

## PRELIMINARY OBSERVATIONS ON THE POWERS AND ROLE OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT

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Even a preliminary assessment of the efficacy of the jurisdictional regime of the International Criminal Court must consider the powers and role of the Prosecutor under the Statute of the Court. Not only does the Office of the Prosecutor, the engine, have the task of generating work for the Court through investigations and case preparation, but the longer-term legitimacy of the International Criminal Court (hereinafter ICC) will largely depend on its ability to uncover and firmly base its decisions on all facts relevant to the adjudication of the question of guilt. Unless the Prosecutor's power to investigate and prosecute cases is sufficiently efficacious, the Court is likely to be confronted with numerous review proceedings, which could undermine basic confidence in the ICC criminal process.

It is only when the ICC has been duly established and the degree of State support for the Court's work is properly tested through the first few situations it considers that we may begin to see the real strengths and weaknesses of the jurisdictional system of the ICC Statute in general and more specifically the position of the Prosecutor. However, at this stage and for our present purposes it may have some value to consider in a tentative and largely descriptive manner the main provisions in the ICC Statute relevant to the powers and role of the Prosecutor.

### **Appointment and removal**

Article 34(c) of the ICC Statute provides that the "Office of the Prosecutor" is one of the organs of the ICC. Article 42(2) on the Office of the Prosecutor reads:

The Office shall be headed by the Prosecutor. The Prosecutor shall have full authority over the management and administration of the Office, including the staff, facilities and other resources thereof. The Prosecutor shall be assisted by one or more Deputy Prosecutors, who shall be entitled to carry out any of the acts required of the Prosecutor under this Statute. The Prosecutor and the Deputy Prosecutors shall be of different nationalities. They shall serve on a full-time basis.

According to Article 42(4) of the Statute, the Prosecutor "shall be elected by secret ballot by an absolute majority of the members of the Assembly of States Parties" to the ICC Statute.<sup>25</sup> The Deputy Prosecutors "shall be elected in the same way from a list of candidates provided by the Prosecutor. The Prosecutor shall nominate three candidates for each position of Deputy Prosecutor to be filled." In other words, also the Deputy Prosecutors will be political appointees, which is not the case in the *ad hoc* Tribunals for the former Yugoslavia and Rwanda (hereinafter ICTR). Moreover, Article 42(4) states that unless otherwise determined at the time of appointment, the Prosecutor and Deputy Prosecutors "shall hold office for a term of nine years and shall not be eligible for re-election." This may ameliorate some of the problems which the fact that also Deputy Prosecutors are political appointees might cause. Article 42(3) establishes qualifications for appointment, including high moral character, extensive practical experience in criminal cases, and excellent knowledge of at least one of the working languages of the Court.

The salaries, allowances, and expenses of the Prosecutor and Deputy Prosecutors are determined by the Assembly of States Parties, but may not be decreased during their terms of office (Article 49).

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\* The views expressed are those of the author and do not necessarily reflect the views of the United Nations. The author thanks Jonas Nilsson for remarks.

<sup>25</sup> Article 112 provides for an "Assembly of States Parties" which will be the governing Assembly of States Parties to the Statute. Each State Party will have one representative and one vote in the Assembly (signatories which have not yet ratified may be observers in the Assembly).

Under Article 46(1), the Prosecutor or a Deputy Prosecutor may be removed from office in situations where he or she is found to have committed “serious misconduct or a serious breach of his or her duties under this Statute, as provided for in the Rules of Procedure and Evidence; or ... [i]s unable to exercise the functions required by this Statute.” Decisions on removal from office are taken by the Assembly of States Parties by secret ballot (Article 46(2)). Removal from office of the Prosecutor requires an absolute majority of the States Parties (Article 46(2)(b)). The requirement is the same for Deputy Prosecutors, but only “upon the recommendation of the Prosecutor” (Article 46(2)(c)). A Prosecutor or Deputy Prosecutor so challenged is entitled to have “full opportunity to present and receive evidence and to make submissions in accordance with the Rules of Procedure and Evidence” (Article 46(4)). But the person in question shall not otherwise participate in the consideration of the matter.

