. It is also important to note that while the Requested State can raise concerns and propose "conditions", the consent of the State is not required. Therefore the Prosecutor may need to negotiate with the State as to any applicable conditions for the execution of the request but always keeping in mind that the State may not impose "unreasonable" conditions and in particular cannot impose conditions contrary to the express terms of Article 99(4), i.e. by requiring the presence of officials of the State.

71. Where the Prosecutor anticipates that he will need to visit a State on several occasions to conduct a series of interviews, it may be useful for him to consider an MOU with the State in order to eliminate the need for new consultations in each case. This MOU could either be specifically geared to this situation and thus based on Article 99(4) or may constitute a particular provision of a broader MOU of more general application. The MOU should simply provide that a faxed notice to the State of the date and place (if appropriate) of the interviews will suffice as the requisite consultations.

72. In the case of the territorial state, the Prosecutor may proceed with execution after "all possible consultations". What this will require will vary from situation to situation depending, for example, on whether the structures of the state are operational or not. The Prosecutor will want to attempt to carry out consultations by sending a notice through any available channels and by contacting any officials that may be able to conduct consultations on the part of the State. However, again in order that the process is not delayed, the Prosecutor should be prepared to proceed after reasonable efforts have been made even if there has been no response from the State.

73. Indeed, the opportunity for direct execution of the investigative measures only exists when the case has been found to be admissible. Otherwise, the requirements of consultations and reasonable conditions will apply in respect of the territorial state. There may be situations where the Prosecutor would prefer to encourage a State to investigate or prosecute the case instead of becoming involved in the cumbersome process of proving admissibility of the case. In particular, consultations and acceptance of reasonable conditions seems to be preferable in cases where there are institutions in place and (at least an emerging) political will to handle such cases in an acceptable way.

74. The modalities of conduct an investigation on the territory where the crime is alleged to have been committed, where consultations have been very limited or non-existent, will require careful planning and execution by the Prosecutor. Normally it would be through consultations that matters such as advance notice of forthcoming missions to the State, notification of the State of proposed investigative activities, authority of the liaison officer, etc., would be resolved. The plans for execution must take into account the logistical and security problems posed by the absence of such consultations.

75. Whatever process is used under Article 99(4), Article 99(5) requires that the Prosecutor's initiatives under Article 99 must still conform to the strict requirements for the protection of national security information provided for under Article 72.

Application of Article 57(3)

76. In exceptional circumstances, such as the need for access to the evidence in the State of the conflict which is clearly unable to execute a request for co-operation, the Prosecutor may seek authorisation from the Pre-Trial Chamber to take specific investigative steps within the territory of the State Party (Article 57(3)(d)); Rule 115). In this regard, since the Pre-Trial Chamber's order may specify the procedure to be followed in carrying out such collection of evidence, it seems important that the request to the Chamber is drafted with this possibility in mind.

77. In collecting evidence on the territory of a State under Article 57(3)(d), the Prosecutor may seek co-operation from any peacekeeping forces or multilateral observer missions deployed in the State. To this end, the Prosecutor may enter into co-operation agreements with the UN or relevant regional organisations, within the framework of the ICC-UN Relationship Agreement, and other organisations in order to ensure that the needs of the Prosecution are taken into account when peacekeeping forces are deployed. In particular, such co-operation may be needed in exhumation of mass graves. In contrast with Article 99(4), the provisions of Article 57(3)(d) enable the Prosecutor to undertake such measure as the exhumation of mass graves, which generally results in the "modification of a public site." It is clear that under Article 57(3)(d) the Prosecutor may carry out directly any measures that are authorised by the PTC including compulsory measures that would normally require the authorisation of a court in the requested state. So for example the Prosecutor may under the authority of the PTC directly conduct a search or exhumation of a gravesite. The scope for peacekeeping forces to eventually carry out arrests on the OTP's behalf is considered separately.

Specific investigative measures

Interviewing witnesses

78. If the interview is conducted under Article 93(1)(b), where it is possible or likely that the testimony will be used at trial, the request for assistance should provide very specifically for direct participation of the Prosecutor in the questioning of the witness and for the presence and similar direct participation by the defence. (Note Rule 68(a)). Furthermore, it should be requested that the testimony be taken under oath, if possible using the solemn

undertaking set forth in Rule 66, and in consonance with the procedures set out in Rules 111. The Prosecutor may also request that the recording, if possible, follows the procedure in Rule 112 (audio- or video-recording) also when a witness is questioned, particularly in respect of witnesses contemplated in Rule 112(4). The Court may sometimes have to provide technical and other support to the national authorities in order to make certain requirements possible to adhere to in practice.

