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THE ROLE AND FUNCTION OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT

By

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DECLARATION

I declare that the topic THE ROLE AND FUNCTION OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT and the dissertation flowing from it, is my own work. I further declare that all sources used or quoted have been indicated and acknowledged by means of complete references. I lastly declare that this dissertation has not been previously submitted by me for a degree or whatsoever.

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SUMMARY

The establishment of the International Criminal Court (ICC), through the 1998 Rome Statute of the International Criminal Court (ICC/Rome Statute) is proof that there is a general acceptance that leaders who act as aggressors and violate recognized human rights should face international criminal justice at the ICC. To achieve the ideals of the Rome Statute, the Office of the Prosecutor was established to act as a fore-runner and a bridge to victims of the core international crimes established by the statute, to have access to international justice.

The prosecutor while investigating and prosecuting the ‘core’ international crimes is expected to be independent and avoid undue influence. Furthermore, the prosecutor has to be seen to be acting without fear or fear in the execution of his duties in order for the ICC’s establishment not to be perceived as a futile exercise. He or she also has to guard against disrespecting the fiercely protected sovereignty of states, be they party to the Rome Statute or not, as states play a major role in the execution of the prosecutor’s requests to the court through cooperating with it.

The prosecutorial discretion to choose which situation to investigate and which senior official to prosecute is a very sensitive task, with major political implications as the court’s authority has not been universally accepted. In order to balance the prosecutorial independence and his not acting without control various principles and concepts were incorporated into the Rome Statute. They include the complementarity rule, the jurisdiction of the court, admissibility and cooperation with the court; which will form the basis through which the role and function of the prosecutor shall be discussed to analyze if indeed he is independent.
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CHAPTER 1

INTRODUCTION

1 Background information

On its adoption, the 1998 Rome Statute of the International Criminal Court (ICC Statute) established a universal framework to end impunity for the commission of serious international crimes. Even though the final text of the statute did not meet [certain] expectations, it included many important elements advocated for by those who worked for the creation of an independent and effective court.¹

The international criminal court is viewed as an indication of the development of a world law where certain supra national norms, which are not exclusive to a state’s unique set of legal rules, are enforced towards individuals directly in the form of individual criminal responsibility. The creation of the court is a clear indication of the international community’s willingness to hold individuals accountable.²

As the international criminal court’s face to the world the chief prosecutor has a critical role to play. He/she has to choose which situations to investigate, which senior officials to indict and which charges to bring. These are all very sensitive decisions to take with potentially major political implications.³ The international criminal court is based on a more general and abstract idea of justice, in that historically, even before the Nuremberg trials, violations of international law have always been viewed as unjust. It is also an autonomous element of world order that exists independently of policy from any individual country,⁴ whether state party or not, as some do recognize and punish the core international crimes while others do not in their domestic legislation.

While carrying out his/her duties, the prosecutor has to ensure that he executes his duties without fear or favor. Should he/she foresee any hurdle which may have a bearing on the overall prosecution of a situation, it is incumbent upon him/her to decline to investigate. This is because institutions like the international criminal court shape the actions that states may take in the name of protecting the welfare of their populations.⁵ The prosecutor must remain independent and impartial to increase the accountability of political actors for their decisions and roles on issues affecting international peace and security.

³Kaye “Who’s Afraid of the International Criminal Court: finding the prosecutor who can set it straight” 2011 Foreign Affairs 118 119.
⁵Orford International Authority and the Responsibility to Protect (2011) 186.
During the negotiation of the ICC Statute there were different opinions by delegates relating to the powers of the prosecutor. One argument was that state complaints and the Security Council’s referrals were insufficient. It was argued that the court will operate on behalf of the international community as a whole; as such, the prosecutor should have the same investigatory and prosecutorial powers as in the case of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Article 16 (1) and Article 15 (1) of the ICTY and ICTR Statutes, respectively, provide that the prosecutor is a distinct and independent organ of the Tribunal[s]. The functions are to investigate and prosecute. Delegates said the track record in international human rights has illustrated the unwillingness of states where there has been a commission of the core international crimes to lay complaints against perpetrators.  

On the other hand, concerns arose that giving the prosecutor unlimited power to prosecute not subject to preauthorization of the pre-trial chamber, may overwhelm the office of the prosecutor, leading to the abuse of prosecutorial powers and ultimately overburden the international criminal court. It was eventually agreed that sources could submit information on the commission of a crime to the prosecutor. He or she would then seek authorization from the pre-trial chamber before proceeding with an investigation. This introduced early judicial review of proceedings initiated either on the prosecutor’s own motion or by the other two parties allowed by the statute to trigger its jurisdiction.

In the preamble of the ICC Statute, we see good reason to give national courts priority and to accept the court’s ‘principle of complementarity’. The international criminal court can only try cases that have not been properly investigated by the state with jurisdiction to hear them. It was recognized from the outset in the Preparatory Committee’s work that the court would have to be based on a ‘principle of complementarity’ if it is to enjoy universal support.

2 Purpose of the study

The purpose of this study is to evaluate the role and function of the prosecutor of the international criminal court with regards to the purported independence of his or her Office, as a separate and independent organ operating without undue influence. It is intended to analyze if such independence really exists and to point out the existence of hindrances which may impede the discharge of his duties. This is done bearing in mind that the prosecutor’s functional independence is essentially an expression of the principle that impartial justice requires a separation of his functions and work from any undue external

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7 Pejic (n 1) 77.
9 Bergsmo “Article 1- the Court” in Trifftrer (ed.) (n 6) 2.
influence. Prosecutorial independence implies that due to the office’s independence he or she cannot be unduly instructed by any organ or external source.\textsuperscript{11}

The legitimacy of the court depends ultimately on its capacity to persuade observers that the exercise of its powers to investigate and punish the violation of international criminal law is consistent. The power must be seen to apply equally to everyone for the communicatively rational justification of the court to be sustained overtime.\textsuperscript{12}

The functional independence of the office of the prosecutor is one essential interest protected by Article 42. The article has to be interpreted in light of other statutory provisions which define the jurisdictional parameters of the court or specify the functions of the prosecutor.\textsuperscript{13} Paragraph 1 of this article gives the prosecutor power to act as a separate organ of the court with the responsibility to receive referrals and any substantiated information on crimes within its jurisdiction.

The paragraph precludes any member of the prosecutor’s office from seeking or acting on instructions from any external source, other than the ones mentioned in Article 13. It implies that information on alleged crimes within the jurisdiction of the court shall be addressed to the prosecutor and no other organ of the court. It is only the prosecutor that has the statutory competence to analyze the seriousness of the information received and to seek additional information as a matter of preliminary examination.\textsuperscript{14}

The international criminal court’s structure allows its officers considerable independent authority from the pressures of officials of state governments that created it in the first place.\textsuperscript{15} When a matter is referred to the prosecutor or an investigation is suggested to him or her by someone sending information, the prosecutor has to decide whether or not to open an investigation into the matter pursuant to Article 53 of the Statute.\textsuperscript{16}

The prosecutor is required to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility established under the statute. Article 54 requires the prosecutor to investigate incriminating and exonerating circumstances equally. This function is more like that of the investigating magistrate or judge instruction of the continental legal system, than the adversarial prosecuting attorney of the common law.\textsuperscript{17}

\textsuperscript{11}Bergsmo “Article 42- The Office of the Prosecutor” in Triffterer (ed.) (n 6) 972 975.
\textsuperscript{13}Bergsmo (n 11) 978.
\textsuperscript{14}Bergsmo (n 13) above.
\textsuperscript{15}Struett (n 12) 109.
\textsuperscript{17}Schabas (n 10) 126.
One of the keys that led to the acceptance in the ICC Statute of the prosecutor’s _proprio motu_ power to start an investigation was the proposal to submit the commencement of an investigation to the control of the pre-trial chamber.\(^{18}\) Judicial supervision is exercised both prior to the opening of an investigation and subsequently for the confirmation of the charges. A judge intervenes at the pre-investigative stage to determine if there are grounds for an investigation to be opened.

The criteria followed by the chamber in exercising its power of supervision over the opening of an investigation tends to follow two main directions. The first, which is explicitly desired by states, is linked to safeguarding the international community against frivolous investigation. The second, which derives from the interpretation of the ICC statute from a human rights perspective, concerns the rights of individuals.\(^{19}\)

### 3 Research problem

Creating a permanent body, capable of prosecuting prospective crimes taking place anywhere in the globe, possibly committed by countries’ own nationals was considered difficult. The fundamental challenge was to create a court that respects national sovereignty interests, but also has the power to trump those interests when they are used to shield international criminals from justice. The tension between the desire to create a strong, credible court and the need to respect state prerogatives arose most pointedly in connection with four issues. These were the court’s complementary regime, its jurisdiction, the role of the prosecutor and the court’s enforcement powers.\(^{20}\)

The four issues mentioned above and others incidental thereto, have a bearing on the role and function of the prosecutor. The central focus of this dissertation will be on an assessment of the extent the prosecutor proclaimed to be independent in principle 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 shall be made to focus on the prosecutor’s position from a balance of powers’ perspective.\(^{21}\)

Additionally, Article 15 on the prosecutor’s authority has been referred to as the ultimate expression of prosecutorial independence in the statute and has been hailed as one of its greatest achievements. At the same time, it has been invoked in criticism of the statute as an example of jurisdictional overreach. It is no coincidence that this article uses both the term “may” and the term “initiate”. The prosecutor’s initiation right is unconditional and

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\(^{19}\) Zappala (n 18) above.


discretionary, but carefully balanced by the need for authorization by the pre-trial chamber.  

The prosecutor is required, by Article 53 of the ICC Statute, to evaluate the information made available to him or her and on the basis of that evaluation, decide whether or not to investigate. The prosecutor is required to consider three issues. They are:

1. Whether there is a reasonable basis to believe that a crime within the jurisdiction of the court has been or is being committed,
2. Whether the case is admissible under Article 17,
3. Whether an investigation would not serve the interests of justice, taking into account the gravity of the crime and the interests of justice.

The consideration of the abovementioned three issues is because the initiation of criminal proceedings is largely considered an executive function of national jurisdictions, to enforce the law and protect the public from criminal activity.  

A court that usurps the jurisdiction of states when grave crimes are committed, while laudable, will fail because states will not support it. No international tribunal can enforce its orders without the cooperation of states.

Furthermore, Article 16 seems to confirm that those who drafted the statute understood that there will be circumstances where political imperatives would make it necessary to delay international justice, perhaps indefinitely. It has been held out to be the solution where prosecution before the court enters into some conflict with peace negotiations. The drafting of this article was very contentious, reflecting the widely divergent views expressed throughout the negotiation process on what the link should be between the court as a judicial body and the Security Council as a political organ of the United Nations.

There has been yet no judicial interpretation of this article. It seeks to address the overlapping relationship between the Security Council and the ICC. It has been held out to be a compromise recognizing the authority of the Security Council to intervene in criminal prosecutions under certain circumstances, according to specific conditions of both content and form. This article prevents a prosecution from being commenced except in accordance with a decision of the Security Council. It relates to a situation with respect to which action under Chapter VII of the United Nations Charter is actually being undertaken by the Security Council.

\[22\] Bergsmo and Pejic (n 6) 978.
\[24\] Horton “Prosecutorial Discretion Before the International Criminal Court and Perceptions of Justice: how expanded prosecutorial independence can increase the accountability of international actors” 2010-2011 Eyes on the ICC 5 6.
\[26\] Bergsmo and Pejic “Article 16-Deferral of investigation or prosecution” in Triffterer (ed.) (n 6) 595.
\[27\] Schabas (n 10) 325.
The statute empowers the United Nations Security Council to prevent or stop an ICC investigation or prosecution for a renewable twelve months period, by means of a resolution adopted under Chapter VII of the United Nations Charter. This three-pronged relationship between the Security Council and the ICC is as follows:

i) The power to defer proceedings,
ii) The Security Council can trigger the court’s jurisdiction,
iii) The Security Council can serve as an enforcement mechanism.\(^{28}\)

4 Chapter review

This dissertation shall be structured in the following manner: chapter two shall deal with an explanation of concepts such as complementarity and jurisdiction. Chapter three shall contain a discussion of the role of the prosecutor and the history behind the establishment of his or her Office. Chapter 4 shall focus on cooperation by the international community with the court to assist the prosecutor in the discharge of his or her duties, which translates to the overall success of the court. Chapter 5 shall briefly summarize the conclusion drawn from our study.