Article 47 provides for the Prosecutor or a Deputy Prosecutor to be subject to disciplinary measures in cases of misconduct of a less serious nature. These disciplinary measures are to be prescribed in the Rules of Procedure and Evidence, which will be adopted by a two-thirds majority of the members of the Assembly of States Parties (Article 51(1)), based on draft Rules prepared and recommended by the Preparatory Commission.<sup>26</sup>

Beyond the power of States Parties to remove the Prosecutor from office, Article 48(5)(a) provides that the privileges and immunities of the Prosecutor may be waived by “an absolute majority of the judges.” The privileges and immunities of the Deputy Prosecutors and staff of the Office of the Prosecutor may be waived by the Prosecutor (Article 48(5)(c)).

### **Independence and accountability**

Article 42(1) contains the fundamental independence provisions that the “Office of the Prosecutor shall act independently as a separate organ of the Court” and that “[a] member of the Office shall not seek or act on instructions from any external source.” Article 42 includes a number of other provisions intended to ensure that this independence is maintained. The Prosecutor and Deputy Prosecutors are prohibited from engaging in activities likely to affect confidence in their independence (Article 42(5)),<sup>27</sup> and may be excused at their request by the Presidency<sup>28</sup> from acting in a particular case (Article 42(6)). Article 42(7) envisages the exclusion of the Prosecutor or a Deputy Prosecutor in matters in which their impartiality “might reasonably be doubted on any ground,” for instance where they “have previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted.” Article 42(8) provides that the Appeals Chamber shall decide on such questions of disqualification. A suspect may at any time request the disqualification of the Prosecutor or a Deputy Prosecutor under that provision.

Article 43(2) of the Statute provides for a Registrar, who is designated the “principal administrative officer of the Court.” The Registrar heads the Registry, which under Article 43(1) is made “responsible for the non-judicial aspects of the administration and servicing of the Court.” However, this is expressed to be “without prejudice to the functions and powers of the Prosecutor in accordance with Article 42.” Article 42(2) states that the Prosecutor “shall have full authority over the management and administration of the Office, including the staff, facilities and other resources thereof.”

Additionally, under Article 44(1) and (2) the Prosecutor is empowered to appoint the staff of the Office of the Prosecutor, subject to the general requirement of ensuring “the highest standards of efficiency, competency, and integrity,” and the requirement that the Prosecutor have regard to the criteria

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<sup>26</sup> See Article 112(2)(a) and Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, UN document A/CONF.183/C.1/L.76/Add.14, 16 July 1998, Annex I, F, 5(a). Subparagraph 6 of the latter states that the draft Rules shall be finalized before 30 June 2000. Once adopted, the Rules can be amended by a two-thirds majority of the members of the Assembly of States Parties (Article 51(2)), but such amendments shall not be applied retroactively to the detriment of the person who is being investigated or prosecuted or who has been convicted (Article 51(4)).

<sup>27</sup> Article 42(5) further provides that the Prosecutor and Deputy Prosecutors “shall not engage in any other occupation of a professional nature.”

<sup>28</sup> According to Article 38, the Presidency consists of three Judges, namely the President, and the First and Second Vice-Presidents.

contained in Article 36(8).<sup>29</sup> Staff regulations, which are applicable to all of the Tribunal's staff, are to be proposed by the Registrar "with the agreement of the Presidency and the Prosecutor" and approved by the Assembly of States Parties (Article 44(3)).

Similarly, Article 38(3)(a) provides that the Presidency is responsible for the proper administration of the Court, but expressly adds that this is "with the exception of the Office of the Prosecutor." Article 38(4) states:

In discharging its responsibility under paragraph 3(a), the Presidency shall co-ordinate with and seek the concurrence of the Prosecutor on all matters of mutual concern.

Certain controls are provided for in Part 11 of the ICC Statute, dealing with the Assembly of States Parties. Under Article 112(2), the Assembly of States Parties shall, *inter alia*:

- (b) [p]rovide management oversight to the Presidency, the Prosecutor and the Registrar regarding the administration of the Court; ...
- (d) [c]onsider and decide the budget for the Court.

Article 112(4) adds that:

The Assembly may establish such subsidiary bodies as may be necessary, including an independent oversight mechanism for inspection, evaluation, and investigation of the Court in order to enhance its efficiency and economy.

It remains to be seen to what extent the work of the Office of the Prosecutor might be influenced by the Assembly through the use of its budgetary powers or oversight mechanisms. If, for example, the Court's jurisdiction has been separately triggered with respect to more than one situation, it may be technically possible for the Assembly to indirectly determine through the adoption of a budget how resources will be allocated to the investigation of those situations, although that would probably violate Article 42(2). Article 112(5) may prove to have practical importance in this regard, insofar as it provides that the Prosecutor or his or her representatives "may participate, as appropriate, in the meetings of the Assembly and of the Bureau."