79. If the interview is conducted under Article 99(4), and the use of the testimony at trial is envisaged or foreseeable, the defence should be given the opportunity to be present and to examine the witness and again the recording requirements and policies in accordance with Rules 111-112 should be observed. A solemn undertaking should also be made in accordance with Rule 66 before testimony is taken by or with the participation of the judge of the Pre-Trial Chamber. Thorough planning is necessary (when possible) in order to conduct such interviews in a cost-effective and efficient manner. In some cases, preliminary contacts with the witness should take place before the interview is conducted and in some cases, utilisation of Article 56 should be contemplated and defence counsel appointed.

80. Since under Article 93(10) the Court may transmit statements to a State Party upon its request, the witness should be asked if he or she agrees to his of her statement being provided to a State. The witness' response should be reflected at the end of the statement.

81. Article 93(1)(b) envisages a taking of witness testimony under oath as a means of international legal assistance. If it is envisaged that the testimony will be taken by the national authorities rather than the OTP, this provision shall be included in the request. This means of taking evidence does not necessarily rule out participation of representatives of the OTP or the defence (or an ICC judge), if requested, when the testimony is taken.

Arrests and surrender

82. The Statute and the Rules uses the generic term 'the Court' for the making of a request for provisional arrest or arrest and surrender. Given that such a request (pre-conviction) would always be based on a warrant of arrest issued by a Chamber (Article 58(5)), the Prosecutor should be considered empowered to make the request to a State under his power to 'seek co-operation' of any State (Article 54(3)(c)). This is particularly important in order to keep an arrest warrant sealed, if necessary, and to be able to request provisional arrest at the appropriate moment. It will also be important because there may be questions that arise as to the information or documentation required under Article 91(2)(c) and the Prosecutor will be in the best position to dialogue with the State on that issue. The State's obligations to act upon the request are set out in Article 59 and Article 89(1).

83. The request and required accompanying material could be prepared in advance (including necessary translations) to ensure a speedy transmission when needed. In order to be able to observe the obligations in Rule 117(1) (notification to the arrested person), a request should explicitly require that the Prosecutor and the Registrar be informed of the arrest as soon as it is executed.

84. It is also important that the Prosecutor makes sure that arrest warrants are amended as the investigation proceeds (Article 58(6)) so that post-surrender issues relating to the principle of specialty (Article 101) can be avoided or minimised.

85. The Statute allows the Prosecutor to seek the issuance of a summons to appear as alternative to an arrest warrant (Article 58(7)). Such a summons can be issued with conditions restricting liberty (other than detention), but only if such are provided for in the State which is to enforce the summons and the Prosecutor is obliged to ascertain the relevant provisions of national law (Rule 119(5)). A database of such law focused on the most rele-

vant jurisdictions and updated on the regular basis could be useful. Such a database could also be used for cases when conditional release with restrictions may take place.

86. The Prosecutor will doubtless be deeply engaged in resolving competing requests for the surrender of an individual under Article 90. The Prosecutor will need to determine, pursuant to Article 90(6)-(7), when to intervene to strengthen the Court's claim for surrender of an individual and when possibly to strengthen the implementation of complementarity if the facts or prudent policy considerations demonstrate that a competing request should take precedence, and then make that argument to the Trial Chamber.

87. Article 98(1) may require the Prosecutor to negotiate a waiver of diplomatic immunity of an individual from a third State, and those negotiations may prove exceptionally delicate and politically challenging. Article 98(2) may require the Prosecutor to negotiate with a "sending State" a consent for the surrender of an individual sought by the Court, and again those negotiations may prove extremely difficult and ultimately futile.

88. The practice of the ICTY has indicated that stumbling blocks more familiar to the law of extradition are frequently proffered by sending states as an obstacle to arrest and surrender. Despite the differing basis of arrest powers under the *ad hoc* Tribunals and the ICC, Article 102 usefully clarifies that "surrender" and "extradition" in the ICC context also are not analogues. This in turn enhances the capacity of the OTP to argue that the obligation to surrender indictees to the Court amounts to a *sui generis* obligation, subject only to the provisions of Part 9 (in particular Article 101, pertaining to the rule of specialty). This principle may become especially important before a Pre-Trial Chamber in the event the Court's personal jurisdiction over an accused is challenged on the basis of particular defects alleged to vitiate an accused's arrest or surrender to the Court (see attached annex).