\(^{28}\) Pejic (n 1) 78.
CHAPTER 2
COMPLEMENTARITY AND JURISDICTION

1 Introduction

The terms complementarity and jurisdiction are very important in the determination of the admissibility or otherwise of a situation before the international criminal court and the prosecutor is obliged to have regard to them. In principle, a situation is inadmissible if as a result of an investigation, a state (whether a party to the Rome Statute or not) has decided not to prosecute the person concerned, unless that resulted from the unwillingness or inability of the state genuinely to prosecute. Paragraph 1 of Article 17 of the Rome Statute conditions the words ‘unwilling’ or ‘unable’ with the adjective ‘genuinely’ and the reason for this will be discussed in the paragraphs to follow.

Many states have enacted legislation allowing universal jurisdiction over serious international crimes and some have actually exercised it. Article 17 might suggest that such states fall under the category of a state with jurisdiction and thereby need to be considered in any analysis for the purposes of a complementary determination. In such a case the real question then is whether any proceedings have taken place anywhere in a situation where there has been a commission of the core international crimes.

When the core international crimes have been committed and no criminal proceedings have taken place, then the court should not entertain any challenge to admissibility based on the argument of complementarity. The legal difficulty with proceeding on the basis that a case is admissible when simply no state is actively prosecuting or has actively prosecuted the matter is that the text of Article 17 does not seem to appear to allow this. It makes the complementarity test conditional on a state being unwilling or unable. The unwillingness and inability of a state to prosecute shall be dealt with in the succeeding paragraphs under the subtopic ‘complementarity as a basis for admissibility’.

2 Complementarity as a basis for admissibility

The Rome Statute established what may be described as an international criminal legal system, combining within the complementarity principle a preference for national proceedings, with the establishment of a permanent international criminal court which serves as a backdrop to domestic efforts to prosecute international crimes. Should the domestic legal system be conclusively seen to be deliberately frustrating the prosecution of the core international crimes, then the international criminal court is expected to take over

30 Schabas (n 29) 341.
31 Cassese and Guido International Criminal Law - cases and commentary (2011) 523.
the investigation and prosecution of the perpetrators of those crimes. The word ‘complementarity’ does not actually appear anywhere in the statute. It was widely used during the negotiations leading up to its adoption and has been employed in legal literature as well as occasionally in the decisions of the court itself.

The ‘principle of complementarity’ which has emerged as a cornerstone for the international criminal court, is a pragmatic compromise between two opposing but related principles. On the one hand, the principle is meant to protect state sovereignty and reassure governments that the court will not have the last word on politically sensitive matters where national legal systems have acted appropriately. On the other hand, it ensures that perpetrators of international crimes within the ICC jurisdiction no longer find any safe haven within complacent or collusive national jurisdictions.

The Preamble and Article 1 of the Rome Statute established complementarity as a legal principle and introduced it as a general notion. Articles 17 and 20, on the other hand, translate that principle into criteria for the admissibility of cases before the court, thus setting forth the material elements for complementarity. Both references (Preamble and Article 1) to complementarity do not specify any automatic legal consequences, nor do they identify their subjects, detailed content or condition of application. Rather, they are of a programmatory nature and incorporate into the statute the notion of complementarity as a basis on which the court is envisaged to function. The statute’s Preamble and Article 1 thus established ‘complementarity’ as a legal principle, rather than as a legal rule.

Following the principle of complementarity encapsulated in Article 17 of the Rome Statute, a case will be admissible at the ICC only if the state (or states) which has (or have) jurisdiction over the case is (or are) “unwilling or unable genuinely to carry out the investigation or prosecution”. The insertion of the word ‘genuinely’ into the test allows the international criminal court to assert jurisdiction if the national or territorial state is investigating or prosecuting in bad faith, for example, to shield the accused while giving the appearance of accountability. The domestic courts, therefore, have the primary responsibility for investigating and prosecuting international crimes and the international criminal court can step in only if those courts fail or cannot do so.

In light of the general meaning of this term, the international criminal court is thus envisaged to supplement the deficiencies of national criminal jurisdictions and together they form a unit in the prosecution of the core international crimes. They further inform the understanding of the mutual roles of national criminal jurisdictions and the international

32 Schabas (n 29) 50.
33 Decision of the Prosecutor’s Application for a Warrant of Arrest in the Lubanga case ICC-01/06-08, 10th February 2006 paragraph 36.
35 Kleffner (n 34) 99.
36 (n 35) above.
37 Cassese and Guido (n 31) 524.
criminal court. The assertion that the international criminal court shall be complementary to national criminal jurisdiction thus generally denotes a system of international law enforcement which allocates the suppression of core international crimes to states parties. The international criminal court only assumes the role of a permanent reserve court, which completes the international criminal order, while national criminal jurisdictions are regarded as remaining indispensable for achieving the ultimate goal of ending impunity.\(^\text{38}\)

The international criminal court does not claim to be the only tribunal that may justifiably prosecute the core international crimes specified in the statute. The court allows both the prosecution of individuals by their own states and the exercise of ‘universal jurisdiction’ by states over foreign individuals. The international criminal court is a court of last resort and it is intended to supplement, not to supplant, national jurisdiction. The Preamble of the Rome Statute recognizes that every state has the responsibility to exercise its own criminal jurisdiction over international crimes.\(^\text{39}\)

The principle of complementarity is not based only on respect for the primary jurisdiction of states. It is also based on the practical considerations of efficiency and effectiveness. This is because states will generally have the best access to evidence, witnesses and the resources to carry out proceedings.\(^\text{40}\) Due to the complementarity rule, the vast majority of crimes that are within the jurisdiction of the international criminal court are expected to be dealt with by domestic criminal courts.\(^\text{41}\) Under this rule, it is hoped that this might induce more states to undertake themselves the prosecution and punishment of atrocities.\(^\text{42}\)

The Preamble of the Rome Statute is a fairly lengthy text that addresses several of the important principles that underpin the statute, such as complementarity and gravity;\(^\text{43}\) and the latter shall be discussed under the subheading ‘jurisdiction’. From the Preamble, the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes is affirmed in paragraph 6. This idea is related to the principle of complementarity set out in paragraph 10 of the Preamble, as well as Articles 1 and 17. The principle of complementarity is also present in paragraph four of the Preamble, which affirms that the “effective prosecution [of the most serious international crimes of concern to international community as a whole] must be ensured by taking measures necessary at national level and by enhancing international co-operation.”\(^\text{44}\)

The prosecutor has to always have regard to the fact that when an overall situation is initiated, relevant and capable national governments must be given the first opportunity under the principle of complementarity. Those governments must take the lead to

\(^{38}\)Schabas (n 29) 100-101.

\(^{39}\)Duff (n 8) above.


\(^{43}\)Schabas (n 29) 32.

\(^{44}\)Schabas (n 29) 45.
investigate their own nationals or others within their jurisdiction otherwise the willingness and ability of national judicial systems to enforce international criminal law would be undermined.\textsuperscript{45} The international criminal court may not proceed with a case when the concerned states are investigating or prosecuting in good faith. The prevailing view during the negotiation of the Rome Statute was that the court was not to have primacy over national justice systems, which is the situation with the \textit{ad hoc} tribunals; but rather would complement them.\textsuperscript{46} 

‘Complementarity’ is often juxtaposed with ‘primacy’, which is the regime in place in the \textit{ad hoc} tribunals, which were established as temporary institutions, set up for the specific purpose of investigating and prosecuting those responsible for crimes committed during the wars in the former Yugoslavia and Rwanda\textsuperscript{47}. Article 9 (1) of the ICTR provides that no person shall be tried before national courts for acts constituting serious violations of international humanitarian law under the statute, for which he/she has already been tried by the ICTR. Paragraph 2 (b) and (c) thereof state that a person who has been tried by national courts for acts constituting serious violations of international humanitarian law may be subsequently tried by the ICTR only if the acts for which he was tried were characterized as ordinary crimes, or the national court proceedings were not impartial, or independent and were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted. According to Article 9 (1) of the ICTY Statute the Tribunal shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed within the jurisdiction of the former Yugoslavia. Paragraph 2 states that the Tribunal shall have primary jurisdiction over national courts and at any stage of the procedure may formally request national courts to defer to the competence of the Tribunal.

The pre-trial chamber\textsuperscript{48} has described ‘complementarity’ as “...one of the cornerstones of the statute...” and that “the principle of complementarity of the court \textit{vis-à-vis} national jurisdictions is based on the premise that the investigation of the crimes provided for in the Statute lies primarily with the national jurisdiction”. It further noted that since the approval of the statute, on the 17\textsuperscript{th} July 1998, a number of national implementing laws have been passed in order to ensure that States Parties have jurisdiction over the crimes contained in the Rome Statute.

The international criminal court is the first international judicial body to interface with national courts on the basis of the principle of complementarity, at least in a formalized sense.\textsuperscript{49} One of the most important and distinctive features of the international criminal court is the complementary regime provided for by the statute, particularly Article 42. If the

\textsuperscript{45}Kirsch and Holmes “The United States and the International Criminal Court” 1999 \textit{AJIL} 12  15.
\textsuperscript{46}Schabas (n 29) 336.
\textsuperscript{48}(n33) paragraph 34.
\textsuperscript{49}Kleffner (n 34) above.
courts of the national jurisdiction are unwilling or unable to prosecute an individual for a crime covered by the Rome Statute, the international criminal court can prosecute that individual without violating the complementarity principle. However, if a nation and its courts are able and willing to prosecute an individual for such crimes, the international criminal court must defer to those national courts under the complementarity principle.\(^{50}\)

The principle of ‘complementarity’ invoked in the Preamble as well as in Article 1 of the Rome Statute, is central to the philosophy of the court. Article 17 provides the mechanism for ensuring that the court is indeed complementary to national justice systems. It was carefully negotiated to ensure that states parties enjoy a level of confidence that their sovereign right to try crimes committed in their territory would not be encroached upon by the court. Without Article 17, it is doubtful that the Rome Statute would have been adopted.\(^{51}\)

Before a prosecutor decides on the course of action to follow in a situation, he/she has to first observe the action or inaction of the state concerned in relation to the core international crimes being committed. Two rather complex paragraphs, which are Articles 17 (2) and 17 (3), attempt to define what the terms ‘unwilling’ and ‘unable’ actually mean. By implication if states are simply inactive, for reasons other than that they are ‘unwilling’ and ‘unable’, then the situation should be inadmissible. ‘Complementarity in practice’ in the form of the usage of terms like: “partnerships, dialogue with state and burden sharing [entails] the desirability of a benign and constructive relationship between national justice systems and the international criminal court.”\(^{52}\) It contemplates what was labeled in a report by the Office of the Chief Prosecutor,\(^{53}\) as ‘uncontested admissibility’. According to this report, a state would be judged on its compliance with the duty to prosecute, by an analysis of its motives rather than its actions.

With respect to ‘complementarity and activity’, if investigations or trials are underway, there would seem to be a presumption that the situation is inadmissible. In order to determine unwillingness, three factors are enumerated in Article 17 (2) of the Rome Statute:

i) The proceedings or the decision not to prosecute was made to shield the person concerned from criminal responsibility for crimes within the jurisdiction of the court.

ii) An unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice.

\(^{50}\)Totten and Tyler “The Principle of Complementarity in Practice” 2008 *Journal of Criminal Law and Criminology* 44.

\(^{51}\)Schabas (n 29) 336.

\(^{52}\)Schabas (n 29) 342.

\(^{53}\)a commissioned expert report, commissioned before Louis Moreno Ocampo assumed office- Informal Expert Paper on The Principles of Complementarity in Practice, taken from Schabas (n 29) 342.
iii) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner inconsistent with an intention to bring the person concerned to justice.