As regards the accountability of the ICC Prosecutor in broader terms, the Statute does not provide for any general control or scrutiny by other bodies of the work of the Prosecutor. There are no professional organs with formal competence to control or officially review the Prosecutor's decisions or performance in general.

### **Investigations: initiation and control**

The question of which role the ICC Prosecutor should play in the launching of investigations was very controversial during the Rome Diplomatic Conference. There was substantial disagreement among States whether the Prosecutor should be empowered to initiate investigations *ex officio*. Some States preferred a system whereby an investigation can only start after a matter or situation has been referred to the Court by a State or the Security Council, and where the complainant State as well as the territorial State and State of nationality have accepted the exercise of the Court's jurisdiction over the alleged crimes. At the final session of the Preparatory Committee, the delegations of Argentina and Germany presented an elaborate proposal on a power for the Prosecutor to initiate investigations *ex officio*<sup>30</sup>. It was adopted with some modifications by the Rome Conference. While Article 13(c) of the Statute recognizes that the Prosecutor can initiate an investigation and thus start the triggering of the Court's exercise of jurisdiction, it must be read against the background of Article 15 which reflects the Argentine/German proposal. Article 15 reads *in extenso*:

- (1) The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court.

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<sup>29</sup> These criteria include the representation of the principal legal systems of the world and equitable geographical distribution, as well as other criteria such as gender balance.

<sup>30</sup> UN document A/AC.249/1998/WG.4/DP.35 of 25 March 1998.

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

(3) If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.

(4) If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.

(5) The refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation.

(6) If, after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.

In other words, the Pre-Trial Chamber is empowered to authorize the commencement of an investigation by the Prosecutor, based on his or her request. Prior to such authorization, the Prosecutor may only conduct preliminary collection and analysis of information.

Article 53(1) states that the Prosecutor shall initiate an investigation after having evaluated the information made available, unless he or she determines that there is no reasonable basis to proceed under the Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:

- (a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;
- (b) The case is or would be admissible under Article 17; and
- (c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice (Article 53(1)).

However, it is necessary to interpret the power of the Prosecutor to initiate investigations pursuant to Articles 13(c), 15 and 53(1) in the proper context of certain stark jurisdictional limitations which the Statute imposes. First, Article 12(2) on preconditions to the exercise of jurisdiction requires that either the territorial State or the State of nationality of the suspect has accepted the Court's jurisdiction. This does not apply when the Security Council has referred the situation to the Court. It is not necessary that the State in question has become a State Party; it is sufficient if the State has accepted the exercise of jurisdiction by the Court through a separate declaration pursuant to Article 12(3).

Secondly, the case must pass the admissibility test based on the complementarity principle as formulated by Article 17. This principle was given fundamental importance in the negotiations on the Statute in the Preparatory Committee and during the Diplomatic Conference, both as an expression of concern of State sovereignty and as a way to bring on board as many States as possible in the process. A case is basically only admissible according to Article 17 when relevant national jurisdictions are "unwilling or unable genuinely to carry out the investigation or prosecution." The admissibility can be challenged by suspects against whom there is an arrest warrant or a summons to appear, by States which

have jurisdiction over the case, or by the territorial State or State of nationality (Article 19(2)). The Prosecutor shall suspend the investigation until the Court makes a determination on the admissibility challenge if the challenge is made by a State referred to in Article 19(2) (Article 19(7)). Given the complex nature of the admissibility test, it is reasonable to expect that the delay caused by admissibility challenges under this provision might become very significant. An important question is to which extent this provision will be abused by Governments hostile towards the Court. Article 19(8) tries to remedy the difficult situation in which the Office of the Prosecutor might find itself by granting that the Prosecutor may seek authority from the Court to pursue limited, “necessary investigative steps” pending a ruling by the Court on admissibility. The steps may only be for the purpose of preserving evidence “where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence may not be subsequently available” (Article 18(6), referred to by Article 19(8)(a)). The Prosecutor may also request authority from the Court to “take a statement or testimony from a witness or complete the collection and examination of evidence which had begun prior to the making of the challenge” (Article 19(8)(b)).