89. Articles 91 and 92 set forth arrest procedures in coordination with requested States. However, situations may arise where the Prosecutor is compelled, due to non-co-operation by a requested State or the sensitivity of "tipping off" the requested State, to explore *ad hoc* measures to effectuate arrest. The type of co-operation the Prosecutor may need from various States to execute an arrest warrant under these circumstances could lead to innovative and extraordinary measures not contemplated by the Statute or the rules. Alternatively, arrests may simply be spontaneously effected by private individuals in absence of any request or authorisation. This has on occasion occurred before the *ad hoc* Tribunals, where third parties have, *via* irregular processes, simply detained indictees on their own initiative and thereafter delivered them to peacekeeping forces obliged to transfer indictees to the seat of the Tribunal, thus prompting an immediate jurisdictional challenge before a Pre-Trial Chamber.

90. The Prosecutor should seek, to the extent possible, cooperative arrangements and consultations under Articles 91 and 92 in order to avoid legal challenges to any arrest or transfer. However, both the complexity of the arrest and surrender mechanisms under Part 9 itself and the factual realities which may lead to an indictee coming into the Court's custody in the first place ensure that legal challenges to the lawfulness of arrests and surrenders are also foreseeable in the ICC context. The regime governing arrest and surrender within the *ad hoc* Tribunals is largely *sui generis,* and the extent and manner to which the *ad hoc* Tribunal jurisprudence in this area will influence the ICC case law is a matter for determination by a Pre-Trial Chamber. As the above-mentioned scenarios are unlikely to arise in the early months of the OTP's operation, an outline of the broader principles to be gleaned from the experiences of arrests and surrender before the *ad hoc* Tribunals is provided, for future reference, in a separate annex to this report.

91. Further, the practice of the *ad hoc* Tribunals demonstrates that the assumptions underpinning its original Statute and Rules – namely, that arrests and surrenders would be conducted by national authorities – proved in practice to be overly-optimistic. Indeed, sig-

nificant numbers of arrests did not occur within the ICTY context until the enactment of Rule 59*bis,* which permitted the transmission of arrest warrants to peacekeepers deployed in Bosnia-Herzegovina and a willingness on the part of these forces to interpret their force mandates in a manner consistent with detention of indictees on the Tribunal's behalf. While it is hoped that States Parties will take their obligations of arrest and surrender to the Court seriously, the possibility that territorial States in particular may be unwilling or unable to do so cannot be excluded. Accordingly, the Prosecutor may also in time wish to explore both the willingness and modalities of peacekeeping forces deployed on the territory of relevant States apprehending persons indicted by the Court. An analysis of the difficult questions raised by these issues and possible mechanisms to facilitate this are addressed both below and in the above-mentioned separate annex on arrests.

VI. Enhanced co-operation

Security Council referral

92. A Security Council referral under Article 13(b) can greatly enhance the Prosecutor's authority to compel co-operation from States, including those not party to the Statute.

93. As Article 13(b) entails Security Council action under the extensive powers conferred upon it by Chapter VII of the UN Charter, the Security Council could also use its Article 13(b) referral power to specify particular measures to enable the Prosecutor to avoid strict requirements for state co-operation and to act with more authority to investigate a situation. Such measures would be within the scope of the Security Council's enforcement powers.

94. Accordingly, the Prosecutor should be prepared in the event of such a referral – and indeed preferably in advance of one – to engage in dialogue with the Security Council concerning the wording of referral resolutions which would ensure that State co-operation is adequately addressed and the Prosecutor's authority sufficiently enhanced through such Security Council referrals.