In conclusion, as a legal principle prior to proceeding to the merits of any situation referred to the prosecutor, he/she has to observe if the complementarity rule has been complied with. Complementarity generally presupposes a form of concurrent jurisdiction. The idea is that the international criminal court will share jurisdiction with national courts and the ICC intervenes in the event of an occurrence of the three situations mentioned in Article 17(2). This rule promotes the primary responsibility of states to criminalize, investigate, prosecute and punish war criminals.\textsuperscript{54} If implemented too strictly, it could paralyze the international criminal court and consign it to irrelevance. If implemented too loosely, it risks stirring considerable resistance amongst governments on whose support the court depends.\textsuperscript{55} To explain this statement, the former can be the situation where the prosecutor expects domestic action despite inherent shortcomings in the legal system; and the latter where there is a lack of strict observance of the complementarity principle, thereby prompting the court’s subjects, in the form of nations of the world, to lose confidence in the international legal system.

3 Jurisdiction as a basis for admissibility

In order for the international criminal court to fulfill its mission of bringing an end to impunity for the crimes contained in the statute states parties have vested it with the powers to investigate, prosecute, declare and enforce individual criminal liability arising out of such crimes. The court’s dormant jurisdiction is activated only with regards to a given situation, when the court’s competent organ verifies that the material pre-requisites for triggering the court’s dormant jurisdiction with regards to such matters are met.\textsuperscript{56} Under the Rome Statute, the prosecutor is obliged to observe the principle of jurisdiction as a basis for admissibility. Under this subheading the jurisdiction of the court shall be looked at from three perspectives, which are: the subject matter, the gravity of the offence and the three parties permitted to trigger the court’s jurisdiction. In relation to the weight or gravity of an offence, the Rome Statute states that the international criminal court may exercise jurisdiction over the most serious crimes of international concern and that the court is complementary to national jurisdictions. These ideas are expressed in both the Preamble and other substantive provisions of the statute.\textsuperscript{57}

The Rome Statute criminalizes acts which most seriously undermine the highest values of the international community and which by their own nature, threaten international peace, security and the well-being of the world. It also creates a court entrusted by the states

\textsuperscript{54}Igwe (n 25) 295.
\textsuperscript{55}Kleffner (n 34) editor’s preface.
\textsuperscript{56}Olasolo The Trigger Procedure of the International Criminal Court (2005) 121.
\textsuperscript{57}Articles 1 and 17 of the Rome Statute.
parties with guaranteeing that such acts do not go unpunished because of the inaction, unwillingness or inability of national jurisdictions to investigate and prosecute them. Lastly, in order to avoid the jurisdictional activity of the international criminal court detracting from the effectiveness of the Security Council’s political-administrative measures, under Chapter VII of the United Nations Charter, for maintaining and restoring international peace and security, the Rome Statute provides for the temporary suspension of the activities of the court at the request of the Security Council.  

In respect of subject matter jurisdiction, the Preamble of the Rome Statute states that the statute’s immediate object and purpose is the establishment of an international criminal court to have jurisdiction over the “…most serious crimes of concern to the international community as a whole…” in order to “…put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.”

Articles 1 and 5 limit the court’s jurisdiction to the most serious crimes of concern to the international community as a whole and the crimes are:

- **i)** The crime of genocide in article 6,
- **ii)** Crimes against humanity in article 7,
- **iii)** War crimes in article 8, divided into four sub categories, namely;
  - a) Grave breaches of the Geneva Convention of 12th August 1949, committed in the context international armed conflict, provided in article 8 (2) (a) of the Rome statute,
  - b) Other serious violations of the laws and customs applicable in international armed conflict, contained in article 8 (2) (b) of the Rome statute,
  - c) Serious violations of article 3 common to the Geneva Convention of 12th August 1949 committed in the context of an armed conflict, not of an international character, provided for in article 8 (2) (c) of the Rome statute,
  - d) Other serious violations of the laws and customs applicable in armed conflict not of an international character, contained in article 8 (2) (e) of the Rome Statute.  

The crime of aggression has been defined by a Special Working Group and was ultimately adopted at Kampala, Uganda, in February 2009 by the Review Conference and is to be located in a new Article 8 bis to the Rome Statute of 1998.

Article 12 on the pre-conditions for the exercise of jurisdiction is fundamental for an effective international criminal court, particularly with regards to states as it sets out the grounds on which they can trigger the court’s dormant jurisdiction. This article is intimately

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58 Article 16 of the Rome Statute.  
59 Olasolo (n 56) 126.  
related to Article 5 which prescribes crimes within the jurisdiction of the court. The jurisdiction of the court is over crimes committed by nationals of states parties and individuals who commit crimes to states parties to prevent the commission of international crimes on their territories, to trigger the court’s jurisdiction in respect of any situation referred to the prosecutor by the Security Council and over any situation brought to the court by the prosecutor acting propiomotu.

The court’s jurisdiction temporis is prospective and it began, for the original states parties, at that date in 2002 when the court came into being. For states that are not party to the statute, unless they make a specific declaration that the court may exercise jurisdiction over their nationals, the court may only exercise such jurisdiction in relation to the relevant offences committed if brought to the attention of the court by the Security Council. Under Article 13 (b) it seems to be presumed that the court may only exercise jurisdiction to the extent that the exercise of such jurisdiction is authorized by the Security Council, on its own accord acting under Chapter VII of the United Nations Charter. Nowhere, however, is it stated explicitly in the statute. The Security Council may, of course, trigger the jurisdiction of the court with respect to a situation occurring in the territory of any state.

Article 13 is the first of the three provisions in the Rome Statute that concerns the triggering of the court’s jurisdiction. This jurisdiction may be triggered by states parties, the prosecutor acting proprio motu and the Security Council. Once it is established that the court has the necessary jurisdiction, a situation must be triggered by one of the three mechanisms set out in Article 13. The term ‘dormant jurisdiction’ is used to describe the process of triggering the ICC jurisdiction. It explains that once this dormant jurisdiction exists these ‘activation prerequisites’, in the form of the three mechanisms provided for in Article 13, have to trigger jurisdiction before the court can actually exercise it. This article is about the exercise of jurisdiction or the trigger as it is often referred to and it does not confer jurisdiction.

The International Law Commission, in its commentary on the draft statute, accepted that the authority of the Security Council to refer a situation was well established in the Rome Statute. It said that the Security Council was allowed to initiate recourse to the court by dispensing with the requirement of acceptance by a state party of the court’s jurisdiction. This power may be exercised, for example, in circumstances where the Council might have authority to establish an ad hoc tribunal under Chapter VII of the United Nations Charter.

The International Law Commission felt that a provision on the Security Council’s power to trigger the court’s jurisdiction was necessary in order to enable it to make use of the court,

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61 Williams and Schabas “Article 12-The Pre conditions for the Exercise of Jurisdiction” in Triftterer (ed.) (n 6) 547.
63 Schabas (n 29) 293.
64 Schabas (n 29) 300.
65 Schabas (n 29) 294.
as an alternative to establishing *ad hoc* tribunals, as a response to crimes which affront the conscience of mankind. On the other hand, the Rome Statute did not intend in any way to add or increase the power of the Council to maintain international peace and security as defined in the Charter of the United Nations. The Rome Statute distinctively makes available to the Security Council a jurisdictional mechanism to maintain international peace and security.

The international criminal court operates on the basis of delegated jurisdiction from its states parties. Such states parties are therefore entitled to vest universal jurisdiction in the court in relation to the Security Council referral. Since the Security Council has no jurisdiction of its own to vest in the international criminal court, a strong case can be made out that in a situation where the Council refers a situation to the court, the court is exercising universal jurisdiction on behalf of the States Parties.\(^66\) When the Security Council triggers the court’s jurisdiction, the prosecutor opens an investigation which is without any pre-conditions, in the form of obtaining the consent of any state party or non-state party to the statute. The court’s jurisdiction is exercised in a manner similar to that of the two *ad hoc* tribunals for the former Yugoslavia and Rwanda.\(^67\)

An important factor to be taken into account is the court’s relationship with the Security Council. The relationship between the two is an interesting one as the functions of both bodies relate in different ways to international peace and security. The Preamble to the statute of the court recognizes that crimes within the jurisdiction of the court can threaten world peace and security.\(^68\) Whether the Security Council must also meet the other admissibility criteria and respect the principle of complementarity when it refers a situation to the prosecutor was a matter that seems to have been intentionally left unresolved at the Rome Conference.\(^69\) Article 13 (b) requires that the Security Council act under Chapter VII of the United Nations Charter. If the Security Council triggers the court’s jurisdiction, it must act within the perimeters of the Rome Statute with respect to jurisdiction. It accepts that the investigation and prosecution will be conducted pursuant to the statute, respecting the division of functions and responsibilities between the prosecutor and the chambers.

In the plenary, which took place during the first few days of the Rome Conference the debate on the trigger mechanisms showed unanimous support for the authority of states parties to refer situations to the international criminal court for investigation and prosecution.\(^70\) A state party can only refer a situation over which the international criminal court already has jurisdiction in accordance with Article 12 (2) of the Rome Statute. Judge

\(^{66}\) Bekou and Cryer (n 16) 50-51.
\(^{67}\) Ferreira-Snyman (n 2) 415.
\(^{69}\) Williams and Schabas “Article 13- Exercise of Jurisdiction” in Triffterer (ed.) (n 6) 570.
\(^{70}\) Schabas (n 29) 301.
Georghios M. Pikis\textsuperscript{71} in a separate and partly dissenting opinion has said that “...state parties are enjoined to exercise the jurisdiction entrusted to them. If they do not, a corresponding duty is cast upon the court to investigate, prosecute and try persons liable for the commission of one or more crimes punishable under the statute.”

Giving power to the prosecutor acting \textit{proprio motu} to trigger the court’s jurisdiction was far more controversial. A large number of delegates were in favour of giving the prosecutor authority conditional on having sufficient safeguards to avoid political motivations. At the end of the Rome Conference the prosecutor’s \textit{proprio motu} authority was retained subject to safeguards. Discussion on the prosecutor’s \textit{proprio motu} authority shall be dealt with in chapter 3 of the dissertation and it forms the basis for the topic of this dissertation.

The prosecutor is required to evaluate the information made available to him or her and on the basis of that information decide whether or not to investigate. He/she has to make these considerations either while acting pursuant to Article 15 under his/her \textit{proprio motu} power or Article 53 acting on the strength of states parties or the Security Council’s communications. Under the Rome Statute, the prosecutor is to consider three issues. As mentioned in chapter 1 they are whether there is a reasonable basis to believe that a crime within the jurisdiction of the court has been or is being committed, whether the situation after his investigation will be admissible under article 17 and whether an investigation would serve the interests of justice. Article 17 relating to the admissibility test requires a consideration of the gravity of the offences. The gravity threshold which is both qualitative and quantitative, acts as an additional filter to prevent the court from investigating, prosecuting and trying peripheral cases.\textsuperscript{72}

The court’s ‘dormant jurisdiction’ is activated only with regard to a given situation, when the court’s competent organ, \textit{i.e.} the pre-trial chamber, verifies that the material prerequisites for the triggering of the court’s dormant jurisdiction with regards to such a situation are met. The activation prerequisites can be arranged into three categories. The first category is those derived from the personal, subject matter, temporal and territorial scope of the international criminal court’s dormant jurisdiction. The second category comprises of two activation prerequisites that specifically address the relationship between the international criminal court with national jurisdictions and the Security Council. The first is derived from the principle of complementarity of the international criminal court \textit{vis-à-vis} national jurisdictions and consists of the inaction, unwillingness or inability of national jurisdictions to investigate and prosecute the crimes allegedly committed within the situation referred to in the activation request. The second is an expression of the principle of cooperation between the international criminal court and the Security Council. It consists of the absence of any Security Council request not to activate the court’s dormant jurisdiction over the situation referred to in the activation request, in order to avoid the jurisdictional activity of

\textsuperscript{71} Situation in the Democratic Republic of Congo \textit{ICC-01/04} in paragraph 16 31.