Furthermore, Article 18 of the Statute raises an additional jurisdictional obstacle based on a proposal put forward by the delegation of the United States at the final session of the Preparatory Committee<sup>31</sup>, which the Diplomatic Conference adopted with some modifications in what seems to have been a hopeful spirit of compromise. It places an obligation on the Prosecutor to notify States Parties and States which would normally exercise jurisdiction over the crimes, of both a referral of a situation by a State Party to the Court (which the Prosecutor finds to be a reasonable basis to commence an investigation) and investigations initiated by him or her. The Prosecutor shall defer to State investigations which the Court may be informed of within one month of receipt of notice, at the request of that State, unless the Pre-Trial Chamber, “on the application of the Prosecutor, decides to authorize the investigation” (Article 18(2)).

If a matter successfully passes these jurisdictional hurdles and an investigation has finally commenced, the Prosecutor will in principle be able to control the way in which the actual investigation is being conducted. However, the Statutory provisions regulating the *execution* of requests for assistance from the Prosecutor to States may in most cases leave the actual implementation of requests on national territory to the authorities of the requested State. The requested national authorities can determine by law whether and to which extent representatives of the ICC Prosecutor may assist in the execution process (Article 99(1)). Although States Parties are obliged under Article 88 to “ensure that there are procedures available under their national law for all of the forms of co-operation which are specified under” the co-operation part of the Statute, it remains to be seen how Article 99(1) will work in practice, especially in territorial States which are seriously afflicted by armed conflict and may even have the war-time regime intact.

Article 99(4) makes an exception to subparagraph (1) for some limited investigative steps which can be executed without compulsory measures. Article 57(3)(d) is also relevant in this regard, insofar as it empowers the Pre-Trial Chamber to authorize the Prosecutor to take specific investigative steps within the territory of a State Party without having secured the co-operation of that State, if the Chamber has determined that the State is clearly unable to execute a request for co-operation “due to the unavailability of any authority or any component of its judicial system competent to execute the request for co-operation.” Moreover, Article 56 gives the Pre-Trial Chamber a role in relation to unique investigative opportunities, both if there is a request from the Prosecutor and when the Prosecutor has not sought measures to preserve evidence.

On a more organizational note, the investigators of the Office of the Prosecutor will be the subordinates of the Prosecutor and as such they will be accountable to him or her. Article 44(1) provides that the Prosecutor’s power to appoint such qualified staff as may be required to his or her office shall include the appointment of investigators. It is not anticipated in the Statute that there will be an investigation unit outside the Office of the Prosecutor. According to Article 42(2) which has been referred to above, the Prosecutor shall have full authority over the management and administration of his or her staff. But the Statute’s State co-operation regime creates a different kind of dependency for the ICC

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<sup>31</sup> UN document A/AC.249/1998/WG.3/DP.2 of 25 March 1998 (“Preliminary rulings regarding admissibility”).

Prosecutor: on the police and judiciary of States in whose jurisdiction investigative steps need to be taken. This dependency is going to be particularly problematic in territorial States where many witnesses will be living and sites relevant to the alleged crimes are normally located, in particular those whose Governments do not appreciate or are opposed to the Court's inquiry.

### **Prosecutorial discretion**

Once the Prosecutor's power to start an investigation has indeed been triggered, the Statute does not empower any State or person to require the Prosecutor to indict a particular person, or to refrain from indicting a particular person, on the basis of the results of that investigation. Article 13 only states that the Court "*may* exercise its jurisdiction" (emphasis added) when a situation has been referred to it by States or the Security Council, not that the Prosecutor is *obliged* to investigate and prosecute or to do so with regard to a particular case. Furthermore, States and the Security Council cannot refer specific cases to the Court, only *situations* (Article 13(a) and (b)).

However, Article 16 of the Statute grants the Security Council a more fundamental power to *postpone* ICC investigations and prosecutions. This deferral provision amounts in effect to a veto power for the Security Council over the work of the Office of the Prosecutor. The Article reads:

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

As regards the more specific point of whether the ICC Prosecutor will be under an obligation to bring proceedings in all cases where there is sufficient evidence, or whether he or she has discretion, Article 53(2) regulates the situation upon investigation. As a basic rule it is the Prosecutor who determines whether there is sufficient basis for a prosecution. The Prosecutor may find that there is insufficient basis because the case is not admissible under Article 17 (Article 53(2)(b)), or because a prosecution "is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of the victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime" (Article 53(2)(c)). If the Prosecutor concludes that there is insufficient basis, he or she shall inform the Pre-Trial Chamber and the State making a referral under Article 14 or the Security Council in a case under Article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion (Article 53(2) *i.f.*).