95. The Statute, in Article 87(5) and (7), limits the Court's referral to the Security Council of non-co-operation findings to situations "where the Security Council referred the matter to the Court". Of course, it is possible for the Court to exercise its jurisdiction pursuant to a State referral or a *proprio motu* action of the Prosecutor in a situation in which the Council is engaged under its Chapter VII mandate (provided only that the Council has not requested the deferral of ICC proceedings in conformity with Article 16). In such a situation, the text of the Statute implies that findings of non-co-operation under Article 87(5) would be referred only to the Assembly of States Parties, and not to the Council, because the latter did not "refer the matter". It seems nonetheless probable that the Court will be able to call upon the Council for its support more broadly, as Article 87(6) allows the Court to "ask any intergovernmental organisation to provide … forms of co-operation and assistance which may be agreed upon with such an organisation and which are in accordance with its competence or mandate" and the Relationship Agreement between the ICC and the UN includes (in Article 17) a broad commitment to cooperate on the part of the UN. For its part, the Council has shown itself capable at least in limited circumstances of linking matters that 'shock the conscience of humanity' to its Chapter VII mandate. Thus, whatever the present political realities, the Court may in principle call upon the Council for assistance, particularly where UN-mandated personnel are in a position to gather evidence, protect victims and witnesses or arrest suspects.

Voluntary co-operation by the States Parties

96. Article 54(3)(d) empowers the Prosecutor to enter into such arrangements or agreements, not inconsistent with the Statute, as may be necessary to facilitate the co-operation of a State, intergovernmental organisation or person. The circumstances that may give rise to the need for an Article 54(3)(d) arrangement or agreement may pressure the Prosecutor to consider procedures that arguably would conflict with Part 9 or any specific agreement already negotiated under it. Any such Article 54(3)(d) arrangement or agreement should be drafted so as not to lead to such a result.

97. Within these broad constraints, however, instruments such as Memoranda of Understanding may usefully – and permissibly – supplement the regime established by Part 9.

98. Part 9 of the Statute sets out the scope of obligations regarding international co-operation and judicial assistance. In many respects, Part 9 reflects the lowest common denominator. Many States Parties would have been prepared to go beyond the duties contained in Part 9. It is not unlikely, that those States will be willing to go beyond what is required under Part 9. In fact, some implementing legislation does offer voluntary co-operation to the Prosecutor. Even States Parties which have been rather reluctant during the negotiations may be prepared to cooperate in an enhanced manner for the purpose of a concrete investigation. The requested State may also be prepared to voluntarily grant enhanced co-operation for one or more categories of investigative measures, be it for the purpose of a concrete investigation or generally. For example, a State may be willing to allow the Prosecutor the autonomous taking of voluntary witness testimony without the restrictions contained in Article 99(4). Where such an attitude is not already fixed by the implementing legislation, the Prosecutor may wish to rely on his or her competence under Article 54(3)(d) and enter into an agreement with the State concerned or exchange letters.

99. Thus, Part 9 should be viewed as setting out the minimum obligations of States parties in this regard, but which does not preclude the capacity of State Parties to *go beyond* what is required or supplement and further enhance the level of co-operation demanded by the Statute. At the same time the Prosecutor should also keep in mind that the minimal powers of Part 9 may provide a sufficient basis in many cases to obtain the relevant evidence in the desired form, such that an additional agreement will not be necessary. Because of limited resources it would be prudent to adopt a focused strategy for the negotiation of such agreements, concentrating on those countries where it would be of the most practical benefit.

100. In some constitutional settings at least, informal arrangements such as Memoranda of Understanding or Exchanges of Letters, not being treaties, may accomplish this result more expeditiously and afford greater flexibility; in particular, by allowing for the rapid provision of assistance on a notification basis to a central authority or even direct communication with particular authorities (*i.e.* outside of diplomatic channels). There also appears to be no impediment to employing them with regard to States who may in principle be cooperative with the Court but for whom, for whatever reason, ratification of the Statute may still be some way off. Interim forms of co-operation may nevertheless be possible *via* these less formal mechanisms.

101. The feasibility of obtaining such *ad hoc* consent of a concerned State for the purpose of a specific investigative measure can be tested out by informal consultations.

102. The Prosecutor should accordingly consider preparation of one or more model 54(3)(d) agreements that can be negotiated expeditiously when circumstances require, and which can be adapted to the circumstances of the investigation. The Prosecutor should not be constrained by form language in any such model agreement, but be pragmatic in negotiating what is actually required in the investigation at hand. Nonetheless, great care should be taken in not developing model agreements that on their face challenge Part 9 agree-

ments. A template Memorandum of Understanding is annexed to this report, which may provide a basis for further work in this area.