\textsuperscript{72}Chernor-Jalloh “The Situation in the Republic of Kenya” 2011 \textit{AJIL} 119.
the court undermining the effectiveness of the measures taken by the Security Council under Chapter VII of the United Nations Charter. In the third category fall two activation pre-requisites which are manifestations of the principle of political discretion. Firstly, crimes allegedly committed within the situation referred to in the activation request shall be of sufficient gravity. Secondly, there are no substantial reasons for believing that the activation of the court’s dormant jurisdiction over such situation would not serve the interests of justice.\textsuperscript{73}

The personal scope of the court’s dormant jurisdiction derives from the fact that the Rome Statute is built upon the principle of individual criminal responsibility for the acts criminalized in it. According to Article 25 (2) of the Rome Statute a person who commits a crime within the jurisdiction of the court shall be individually responsible and liable for punishment in accordance with the statute. Article 25 (1) adds that the court shall have jurisdiction over natural persons. The first limitation on the personal scope of the court’s dormant jurisdiction may appear \textit{prima facie} to be contained in Article 26, which provides that “the court shall have no jurisdiction over any person who was under the age of eighteen at the time of the alleged commission of the crime”.\textsuperscript{74}

\textsuperscript{73}Olasolo (n 56) 122.
\textsuperscript{74}Olasolo (n 56) 123-124.
CHAPTER 3

THE PROSECUTOR’S ROLE AND FUNCTION

1 Introduction

While the ICTY and ICTR possess the authority to adjudge actions of high state officials as criminals and send them to jail, those institutions were established by the United Nations Security Council, within narrow territorial limits. The international criminal court, by contrast, is largely independent of the Security Council as it was established by the Assembly of States Parties and vests the power to investigate and prosecute politically sensitive crimes within its broad mandate in a single individual, its independent prosecutor.  

The prosecutor sits at a critical juncture in the structure of the court, where the pressures of law and politics converge. The cases adjudicated by the international criminal court are infused with political implications and require sensitive decision-making by those members of the court, including the prosecutor, who are vested with the discretion to exercise its powers. In relation to the international criminal court as a whole, two fundamental questions relating to the prosecutor have to be addressed:

1. The extent to which the prosecutor can be expected to function as an accountable political actor;
2. The extent to which he or she will be able to claim legitimacy.

2 History of the establishment of the prosecutor’s office

Although the International Law Commission did not seriously consider a prosecutor with authority to actually initiate prosecutions, in the absence of a complaint, its views gradually evolved in favour of an increasingly independent prosecutorial body. The idea that the prosecutor might actually launch prosecutions in the absence of a complaint, otherwise known as to ‘trigger’, began to emerge in the Ad Hoc Committee in 1995. During the Rome Conference, at the negotiation of the Rome Statute, some delegates felt that the role of the prosecutor should be more fully elaborated and expanded. They felt that it should include the initiation of investigations and prosecutions, in the case of serious crimes under general international law that were of concern to the international community as a whole in the absence of a complaint.

The delegates were of the view that this expanded role would enhance the independence and autonomy of the prosecutor, who would be in a position to work on behalf of the

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76 Danner (n 75) above.
77 ILC Ad Hoc Committee Report paragraph 113-114.
78 Schabas (n 29) 316.
international community rather than a particular complaint of the Security Council or states parties. Opinion also differed as to whether in the absence of a state complaint, it would be appropriate for the prosecutor to initiate an investigation. One view was that the absence of such complaint was an indication that the crime was not of sufficient gravity or concern to the international community. Another view was that this might mean the states concerned were unable or unwilling to pursue the matter.\(^\text{79}\)

A text governing an *ex officio* prosecution, bearing many similarities to the language ultimately incorporated in Article 15 of the statute was proposed by Italy and Trinidad and Tobago saying that “the Prosecutor shall initiate investigations *ex officio* or on the basis of information obtained from any source particularly governments, United Nations organs, intergovernmental and non-governmental organizations. The Prosecutor shall assess the information received or obtained and decide whether there is a sufficient basis to proceed”.\(^\text{80}\) Arguing that both states parties and the Security Council would be unlikely to lodge complaints for a variety of political reasons, some states contended that the prosecutor should be empowered to initiate investigations *ex officio* or on the basis of information obtained from any source.\(^\text{81}\)

To make the proposal more palatable, its proponents proposed that there be various checks and balances, including notifications to states and prior authorization by a chamber of the court.\(^\text{82}\) Opponents of the prosecutor’s empowerment proposal said that this conception of an independent prosecutor would lead to the politicization of the court and also lead to allegations that the prosecutor had acted out of political motives. Concerns were also expressed that in the absence of a states’ complaint and the accompanying support, the prosecutor would be ineffective. It was also said that the international community was simply not ready for an international criminal court that could undertake prosecution on its own initiative.\(^\text{83}\)

The final draft adopted by the Preparatory Committee contained two relevant provisions. The first which was entitled ‘the Prosecutor’ was broadly patterned on the initial proposal by Italy and Trinidad and Tobago. It affirmed the authority of the prosecutor to undertake cases acting *ex officio* (*or proprio motu*), on the basis of information received from various sources. The second, which was entitled ‘information submitted to the prosecutor’, set out the procedural framework for the exercise of this authority and in particular the need for preliminary authorization by the pre-trial chamber.\(^\text{84}\)

At the Rome Conference, there were sharp debates about whether the prosecutor should have the authority to initiate an investigation *proprio motu*, in the absence of a complaint or

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\(^\text{79}\)&n 75) above.

\(^\text{80}\)Preparatory Committee’s 1996 Report Volume II 109.

\(^\text{81}\)Preparatory Committee’s 1996 Report Volume I paragraph 149.

\(^\text{82}\)(n 81) paragraph 150.

\(^\text{83}\)(n 81) paragraph 151.

\(^\text{84}\)Preparatory Committee’s Final Draft 33-38.
referral by the Security Council or states parties. Strong views were expressed on both sides of the divide.\textsuperscript{85} During the negotiation of the Rome Statute, both supporters and opponents of a prosecutor with \textit{proprio motu} powers grounded their arguments on fears of politicizing the court. Opponents argued that the prosecutor could become either a ‘lone ranger running wild’ around the world, targeting highly sensitive political situations or a weak figure who would be subject to manipulation by states, non-governmental organizations and other groups who would seek to use the power of the ICC as a bargaining chip in political negotiations.\textsuperscript{86}

Proponents of the \textit{proprio motu} powers, on the other hand, argued that limiting the prosecutor’s investigatory ability to situations identified by overtly political institutions like states and the Security Council would decrease the independence and credibility of the court as a whole. Both sides agreed that the outcome of this debate would fundamentally affect the court’s structure and functions. Non-governmental organizations, in particular, fought for the inclusion of an independent prosecutor in the Rome Statute. They echoed concerns that limiting the triggering of the court’s jurisdiction to states parties and the Security Council would result in the politicization of the court. They additionally argued that the state’s historical reluctance to use the existing state complaint procedures in human rights mechanisms suggests that they would be similarly unwilling to incur the political costs of referring cases to the ICC.\textsuperscript{87}

Despite the delegate’s rejection of the Security Council as the ultimate regulator of the ICC jurisdiction, as per the United States’ proposal, many states recognized the danger posed by arming the prosecutor with unfettered discretion. In March 1998, a few months before the convening of the Rome Conference, Germany and Argentina introduced a proposal that granted the prosecutor \textit{proprio motu} power, but also provided a check on his or her discretion at an early stage of the investigation. According to this proposal, the prosecutor’s independent decision to initiate an investigation would be subject to judicial review by the pre-trial chamber before the prosecutor could actually proceed with an investigation. This proposal was eventually incorporated into the Rome Statute, which allows the prosecutor to commence an investigation on his/her own initiative.\textsuperscript{88}

\textbf{3 The prosecutor’s receipt of information- either proprio motu or generally}

The Office of the Prosecutor has adopted the term ‘communication’ to describe information provided on the basis of Article 15. The primary source of such ‘communications’ are individuals and non-governmental organizations. Since the court was established in 2002, several thousand such communications have been received. Although not provided for in Article 15, as part of this ‘preliminary examination phase’, the prosecutor may also

\textsuperscript{85}Schabas (n29) 317.
\textsuperscript{86}Danner (n 75) 410.
\textsuperscript{87}Danner (n 75) 411.
\textsuperscript{88}Danner (n 75) above.
undertake field missions. The *proprio motu* power to initiate investigations is dependent ‘on the basis of information’ concerning crimes within the jurisdiction of the court. When the provision was being considered, there was concern expressed about the sources of information. In the result, Article 15 (1) of the statute, places no real limit on the sources, while Article 15 (2) authorizes the prosecutor to seek “additional information from states, organs of the United Nations, intergovernmental and non-governmental organizations or other reliable source that he or she may deem appropriate”. Moreover, the prosecutor may also receive written or oral testimony at the seat of court.

In practice, the conditions concerning the receipt of information by the prosecutor acting *proprio motu* are not really any different from those when he/she acts pursuant to states parties or Security Council referrals. The prosecutor must always analyze the seriousness of the information provided, even when it comes from states parties or the Security Council, as the Rules of Procedure and Evidence make it quite clear. Although not explicitly provided for by Article 15, it seems consistent with its object and purpose that the prosecutor considers potential situations within the jurisdiction of the court, even in the absence of any information provided by a third party and it would appear that this is indeed the case.

In practice, it would seem that the prosecutor can receive written or oral testimony anywhere, to the extent that there is no objection from the state where this is taking place. When testimony is taken in accordance with Article 15 (2) as well as, more generally, when information is provided under Article 15 (1), the prosecutor is required to protect its confidentiality or “take any other necessary measures, pursuant to his or her duties under the Statute”. The Rules of Evidence and Procedure contemplate a situation where the prosecutor might receive testimony if there is a serious risk that it might not be possible to receive subsequently. In such a case, the prosecutor may request the pre-trial chamber to take such measures as may be necessary to ensure the efficiency and integrity of the proceedings, in particular, to appoint counsel or a Judge from the pre-trial chamber to be present during the taking of testimony in order to protect the rights of the defense.

### 3.1 Reasonable basis to investigate and to prosecute

In the Rome Statute, investigation and prosecution are distinct and nowhere is this clearer than in the first and second paragraphs of Article 53. Paragraph 1 contemplates the prosecutor’s decision to “initiate an investigation”. Paragraph 2 operates subsequent to the decision to “initiate an investigation”, governing the prosecutor’s decision not to proceed

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89 Schabas (n 29) 320.
90 Schabas (n 29) 319.
91 Rule 104 (1).
92 Schabas (n 90) above.
93 Schabas (n 90) above.
94 Rule 47 (2).
with a prosecution. At each stage the prosecutor may decide not to go ahead either with an investigation or a prosecution.\footnote{Schabas (n 29) 659.}

The prosecutor is expected to determine whether there is a “reasonable basis to proceed with an investigation” in terms of Article 15 (3). In making this determination, the prosecutor is to consider whether the available information provides a reasonable basis to believe that a crime within the jurisdiction of the court has been or is being committed. He or she also has to determine whether the case is or would be admissible under Article 17. In making the determination he or she has to take into account the gravity of the crime and the interests of victims and decide that there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.\footnote{Rule 48, Rules of Procedure and Evidence.} The “reasonable basis” test is also imposed by Article 53 (1) (a), which applies to referrals by the Security Council and the states parties. In practice then, the prosecutor applies the same test whatever the source that triggered the court’s jurisdiction.\footnote{Schabas (n 29) 321.}

In response to a communication from Venezuela, the prosecutor responded by saying that he had determined that the communications described isolated atrocities and as a result did not meet the “stringent threshold” of widespread and systematic attack that is required for charges of crimes against humanity.\footnote{Letter of the Prosecutor to Venezuela, dated 09\textsuperscript{th} February 2006.} In response to a communication from Iraq, the prosecutor said that there was a reasonable basis to believe that crimes within the jurisdiction of the court have been committed, namely willful killing and inhumane treatment. He further said the information available at the time supports a reasonable basis for an estimated four to twelve victims of willful killing and a limited number of victims of inhumane treatment. However, he went on to say that when compared to other situations under examination by his Office, the available evidence did not meet the gravity threshold imposed by Article 8 (1) of the Rome Statute.\footnote{Letter of the Prosecutor to Iraq, dated 09\textsuperscript{th} February 2006.}

Article 53 takes effect once a situation has been triggered by any of the three authorized entities. It requires the prosecutor to initiate an investigation, unless he/she determines that there is no “reasonable basis” to proceed. The Prosecutor has described Article 53 as “the point where many of the philosophical and operational challenges in pursuit of international criminal justice coincide”. He also added that “there is no clear guidance on what the content of the idea is”.\footnote{Office of the Prosecutor “Policy Paper on the Interests of Justice” September 2007 2.} The Rules of Evidence and Procedure add that the prosecutor is to “analyze the seriousness of the information received”.\footnote{Rule 104 (1).} At this stage, the prosecutor may request additional information from any relevant and reliable body and may
also take both written and oral testimony at the seat of court. Unless there is no reasonable basis to proceed, the prosecutor will proceed with an investigation.

Once a situation has been referred to the prosecutor for an investigation by the Security Council and states parties he is expected to investigate it. The language that appears in Article 15 of the Rome Statute, with respect to investigations and prosecutions launched by the prosecutor acting *proprio motu* does not say much. In that context, the terminology is not mandatory and it is said that the prosecutor “may” initiate investigations acting *proprio motu*. Only when the prosecutor determines that there is a reasonable basis to proceed with an investigation is he or she then required to obtain an authorization from the pre-trial chamber. It is not easy to reconcile Article 15 and Article 53 and the better interpretation is that they operate at different levels. In other words, Article 53 governs situations that are referred to the prosecutor by the Security Council or states parties. Where the investigation is *proprio motu*, Article 15 is the applicable provision, at least with respect to the decision to investigate.

Article 53 governs the determination by the prosecutor to ‘initiate an investigation’, as the title of the provision suggests. However, it also deals with the prosecutor’s decision to begin a prosecution. That the two terms ‘investigation’ and ‘prosecution’ describe distinct concepts can be seen elsewhere in the Rome Statute and especially in the title in Part 5. These references concern distinct phases in the activity of the prosecutor, with investigation referring to the stage before an accused person can be identified, while prosecution refers to the process that begins after that point. Of course investigation – the process of systematic examination and careful research – as a concept may well continue throughout the proceedings and even at the appeal stage.

3.2 Interests of justice

The Rome Statute itself provides direction on the factors to be considered in assessing the ‘interests of justice’. The prosecutor is expected to weigh any decision not to initiate an investigation by taking into account the gravity of the crime and the interests of the victims. The expression ‘interests of justice’ appears in many different legislative contexts, in various legal systems where it is generally used to acknowledge the need for discretion and the inability of legal texts to codify answers for difficult issues. That is why the term is not defined anywhere. Participants in the Rome Conference could never have agreed on the circumstances under which the prosecutor might defer for instance an investigation where there is an amnesty application in a domestic jurisdiction. Had there been an amendment to Article 53 (1) (c) of the Statute to the effect that the interests of justice shall not be

102 Rule 104 (2).
103 Calvo-Goller (n 23) 157.
104 Schabas (n 29) 659.
105 Articles 16, 17 (1) (a), 42 (1), 54 (1) (b), 68 (1) etc.
106 (n 104) above.
confused with the interests of peace such amendment would not have been met with consensus. Of course the prosecutor is free to exercise his discretion in the manner developed in his policy paper, but to suggest that this interpretation derives from the Statute itself is hard to sustain.107

In a judicial consideration of Article 53 (1), the Pre-trial Chamber 1 has noted that the prosecutor is granted the discretion in this area. One of the factors he has to consider is whether the proceedings would be detrimental to the interests of justice. Furthermore, “the states parties have not established in the Statute or in the Rules a closed list of criteria according to which the prosecutor must exercise its discretion”.108 Jurisdiction and admissibility have been discussed in the previous chapter and the introduction of interests of justice into the decision making process provides the prosecutor with an enormous scope for what amounts to a highly discretionary determination. The interests of justice are considered after it has been determined that the jurisdictional and admissibility tests warrant proceedings to investigate.

4 Procedure in investigation

The investigation and subsequent prosecution have a direct bearing on a trial as a whole. A trial might be fair but failure to protect the defendant’s interests during the preliminary phase may ultimately result in an unfair trial. For the international criminal court to be considered a fair and impartial forum for administering justice, it is critical that the rights of the investigated or accused person are safeguarded.109 The prosecutor is expected “to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under [the] Statute, and, in doing so, investigate incriminating and exonerating circumstances equally”.110 The wording suggests a prosecutor with a high level of neutrality and impartiality. Article 54 further says that the prosecutor is expected to respect the interests and personal circumstances of victims and witnesses and be especially thoughtful in matters involving sexual violence, gender violence or violence against children.

Investigation is not as simple for an international court because the prosecutor must conduct investigations on the territory of sovereign states. The investigation depends on the receptivity of the domestic legal system to initiatives from the Prosecutor’s Office. This will be especially difficult in the case of states that are not parties to the Rome Statute or states that find themselves threatened by such investigations.111 According to Article 55 of the Rome Statute, during an investigation a person shall not be compelled to incriminate him or herself or to confess to guilt. He or she shall further not be subjected to any form of coercion, duress or threat, torture or any other form of cruel, inhumane or degrading

107Schabas (n 29) 661-663.
108Decision on the Application of Rule 103, 4th February 2009- Situation in Darfur, Sudan (ICC-02/05) para. 18.
109Calvo-Goller (n 23) 155.
110Article 54 (1).
111Schabas (n 10) 181.
treatment or punishment. He or she shall be questioned in a language he or she understands with the assistance of competent interpreters free of any charge and such interpretation should be of such a nature as to meet the requirements of fairness. This article goes on to say that the investigated person shall not be subjected to arbitrary arrest or detention and shall not be deprived of his or her liberty in any manner other than the one established in the statute. It lastly states that a person suspected of having committed a crime subject to the jurisdiction of the court is entitled to be informed of other specific rights prior to being questioned.

Article 56 entitles the prosecutor, when there is a unique opportunity with respect to testimony or evidence that may subsequently be unavailable, to request authorization to record the testimony or to collect and test the evidence. The prosecutor is expected to seek such measures even when the evidence is favorable to the defendant, in keeping with the duty of neutrality and impartiality.112

4.1 Prosecutorial discretion

The prosecutor may decide not to initiate an investigation due to lack of a reasonable basis to proceed.113 In instances where the prosecutor had proceeded to an investigation, he/she may reach the conclusion that there is no sufficient legal or factual basis to seek a warrant or summons or the case is inadmissible under Article 17 or the prosecution is not in the interests of justice114 which goes to the heart of his/her independence.

4.1.1 Independence of the prosecutor

The independence of the international criminal court, and particularly the prosecutor, from direct political control is rightly celebrated as a salutary development. The prosecutor’s ability to make individualized considerations based on law and justice, rather than on self-interest or the sheer power of any particular state, transforms the court from a political body festooned with trappings of law to a legal institution with strong political undertones. The independent prosecutor also brings the ICC closer to the best practices of domestic criminal justice systems.115

The power to choose to pursue an investigation and the concomitant power of declination lies at the heart of the independence of the prosecutor, as embodied in the Rome Statute. Other aspects of his/her work may also force the prosecutor to exercise discretion in selecting and prioritizing investigations, and may come with resource constraints which inevitably limit the ICC prosecutor’s ability to pursue all meritorious cases. With respect to investigation, for example, the Rome Statute requires the prosecutor to establish the truth of the events in question and mandates that he/she investigate both incriminating and

112 Schabas (n 10) 131.
113 Article 53 (1).
114 Article 53 (2).
115 Danner (n 75) above.
exonerating circumstances equally. This directive suggests that his/her duty to investigate will be quite broad, and presumably more resource intensive than a search focused solely on incriminating evidence.\textsuperscript{116}

In addition to selecting which situations to investigate and deciding how to prioritize investigations, the prosecutor will have the critical task of deciding which individuals to charge with crimes as a result of his investigations. These screening decisions will shape the content of the cases heard by the ICC and will determine the overall direction of the institution. The Rome Statute specifically contemplates that the prosecutor will have discretion over which individuals to charge in connection with any particular violation. The statute under the heading ‘Office of the Prosecutor’, declares that “…shall act independently as a separate organ of the Court”.\textsuperscript{117} No external entity can unduly direct the prosecutor to charge cases against particular individuals.

The states that negotiated the Rome Statute elected to create a prosecutor with a greater amount of independence and simultaneously constructed a complex pre-trial procedure that endows a pre-trial chamber with significant oversight over the prosecutorial activities. Even with these checks and balances, the prosecutor retains a significant amount of discretion in his/her investigatory, screening, charging and admissibility determination.\textsuperscript{118}

\subsection*{4.1.2. Sufficient basis to prosecute}

In principle, investigations should lead to a prosecution but a prosecutor may decide after investigating not to proceed with such prosecution. This may be manifested in the fact that the prosecutor has not gathered sufficient evidence to warrant a prosecution. The determination is similar in some respect to that regarding the decision to initiate an investigation, which is governed by Article 53 (1). The test under Article 53 (2) also consists of three elements and although they are roughly parallel to those of Article 53 (1), there are some significant distinctions:

"a) The test that the Prosecutor is to apply under Article 53 (2) (a) is slightly different from that of Article 53 (1) (a). In concluding not to proceed to prosecute a case, the Prosecutor is supposed to determine that there is ‘not a sufficient basis’ for a prosecution. In Article 53 (1), the test is ‘no reasonable basis.’ The nuance in language suggests that the test for prosecution is somewhat more demanding and is formulated more rigorously. Whereas under Article 53 (2) the requirement is ‘a sufficient legal or factual basis to seek a warrant or summons’. Thus, the Prosecutor should consider not only the formal jurisdictional issues, but also such matters as the availability of evidence and the likelihood of compelling defenses being raised.

\textsuperscript{116} Danner (n 75) 416.
\textsuperscript{117} Article 42 (1).
\textsuperscript{118} Danner (n 75) 419.
b) The Prosecutor is to consider the admissibility of the case. The language in Article 53 (2) (b) is slightly different, demanding that the case ‘is admissible’, whereas under Article 53 (1) (b), the Prosecutor is to consider whether the ‘case is or would be admissible’. This reflects the fact that the Prosecutor is at a different stage in his work under each provision.

c) In deciding whether to prosecute, the question to be asked is if this is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrators, and his or her role in the alleged crime. Again then, the test is more demanding and the Prosecutor is explicitly required to consider specific issues, although the ultimate decision remains discretionary. Whereas under Article 53 (1) (c), gravity and the interests of victims are presented as a counter weight to the interests of justice, under Article 53 (2) (c) the word ‘nonetheless’ is absent and the various factors are presented in a more neutral manner; as if they may contribute to the ‘interests of justice.’

d) An overarching and additional element is all circumstances and this is to include the age or infirmity of the alleged perpetrators. That the two factors-age and infirmity are listed together and they suggest humanitarian concerns. But there may also be practical ones and the Prosecutor might consider it a waste of resources to proceed where there is a realistic chance that an accused person might not be able to complete a prolonged trial because of illness or death.”

4.2. Notification of decisions

The prosecutor is required by the Rome Statute to notify the pre-trial chamber if he/she decides not to proceed, but only where this determination is based upon the ‘interests of justice’. The statute however does not impose any requirement of notification to the source of the referral, be it a state party or the Security Council, as is the case with a decision not to prosecute under Article 53 (2). This odd situation – which is probably nothing more than an anomaly of the haste with which the text was drafted is rectified by the Rules of Evidence and Procedure.

Notification to either the source of the referral or the pre-trial chamber must contain the conclusions of the prosecutor and the reasons for them. The court is also required to provide victims with a notification of a decision not to initiate an investigation. The purpose of this requirement, apparently, is to allow victims to apply for participation in the

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119 Schabas (n 29) 666-667.
120 Schabas (n29) 667.
121 Rule 105 (1).
122 Rule 105 (3), (5).
123 Rule 92 (2).
proceedings. All these notification requirements are imposed in order to enable prompt contestation of the prosecutor’s determination, in accordance with Article 53 (3).  

Article 15 (6) of the statute requires that the prosecutor inform those who have provided information if he concludes, after preliminary examination, that there is no reasonable basis for an investigation. He or she is required to promptly ensure that notice is provided, including reasons for his or her decision, in a manner that prevents any danger to the safety, well-being and privacy of those who provided information to him or her, under Article 15 paragraph 1 and 2, or the integrity of the investigation or proceedings.  