103. An agreement under Article 54(3)(d) should not include provisions that replicate duties which already exist under Part 9 as this would weaken the obligatory nature of the statutory minimum standard. It might not be necessary to adopt an agreement under Article 54(3)(d) wherever that seems possible. Given the limited resources it could rather be commendable to target specific States depending on the foreseeable degree of utility. Should some general obstacles to an efficient investigation become evident in the course of future practice, the Prosecutor may wish to remedy this situation by standard agreements with as many States Parties as possible.

104. The Prosecutor may also enter into agreements on the protection of national security information (Article 54(3)(e)). Article 72 will require the Prosecutor to engage with any requested State that is concerned with the provision of information that, in its opinion, would prejudice its national security interests if released to the Court. Article 72(5) points to the cooperative means and the possible conditional agreement that may be required to obtain such information. The Prosecutor may find, particularly with States that can offer useful information on a regular basis, that a permanent agreement under Article 72(5) setting forth the procedures for the provision of such information in all (or at least most) cases of co-operation on national security information would be most useful and efficient for investigative as well as prosecutorial purposes. However, and as has been demonstrated by the interpretation adopted of cooperative legislation within the practice of the *ad hoc* Tribunals, there may be a risk that such agreements may be used to instead circumvent State's obligations under Part 9. In any event, when entering into such agreements, provisions of Articles 93(3) (grounds for refusal) and 72 will be kept in mind. An agreement with a States Party regarding national security information may also address the issue of disclosure of information or documents that has been transferred to and is held by another State Party in accordance with Article 73.

Voluntary co-operation by States not party to the ICC Statute and with intergovernmental organisations

105. As mentioned above, such co-operation may occur on both an informal or formal and on an *ad hoc* or on a permanent basis. The ICC's power to enter into such contacts is enshrined in Article 87(5), 87(6) and the Prosecutor's respective competence are contained in Article 54(3)(c) and (d) extends to States not party to the ICC Statute and to international organisations.

106. In particular, agreements with a State not party to the ICC Statute may include provisions related to access to or collection of evidence on the territory of that State. The agreement may, in particular, provide for the some or all of the forms of assistance set out in Article 93(1) as may be necessary or useful in the particular circumstances.

107. The Prosecutor may apply such means of co-operation as *Memorandum of Understanding* with international organisations such as UNHCR, UN Headquarter, and NATO. The existing (confidential) MOU between NATO and the ICTY, which sets forth procedures to be followed in the case of apprehension of indictees by NATO-led peacekeeping forces, may provide a point of departure for a future attempt at drafting the latter, although this example also provides an illustration of a number of pitfalls to be avoided with regard to such agreements (see attached annex).

108. The *ad hoc* Tribunals' experience shows that there might be attempts by some intergovernmental organisations to restrict OTP access to their current or former staff as potential witnesses directly without the organisation's mediation. Indeed, such a restriction can be justified if the staff enjoy immunity in respect of proceedings at the ICC. Some inter-

governmental organisations might insist on extension of the application of Article 54(3)(e) (confidentiality) to *any* material provided by the organisation to the Prosecutor. As Tribunals' experience proves, such a blanket approach may conflict with the Prosecutor's disclosure obligation, particularly in regard to exculpatory material. At the same time the OTP shall be vigilant of and react adequately to any breach of the confidentiality as to materials received under Article 54(3)(e) since such incidents may significantly damage the ICC credibility not only with the provider of the material, but with other providers.

109. These and other related matters will have to be addressed in the OTP internal guidelines on co-operation with intergovernmental organisations.

VII. Issues for future consideration

110. This memorandum has by no means been able to cover all the issues related to fact-finding and investigation that will need to be the subject of policy-formulation and practical preparation by the Office of the Prosecutor in its early months. We therefore take this opportunity to identify what have come to our attention as possible key issues for early work in this area:

- Respective roles of the Registry, Chambers and Prosecutor's role pursuant to Part 9 of the ICC Statute;
- Composition of the international co-operation unit within OTP;
- Preparation of models agreements, including those under Article 54(3)(d) and agreements with the UN related to the Prosecution's co-operation with deployed peacekeeping forces;
- Requests by a State to the Court;
- Guidelines on co-operation with intergovernmental organisations;
- Approaches to issues of immunity and confidentiality;
- Interaction with the Assembly of States Parties and determination of respective roles with respect to provision of technical assistance on implementing legislation, non-co-operation, and other issues;
- Arrest strategies that respond to non-co-operation from requested States.