4.3 Authorization

The procedural regime of the ICC is largely a hybrid of two different systems: the adversarial approach of English common law and the inquisitorial approach often described as the ‘civil law’ system. Under the adversarial procedure, the authorities responsible for prosecution prepare a criminal charge inspired either by a private complaint or on their own initiative. Although generally bound to respect standards of fairness and the presumption of innocence, their efforts focus on building a case against the accused. When the trial begins there is no evidence before the judge, evidence is admitted according to specific and often quite restrictive rules and its admission may be contested by the defendant.  

Under the inquisitorial system, an instructing magistrate prepares a case by collecting evidence and interviewing witnesses, often unbeknown to the accused. The instructing magistrate is a judicial official, who is bound to complete the job with neutrality and impartiality, and who must collect evidence of both innocence and guilt. The evidence compiled, including witness statements, is then filed in court prior to the start of the trial itself. Usually, the trial becomes more adversarial at this point, because the prosecution and the defense each participate in the judicial debates.  

The fears of the conservatives have been given some recognition in provisions by which the court’s judges may supervise prosecutorial discretion. In the result, the prosecutor’s decision to undertake the investigation of a situation proprio motu is subject to endorsement by the pre-trial chamber, which is composed of three judges. When the prosecutor concludes that there is a ‘reasonable basis’ for proceeding with an investigation, the prosecutor must submit a request for authorization of an investigation by the pre-trial chamber.

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124 Schabas (n 119) above.
125 Rule 49, Rules of Evidence and Procedure.
126 Schabas (n 10) 117.
127 Schabas (n 10) 118.
128 Schabas (n 10) 121.
129 Rule 50, Rules of Evidence and Procedure.
The use of the word ‘shall’ may be construed as eliminating any discretion on the part of the prosecutor as to whether an application to the pre-trial chamber should be made once a conclusion is reached that there is ‘a reasonable basis to proceed with an investigation’. Confirmation of such a construction is provided by similar language in Article 53 (1). Such interpretation, which will no doubt regularly be invoked by those who make submissions to the prosecutor in accordance with Article 15 (1), seems unreasonable. The Rome Statute provides recourse or remedy to an applicant who submits information to the prosecutor, in the event that the prosecutor concludes that there is a reasonable basis for an investigation, but declines to seek authorization from the pre-trial chamber. Had this provision been mandatory, surely those who drafted the Rome Statute would have included a mechanism for its enforcement.\(^\text{130}\)

Once the ‘reasonable basis’ has been established, supporting material is to be provided to the judges at this stage. Victims are specifically entitled to make representations during these proceedings, presumably in support of a request for authorization to investigate. The pre-trial chamber must confirm that a ‘reasonable basis’ for investigation exists, in addition to making a preliminary determination that the case falls within the jurisdiction of the court.\(^\text{131}\) This does not mean that issues of jurisdiction and admissibility are definitely settled and the court is not prevented from reversing its initial assessment at some subsequent stage. Should the pre-trial chamber reject the prosecutor’s request, he or she can always return with a subsequent application for authorization based on new facts or evidence.\(^\text{132}\)

At any time after the initiation of an investigation, the prosecutor may seek a warrant of arrest from the pre-trial chamber. The pre-trial chamber must be satisfied that there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the court, and that the arrest of the person is necessary in order to ensure the accused person’s appearance at trial, to prevent the obstruction of the investigation, or to prevent the person from undertaking any further activity prohibited by the statute. The prosecutor must include a concise statement of the relevant facts and a summary of the evidence in order to justify the existence of reasonable grounds, as well as supporting materials to account for the need to arrest.\(^\text{133}\)

5 Facilitating the participation and protection of victims/witnesses

To facilitate the participation of victims when the prosecutor intends to seek authorization, he has to inform the victims known to him or the Victim’s and Witness Unit of the Court or their legal representatives, unless he decides “that doing so would pose a danger to the

\(^{130}\text{Schabas (n 29) 321-322.}\)

\(^{131}\text{Article 15 (4).}\)

\(^{132}\text{Schabas (n 10) 121.}\)

\(^{133}\text{Schabas (n 10) 132.}\)
integrity of the investigation or the life or well-being of the victims and witnesses.”\textsuperscript{134} The prosecutor may also give notice by general means in order to reach groups of victims. He or she may also seek the assistance of the Victims and Witness Unit as appropriate.\textsuperscript{135} However, the prosecutor in the recent case of \textit{The Prosecutor v Thomas Dyi Lubanga}\textsuperscript{136} has raised an argument which legal scholars interpret as raising a serious ethical concern which seems to be overshadowed by the dictates of the statute on the issue of victim and witness protection.

\textbf{5.1 Summary of the case}\textsuperscript{137}

The Office of the Prosecutor (OTP) and the Court had vastly different ideas about the use of confidentiality which almost led to the release of Lubanga, due to a perceived unfair trial by the defense and the number of postponements requested by the Prosecutor. Just before the conclusion of the case, the Prosecutor was presenting its rebuttal evidence and the defense demanded that an intermediary of a child soldier witness be recalled to strengthen an argument that testimonies had been obtained through pressure from the investigators of the OTP. To rebut this evidence the Prosecutor had to recall a previous confidential intermediary who described how confidential intermediaries would locate child soldiers, bring them to the OTP Investigators who would in turn interview them and determine if they would be good witnesses.

However, this testimony led to the disclosure of an unspecified testimony of another intermediary who was confidential and still working in the field. The defense said that it could not adequately cross-examine the present witness without their knowledge of the other intermediary. The Court agreed with the defense and ordered that the identity of the intermediary be disclosed only to the defense once the necessary protective measures were implemented by the Victim and Witness Unit of the Court (VWU). The Prosecutor argued that the intermediary’s safety would be jeopardized and requested a stay of the proceedings pending an appeal of the court order, which the Court denied. Days later the VWU informed the Court that appropriate protective measures had been worked out and the cross-examination of the witness was set to resume the next day. Prior to the resumption the Prosecutor informed the Court that the witness was having second thoughts about the adequacy of the protection and was requesting a postponement for a further review of the protective measures, to which the defense objected and was supported by the Court. The Prosecutor applied for a stay of proceedings pending the appeal of this order and the Court reluctantly put it over one day where it allowed the defense to cross examine on matters known by the present witness and the one known by the contentious confidential intermediary to a later day, to which the defense objected as unfeasible and the Court then

\textsuperscript{134}Rule 50, Rules of Procedure and Evidence.
\textsuperscript{135}(n 142) above.
\textsuperscript{136}Case No. ICC-01/04-01/06.
\textsuperscript{137}Shaver “International Criminal Law” 2011 \textit{International Lawyer} 141.
ordered disclosure which the Prosecutor objected to and refused to comply on the following argument:

i) HE was bound by his autonomous statutory duties of protection that he had to honor at all times and that he had to be satisfied that disclosure would not violate this ethical obligation.  

ii) He was sensitive to his obligation to comply with the Chamber’s instruction. However, he also has an independent statutory obligation to protect persons put at risk on account of his actions. He should not comply or be asked to comply with an order that may require him to violate his separate statutory obligation by subjecting the person to a foreseeable risk, on account of prior interaction with his Office. He viewed this as not a challenge to the authority of the Chamber, but instead a reflection on his own legal duty under the Statute.

The Court ordered the case “stayed as an abuse of court process,” due to the deliberate refusal to follow a court order and was concerned that the Prosecutor would pick and choose orders of the court to follow, based on his interpretation of the statute. The Court made it a point that once the trial starts, the protection of witnesses becomes the Court’s responsibility and not the Prosecutor’s, and it has the last word on the adequacy of protection measures and not the Prosecutor. By the time the Appeal was heard the Prosecutor had long addressed the protection measures and was ready to resume trial. The Appeal Chamber nonetheless made the observation that “where there is a conflict between the Prosecutor’s perception of his duties and the orders of the Trial Chamber, the Trial Chamber’s orders must prevail.”

5.1.1 Criticism of the court’s view

a) The Appeal’s Chamber did not resolve whether or not the Prosecutor had an independent ethical obligation towards those witnesses which the Prosecutor has recruited to cooperate, at personal risk to their life and safety, nor did it provide guidance to the court and parties regarding how to resolve the contest of wills that develop when an attorney believes that an order of the Court places him in an ethical dilemma. Simply stating that the Court’s decision is final gives short shrift to this important question.

b) Prosecuting attorneys generally have a number of ethical obligations relating to their positions of trust, according to Regulation 17 of the Regulations of the Office of the Prosecutor. One such obligation deals specifically with protecting the identity of confidential informants. Customary criminal law provides the prosecutor with a

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138 (n 136) 11.
139 (n 136) 12.
140 (n 136) 48.
141 Shaver (n 137) 144.
‘privilege of non-disclosure’ due to this ethical obligation. Under this privilege, if disclosure is ordered over the objection of the prosecutor, the prosecutor has the election to forfeit the evidence relating to the informant or dismiss the case, if the former is not feasible. This election is not considered an abuse of process or bad faith. Thus, the Prosecutor’s suggestion that a similar process should apply here is not without precedent.  

c) The Rome Statute does not expressly contain a privilege of non-disclosure, but does impose a similar duty to protect on the prosecutor, which can equally be viewed as an ethical obligation. Article 68 (1) imposes a duty on both the Court and the OTP to “protect the safety, physical and psychological wellbeing and privacy of victims and witnesses”. The Trial Chamber took the position that the entire responsibility for protecting witnesses transfers to it once the trial starts. A fair reading of the Statute suggests that this is not the case. Article 68 (1) initially assigns the duty of protection to the Court, but adds that “the Prosecutor shall take such measures, particularly, during the investigation and prosecution of such crimes”. It would not seem logical to read “particularly” to mean “only”. Moreover, the prosecution of a crime is commonly interpreted to include the trial of the offence, not just the investigation. Thus, it seems clear that this joint duty to protect is an on-going duty of both the prosecutor and the court.

d) The chamber should always seek the consent of the person protected and it appeared to the Prosecutor that the Court was preparing an order to disclose without the party’s consent, even though it could still be possible to get that consent. It is easy to see why the Prosecutor felt that they were in an ethical dilemma.

6 Review of the prosecutor’ decision

A decision by the prosecutor not to proceed either with an investigation or a prosecution is subject to review by the pre-trial chamber in accordance with Article 53 (3) of the statute. This decision may be reviewed upon the request of the state party that has made the referral or the Security Council if it has triggered the jurisdiction of the court. The pre-trial chamber may request the prosecutor to re-consider that decision and he may do so in whole or in part and do that consideration as soon as possible.

The Rules of Evidence and Procedure require only that the prosecutor notify the pre-trial chamber of his decision, which is then communicated to all those who participated in

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142 Shaver (n 137) 145.
143 Shaver (n 141) above.
144 Shaver (n 137) 146.
145 Rule 107, Rules of Procedure and Evidence.
146 Article 53 (3).
147 Rule 108 (2).
the review. The position is somewhat different where the pre-trial chamber seeks to review, acting on its own initiative. The pre-trial chamber may only review if the prosecutor has taken the decision on the basis of the ‘interests of justice’. The prosecutor’s decision not to proceed is deemed effective only if confirmed by the pre-trial chamber. Furthermore, although not specified in the statute itself, the Rules of Procedure and Evidence declare that when the pre-trial chamber does not confirm the prosecutor’s decision not to investigate or prosecute, he or she shall proceed with the investigation or prosecution. When the pre-trial chamber acting proprio motu by virtue of Article 53 (3) (b) reviews the prosecutor’s decision not to proceed, on ‘the interests of justice’ ground, it may request the prosecutor to provide specific or additional information or documents in his or her possession, or summaries thereof that the pre-trial chamber considers necessary.

Whether or not the prosecutor is requested by the pre-trial chamber to reconsider a decision not to investigate or prosecute as provided for under Article 53 (4) of the statute, this may always be done by the prosecutor on his own initiative based on new facts or information. There are two consequences of this provision:

a) Once the decision has been communicated and the reasons given, in the absence of a request by the pre-trial chamber, the prosecutor is without authority to reconsider the question in the absence of new facts or information.

b) There is a clear implication that a referral by a state party or the Security Council remains valid indefinitely, even if the prosecutor has decided not to proceed with an investigation or a prosecution and his or her exercise of discretion has not been interfered with by the pre-trial chamber. The referral remains in suspended animation, capable of reactivation at any time in light of new facts or information.

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149 Rule 109, Rules of Procedure and Evidence.
150 Article 53 (3) (d) of the Rome Statute.
151 Rule 110 (2).
152 Schabas (n 29) 669.
153 Schabas (n 29) 670.
CHAPTER 4

COOPERATION WITH THE INTERNATIONAL CRIMINAL COURT

1 Introduction

The level of cooperation the prosecutor receives from states will determine the success of the international criminal court. As the ICC has no police force, military, or territory of its own, it needs to rely on states parties to, among other things, arrest individuals and surrender them to the court. He or she also needs the states parties’ cooperation to collect evidence and serve documents in their respective territories. Without this cooperation the ICC can encounter great difficulty in conducting its proceedings.\(^\text{154}\) The Office of the Prosecutor in an informal expert paper has observed that, although not beyond dispute, the duty to cooperate with the ICC is triggered first when an investigation is formally commenced.\(^\text{155}\) This duty of cooperation thereafter covers subsequent proceedings, which inevitably includes obligations that have to be discharged after the final verdict, for example, the transfer of a convicted prisoner to the court for testimony.\(^\text{156}\)

Article 88 of the Rome Statute obliges states to adopt domestic legislation to allow cooperation with the ICC. This Article provides that “states parties shall ensure that there are procedures available under their domestic laws for all of the forms of cooperation which are specified under this Part”. Very few states parties have passed the necessary domestic laws to cooperate with the ICC despite the expected pace with which the ratification has to take place. The ratification of the Rome Statute by states parties allows the court to discharge its duties without any unnecessary frustration as those domestic laws allow them to comply with the court’s directives.\(^\text{157}\)

2 States parties cooperation

The cooperation mechanism envisaged by the Rome Statute is generally viewed from a horizontal angle on the ground that the relationship between the court and the international community is based on an agreement. The complementarity mechanism, discussed in chapter 2 of this dissertation, further reinforces this horizontal view of the relationship. Although the assumption of primary jurisdiction over a situation by the ICC member states is horizontal (primary) \textit{vis-à-vis} the court, the obligation to offer assistance to the court when declining the right to exercise jurisdiction is subject to a vertical authority.\(^\text{158}\)

\(^{154}\) Oosterveld and Perry “The Cooperation of States with the International Criminal Court” in Schabas (ed.) (n 75) 606.


\(^{156}\) Rule 193 of the Rules of Procedure and Evidence.

\(^{157}\) Oosterveld and Perry (n 154) 607.

The Rome Statute recognizes the importance of states cooperation for the effective operation of the ICC and its’ entire Part 9 is dedicated to matters of international cooperation and judicial assistance. The duty to cooperate with the ICC imposed on states parties is two-fold: there is a general duty to cooperate and an obligation to amend domestic laws to permit cooperation. Articles 86 and 88 form the foundation of the obligation on states parties to cooperate with the ICC.\textsuperscript{159} According to Article 86 “states parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court”.

The kind of assistance that is expected of states parties may come in the form of the identification and determination of the whereabouts of persons sought by the court or the location of items; the taking of evidence including testimony under oath; the production of evidence including expert opinion and reports necessary to the court; the questioning of suspects; the service of documents; the facilitation of the voluntary appearance of persons as witnesses or experts before the court; the examination of places and sites; the execution of searches and seizures; the provision of records and documents including official records and documents; the protection of victims and witnesses and preservation of evidence; the identifying, tracing and freezing or seizing of proceeds, property, assets and instrumentalities of crimes for the purpose of eventual forfeiture.\textsuperscript{160} The list of these means of cooperation concludes with a blanket clause that obligates states parties to provide all other types of assistance “not prohibited by the law of the requested State” and which will facilitate investigations or prosecutions.\textsuperscript{161}

The Rome Statute sets out the duties and powers of the prosecutor with respect to investigations and establishes a regime for cooperation from states parties in the conduct of investigations and such duties and powers are set out in Article 54 (1) (a). The court’s ability to obtain the cooperation of states in the conduct of investigations is derived from Article 54 (3) (c) of the statute, which empowers the prosecutor to “[s]eek the cooperation of any State”. The prosecutor is also directed to conduct investigations on the territory of a state in accordance with the provisions of Part 9 of the statute. The Rome Statute also affords rights to persons during the investigation of crimes within the jurisdiction of the court and this was discussed in chapter 3 of the dissertation.

The duty to cooperate fully is explicitly confined to cooperate in accordance with the provisions of the statute, which means that the ICC cannot demand cooperation beyond what the statute requires. States may also provide additional cooperation voluntarily. The duty of implementation requires that states parties make any necessary domestic changes so that they are able to provide all the required forms of cooperation. This duty also allows

\textsuperscript{159} Oosterveld and Perry (n 154) above.
\textsuperscript{160} Article 93 of the Rome Statute.
\textsuperscript{161} Article 93 (1) (l).
the states parties to design procedures in keeping with their legal and constitutional systems.\textsuperscript{162}

The competent authorities of a custodial state are expressly forbidden by the statute from questioning whether the warrant was properly issued by the pre-trial chamber.\textsuperscript{163} However, the statute unequivocally envisages other forms of contestations by the accused, for an example, an accused may challenge an arrest on the grounds of double jeopardy, in which case the custodial state is to consult with the court to determine if there has been a ruling on admissibility. If the court is considering the issue of admissibility, then the custodial state may postpone the execution of the request for surrender.\textsuperscript{164}

3 Non-state-party cooperation

The express duty to cooperate demanded by the Rome Statute is confined to states parties, but Article 87 (5) (a) authorizes the court to invite non-state parties on an \textit{ad hoc} basis to cooperate with it. Additionally, non-states parties which accept the jurisdiction of the court must also cooperate with the court in accordance with Part 9 of the ICC Statute. The Security Council when referring a situation to the prosecutor, may require that United Nations member states cooperate with the court regardless of whether those states are parties to the Rome Statue or not.\textsuperscript{165}

It has been argued that there may be a customary law duty to ensure that there is compliance with international humanitarian law, which in turn could translate into a duty to cooperate with the ICC in a given situation.\textsuperscript{166} The cooperation of entities other than states has proven indispensable in practice. The ICC utilizes intergovernmental organizations as non-state parties and cooperation thus depends on a voluntary commitment.\textsuperscript{167}

States not parties to the statute that do not have any cooperation agreement with the court are bound to cooperate with it. To understand this assertion, reference has to be made to the modalities for referral of a situation to the court and also to the nature of the crimes that fall within the jurisdiction of the ICC according to Article 5 of the Rome Statute. With regards to the modalities, if for example the Security Council has referred a situation to the court pursuant to Chapter VII of the United Nations Charter, if there is an alleged breach of international peace and security, there is a general obligation to all member states of the United Nations to cooperate including non-states parties of the Rome Statute. In this instance, the Security Council resolution through which the situation was referred to the

\textsuperscript{162} Cryer and Friman (n 40) 407.
\textsuperscript{163} Schabas (n 10) 135.
\textsuperscript{164} Article 89 (2).
\textsuperscript{165} The Situation in Sudan (Darfur) – Security Council Resolution 1593 (2005) of 31\textsuperscript{st} March 2005.
\textsuperscript{166} Cryer and Friman (n 40) 411.
\textsuperscript{167} Article 87 (6).
court is the source of the obligation to cooperate for states members of the United Nations.\(^{168}\)

With respect to crimes that fall within the jurisdiction of the court, Article 5 of the ICC Statute mentions genocide, crimes against humanity, war crimes and the crime of aggression as recently defined. War crimes are crimes in which the states parties to the Geneva Convention of 1949 agree to undertake the obligation to respect and to ensure respect, according to common Article 1.\(^{169}\) In order to respect and ensure respect for international humanitarian law, all states parties to the Geneva Convention that may not necessarily be members of the Rome Statute, have to cooperate in conformity with Article 88 paragraph 1 of the First Additional Protocol of 1977. This Article 88 states that “the High Contracting parties shall afford one another the greatest measure of assistance in connection with criminal process brought in respect of any grave breaches of the Conventions of this Protocol”.

From what has just been stated in the previous paragraph, it is easy to deduce that the types of crimes punishable by the court leads to the belief that all states parties to the 1949 Geneva Conventions and to the First Additional Protocol, although they are not parties to the Rome Statute, have a duty to cooperate with the court in the punishment of those crimes. The cooperation in the punishment of the crimes mentioned in the Rome Statute is one of the means through which the states parties to the 1949 Geneva Convention and the First Additional Protocol can have respect for international humanitarian law.

Under Article 87 (4) of the Rome Statute, binding requests may demand that measures be taken for the protection of evidence or the physical or psychological well-being of the victims, witnesses and their families. The court may also ask any intergovernmental organizations to provide information or documents, in accordance with Article 87 (4), but since such entities are not parties to the Rome Statute they are not bound to adhere. Exceptionally, the United Nations must cooperate with the ICC on the basis of their bilateral agreements and the ICC will succeed if it enters into similar agreements with regional organizations.\(^{170}\) Noteworthy is that Article 15 (2) of the Rome Statute actually empowers the prosecutor to seek additional information from a variety of sources including non-governmental organizations.

### 4 Mechanisms for cooperation

The mechanisms established by the Rome Statute are largely familiar to states in that they closely resemble those that already exist in the form of bilateral and or multilateral treaties on judicial assistance. Requests for cooperation are to be transmitted through diplomatic

\(^{168}\) Nesi “The Obligation to Cooperate with the International Criminal Court and States Not Party to the Statute” in Politi and Nesi (eds.) (n 68) 222.

\(^{169}\) Nesi (n 168) above.

\(^{170}\) Bantekas (n 158) 407.
channels or any other appropriate mechanism designated by each state party upon ratification, acceptance, approval or accession.\textsuperscript{171} The request for cooperation is to be communicated in a language designated by the state concerned. States are required to safeguard the confidentiality of the request, except to the extent necessary for its fulfillment.\textsuperscript{172} Requests for assistance are to be in writing as a general rule and are to include a concise statement of the purpose for the request.\textsuperscript{173} Article 93 of the Rome Statute spells out the precise forms of cooperation and paragraph (l) of the same Article imposes a general obligation to provide any form of assistance not prohibited by the law of the requested state, with a view to facilitate an investigation.

The procedure for states parties to execute requests for the arrest and surrender of individuals in their territories is quite clear in that the ICC transmits the request together with the supporting material as required by Article 91 of the Rome Statute. Upon receiving the request from the court, states parties are required to follow their domestic laws, which are supposed to be in accordance with the provisions of the Rome Statute. Rule 194 of the Rules of Evidence and Procedure of the ICC states that requested states must immediately inform the ICC Registrar if persons under the indictment of the court are available for surrender. States and the Registrar of the ICC must agree on the date and manner of surrender.

There is a provision in the Rome Statute for the practicality that on certain instances persons being surrendered to the ICC cannot be taken directly from their point of arrest to the court’s detention facilities in the Hague without a transit through a number of states. Article 89 (3) provides that if a transit through the territory of a state party is required, that state party must authorize same in conformity with its domestic laws, unless the transit would impede or delay surrender. The ICC will require the voluntary cooperation of non-states parties to the Rome Statute, if the transit of persons is going to be done over their territories, as the Rome Statute does not bind them.\textsuperscript{174}

In the discharge of his/her duties the official responsible for the transportation of a surrendered person may require to make unscheduled landings in states that the ICC has not requested prior authorization. Rule 182 of the Rome Statute’s Rules of Procedure and Evidence provides that the ICC may submit an urgent request for the transit by any means capable of transmitting the request. Article 89 (3) (e) states that the ICC has 96 hours to make the request and during this period a state is required to detain the arrested persons on behalf of the court. If the transit state has not received the court’s request by the expiration of the stipulated period, the state must release the persons from custody.

\textsuperscript{171} Article 87 (1) (a).
\textsuperscript{172} Article 87 (3).
\textsuperscript{173} Article 96 (2).
\textsuperscript{174} Oosterveld and Perry (n 154) 612.
In summary, given the existence of the court, operating within the regime of complementarity, as a court of last resort, states can be of assistance to it by ensuring that their domestic laws are sufficient to enable a thorough investigation of individuals alleged to have committed crimes within the court’s jurisdiction and also provide for mechanisms for the trial of such individuals. This is clearly spelt out in Article 88 of the Rome Statute which requires states parties to ensure the existence of procedure within their domestic laws which will create an enabling environment for their cooperation in investigating crimes and the procurement of evidence.\textsuperscript{175}

4.1 Surrender and arrest

During the negotiation of the Rome Statute, there was a great debate regarding the wording and the mechanisms for the arrest of alleged perpetrators of international crimes and their transfer to the ICC. While some delegates argued for a simple transfer mechanism without any domestic procedures, others argued in favour of extradition especially where their nationals were involved. In the end the term ‘surrender’ was specifically chosen to be used in the Rome Statute as it refers to the process of states turning over individuals to treaty based international bodies, a process quite different from extradition as the latter takes place between states with an agreement for such.\textsuperscript{176}

Domestic law prohibits extradition under certain circumstances and exceptions were advanced during the Rome Statute’s negotiations in order to create a legal regime that did not allow compromises and refusals to the court’s requests for surrender. Under the ICC legal regime it is indirectly acknowledged under the statute that the requested state as part of its surrender procedures it can test evidence and that the court must support its request with documents, statements or information to have its request honoured.\textsuperscript{177} The Rome Statute also demands that national requirements for surrender not be more burdensome than those applicable in inter-state extradition. A state that usually applies evidentiary requirements for extradition, but has exceptions concerning requests from certain states, will therefore be prevented from applying such requirements \textit{vis-à-vis} the ICC.\textsuperscript{178}

Another debate during the negotiation of the Rome Statute was around the process that was to be used during the arrest and transfer of an alleged perpetrator of an international crime to the ICC. The term ‘arrest’ raised the questions as to whether states could utilize their national arrest powers or would have to follow the ICC specific arrest procedures to take individuals into custody and this issue was linked to the question of cooperation. For some states national laws varied such that the use of those laws could limit the ICC’s ability to discharge its fundamental duty and for some any derogation from their national laws would be unacceptable and would be perceived as an invasion of sovereignty. Delegates

\textsuperscript{175} Oosterveld and Perry (n 154) 626.
\textsuperscript{176} Oosterveld and Perry (n 154) 610.
\textsuperscript{177} Article 91 (2) and (4).
\textsuperscript{178} Cryer and Friman (n 40) 415.
eventually agreed that the Rome Statute would refer to both specific obligations for arrest and surrender and acknowledged procedures in existence under national laws.\textsuperscript{179}

For the ICC, arrest and surrender or provisional arrest will always be in accordance with the warrant issued by the pre-trial chamber. National authorities will comply with the request by applying domestic procedures. The statute sets out some minimum requirements relating to domestic arrest proceedings, prescribes a division of competencies, consultations regarding provisional release and the speedy execution of the request.\textsuperscript{180} An arrest warrant may further be accompanied by a request for the identification, tracing and seize or freezing of assets and property belonging to the suspect.\textsuperscript{181}

Besides material evidence, the ICC has the authority to request the arrest and surrender of individuals from the custodial state. The accused person may challenge the request for surrender as being against the principle of double jeopardy and once surrendered the court must respect the principle of specialty, unless the requested state waives it.\textsuperscript{182} Noteworthy is that the primary obligation of the custodial state under Article 59 of the Rome Statute is to arrest the accused and thereafter to surrender him to the ICC only where it decides not to prosecute him.\textsuperscript{183}

\textbf{4.2 On site investigations}

On site investigations are very important as they allow the court’s investigators to have a direct access to the sites of criminal activity, victims and witnesses which is generally conducive for an effective and complete investigation. It happens that potential witnesses become reluctant to speak in the presence of national authorities due to their experiences, hence the existence of a provision in the ICC Statute empowering the prosecutor to take specific measures on the territory of a state party without making a formal request to the state authorities. This power is confined to non-compulsory measures like taking voluntary witness statements and may require consultations and sometimes adherence to reasonable state imposed conditions.\textsuperscript{184} Exceptionally the pre-trial chamber may authorize specific on-site measures to be taken without getting the necessary cooperation of state authorities in the case of a ‘failed state’ that is unable to execute a request.\textsuperscript{185}

\textbf{4.3 Individual cooperation}

The success of the prosecutor in executing his/her duties will be determined by his/her ability to secure the testimony of witnesses, which is also dependent on the ICC’s ability to protect witnesses. Witnesses in the ICC have varying needs, interests and roles which range

\begin{itemize}
\item \textsuperscript{179} Oosterveld and Perry (n 154) 609.
\item \textsuperscript{180} Articles 59 and 89 (1).
\item \textsuperscript{181} Article 57 (3) (c).
\item \textsuperscript{182} Article 101.
\item \textsuperscript{183} Bantekas (n 158) 437-438.
\item \textsuperscript{184} Article 99 (4).
\item \textsuperscript{185} Article 57 (3) (d).
\end{itemize}
from experts to victims who survived international crimes and they are supposed to be afforded personal safety. The Rome Statute and its Rules of Procedure and Evidence have provisions designed to enable the ICC to issue orders to protect witnesses throughout their involvement in the court proceedings. The efficiency of the court’s prosecution will depend on states parties’ fulfillment of requests to honour witness protection orders. The ability of the court to provide for the physical protection of witnesses is found under Article 86 (1) of the Rome Statute.

Article 93 of the Rome Statute allows the ICC to provide assurances to witnesses that the court will not detain them for acts or omissions that occurred prior to their arrival before court. This provision may be used to procure the evidence of subordinate alleged perpetrators who for one reason or the other are afraid to testify against their superiors. The protection of witnesses available to the ICC may include orders for the physical protection of witnesses under protective orders and the protection of witnesses during the evidentiary and testimonial phases of the ICC proceedings.

5 Exception to cooperation

States are only allowed to deny requests for the production of documents or the disclosure of evidence that relate to national security, according to Article 93 (4). The right to confidentiality extended to states parties under Article 93 (4) is not absolute as Article 72 (7) (b) (i) empowers the ICC to order the disclosure of evidence in all other circumstances, especially after having exhausted the procedure in paragraph (a) of the same Article 72 (7). The main exceptions to the general obligations spelt out in Article 86 relate to the entitlement to surrender an accused person to a third state on the basis of a pre-existing bilateral or multilateral extradition agreement and where the request concerns the production of any documents or disclosure of evidence that relates to a state’s national security. While the first exception is absolute, the one on national security interests does not deny the ICC access to such evidence when necessary. This is supported by Article 72 which renders the ICC as the final arbiter in matters relating to the admissibility of material evidence that is otherwise deemed to prejudice a state party’s national security interests.

Apart from the national security concerns only one ground for refusal to cooperate with the ICC was retained in its statute and that is if the requested measure is prohibited on the basis of an existing fundamental legal principle of general application in the requested state. Legal scholars argue that a strict interpretation should apply and it may be that the principle

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186 Oosterveld and Perry (n 154) 646.
187 Article 93 (2).
188 Oosterveld and Perry (n 154) 649.
189 Article 99.
190 Article 93 (4).
191 Article 93 (3).
must be of a constitutional character, with the exception of all other grounds for declining inter-state cooperation such as double criminality being disallowed.¹⁹²

¹⁹² Cryer and Friman (n 40) 416.
CHAPTER 5
CONCLUSION

It is both a legal and ethical obligation that the prosecutor in the execution of his/her duties he/she does it without any fear or favour, as the ICC is an institution that shapes the actions states may take in the name of protecting the welfare of their populations. The prosecutor has the authority to investigate and prosecute the crimes mentioned in Article 5 of the Rome Statute, emanating from situations referred to the court by the parties mentioned in Article 13 of the same statute. The Office of the Prosecutor is the principal organ through which alleged violations of the core international crimes get to be heard by the ICC.

There is of cause an implied acknowledgement in the Rome Statute that political imperatives may make it necessary that international justice be delayed, perhaps indefinitely through Article 16. This may be in circumstances where the Security Council perceives an investigation or prosecution of a situation as entering into conflict with peace negotiations during the course of the Security Council’s discharge of its mandate to maintain international peace and security, pursuant to Chapter VII of the United Nations Charter and not pursuant to the Rome Statute as permitted by Article 13 (b). It is acknowledged that there has yet not been a judicial interpretation of Article 16 which is said to address the overlapping relationship between the ICC and the Security Council.

As a method of showing respect for the sovereignty of states whether party or not to the Rome Statute, the principle of complementarity was incorporated into the Rome Statute. This principle as a rule requires the prosecutor to defer investigations and prosecutions of crimes within the jurisdiction of the court to the states within which they occurred, unless those states are unwilling or unable to genuinely take any action with respect to those situations. This demonstrates that the prosecutor serves as an alternative to domestic efforts to prosecute the core international crimes, which leads to the conclusion that states have primacy over the investigation and prosecution of such crimes. Should the domestic efforts fail as a result of actions in bad faith, then the prosecutor of the ICC can take over the investigation and subsequent prosecution of that situation. The prosecutor of the ICC and the national jurisdictions together form a unit in the investigation and prosecution of situations and they play a mutual role.

This mutual role is vital as, apart from being complementary, it enhances cooperation with states as they have the best access to evidence, witnesses and the necessary resources to carry out proceedings. It would have been futile for the negotiators of the Rome Statute to create a court that would be seen to be in constant conflict with states whether party to the statute or not, on the basis of the prosecutor’s failure to respect their sovereignty due to unlimited authority granted to him/her. As a safeguard to the abuse of his/her prosecutorial power, the pre-trial chamber was deliberately given the authority to authorize the prosecutor’s actions on the basis of legally permissible grounds.
The prosecutor’s independence, subject to authorization by the pre-trial chamber is visible in the power to initiate investigations *proprio motu* without being triggered by political organs such as the Security Council and states parties. At the Rome Conference non-governmental organizations fought for the inclusion of such prosecutorial power as they feared that limiting the court’s triggers to the political organs aforementioned would lead to the politicization of the court. They argued that history has shown states, particularly, to be reluctant to incur the political costs of referring cases to existing complaint procedures. In order for the prosecutor to proceed on the basis of information availed to him/her, he/she has to independently analyze the seriousness of the information available with the help of additional information from other reliable sources he/she may deem appropriate and then initiate an investigation. However, this is subject to the information providing a reasonable basis to believe that a crime within the jurisdiction of the court has been committed, the matter will be admissible under Article 17, and taking into account the gravity of the crime and the interests of the victims, there are nonetheless substantial reasons to believe that an investigation would serve the interests of justice. Article 15 is not mandatory on the prosecutor as it states that he/she “may” initiate an investigation.

In his/her conclusion after an investigation that there is a sufficient basis to prosecute a situation from any of the three triggers allowed by the Rome Statute, the prosecutor has to independently make a finding on the following: “a sufficient legal and factual basis to seek a warrant or summons under Article 58; that the case is admissible under Article 17; and that the prosecution is in the interests of justice taking into account the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime...” This is subject to the prosecutor informing the pre-trial chamber and the state party making the referral or the Security Council of his/her conclusion and the basis for that conclusion. Article 53 (4) does allow the prosecutor to reconsider a decision to initiate an investigation or prosecution based on new facts.

In order for the prosecutor to execute his/her duties he/she has to receive the cooperation of all stakeholders like states, witnesses, victims and non- or inter-governmental organizations. There is a procedure which has to be followed if states parties which are inevitably bound by the Rome Statute fail to cooperate with the ICC. Article 87 (7) of the Rome Statute states that the ICC may make a finding of non-compliance and then refer the matter to the Assembly of States Parties which will name and shame the non-complying party. When the Security Council has referred the situation to the ICC, the ICC may refer the matter back to the Security Council which will take appropriate action pursuant to its powers under the Charter of the United Nations.

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193 Article 53 (1).
194 Article 53 (2).
195 Schabas (n 119) 130.
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