The Pre-Trial Chamber may then, at the request of the referring State or the Security Council, review such a decision by the Prosecutor and request him or her to reconsider that decision (Article 53(3)(a)). If the Prosecutor's decision is based solely on interests of justice considerations pursuant to Article 53(2)(c), the Pre-Trial Chamber may review the Prosecutor's decision on its own initiative and the Prosecutor's decision "shall be effective only if confirmed by the Pre-Trial Chamber" (Article 53(3)(b)). The Prosecutor may at any time reconsider a decision whether to initiate a prosecution based on new facts or information (Article 53(4)).

Where the Prosecutor does decide to prosecute, the indictment cannot proceed to trial unless confirmed at a judicial confirmation hearing, which is also required in the ICTY and ICTR. The mechanism for the confirmation of indictments is contained in Article 61 of the ICC Statute. The test to be applied by the Pre-Trial Chamber to determine whether an indictment should be confirmed is whether there is "sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged" (Article 61(7)). Article 61(1) also provides that the confirmation hearing shall be held in the presence of the person charged and his or her counsel. This provision contrasts with the position before the ICTY and ICTR, where confirmation hearings are *ex parte*.

Article 61(4) provides that the Prosecutor can withdraw or amend an indictment at any time prior to its confirmation. After confirmation and before the trial has begun, amendment or withdrawal of the indictment requires permission of the Pre-Trial Chamber, and where the amendment involved the addition of new charges or the substitution of more serious charges, the new or amended charges are subject to the confirmation procedure (Article 61(9)). After the commencement of trial, charges may only be withdrawn with the permission of the Trial Chamber (Article 61(9)).

### **Compulsory powers?**

The conduct of investigations by the ICC Prosecutor is dealt with in part by Article 54 of the Statute. Article 54(2) concerns investigations on the territory of States. It determines that such steps must be taken in accordance with Part 9 of the Statute on State co-operation or Article 57(3)(d). Both avenues are very narrow indeed. The main rule on the execution of requests for assistance in Article 99 (in Part 9) has already been described above. The exception in Article 99(4) only concerns situations where investigative steps can be taken “*without any compulsory measures*,” and in any event it aims at “the interview of or taking evidence from a person on a voluntary basis, including doing so without the presence of the authorities of the requested State Party if it is essential for the request to be executed, and the examination without modification of a public site or other public place” (emphasis added). As referred to above, Pre-Trial Chamber authorization under Article 57(3)(d) depends on a determination by the Chamber in the case that “the State is *clearly unable* to execute a request for co-operation due to the *unavailability of any authority or any component* of its judicial system competent to execute the request for co-operation under Part 9” (emphasis added). In other words, the application of the exception in Article 57(3)(d) is limited to situations of clear inability of the national criminal justice system to investigate and prosecute. There was no such inability, for example, in the Bosnian Serb *de facto* entity in Bosnia and Herzegovina during the critical phases of the armed conflicts there in 1992-94.

Article 54(3) simply lists the investigative steps which the Prosecutor may take. They are co-operative and include collecting and examining evidence and requesting the presence of and questioning persons being investigated, victims and witnesses. The Prosecutor must turn to the Pre-Trial Chamber and request “orders and warrants as may be required for the purposes of an investigation,” and the Chamber may issue such orders and warrants pursuant to Article 57(3)(a). The general obligation of States Parties to “cooperate fully with the Court in its investigation and prosecution” of crimes within its jurisdiction is expressed by Article 86. Article 93 obliges States Parties to comply with the requests by the Court, procedural Court orders included, to provide assistance in relation to investigations and prosecutions. The Article contains a detailed list of forms of assistance relevant to such requests.

Article 64(6)(b), which deals with trial proceedings, provides that the Trial Chamber has the power to “[r]equire the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States as provided in this Statute.”

In cases of non-compliance by States Parties which prevent the Court from exercising its functions and powers under the Statute, “the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council” (Article 87(7)). Article 112(2)(f) only provides that the Assembly of States Parties shall “consider pursuant to Article 87, paragraphs 5 and 7, any question relating to non-co-operation”<sup>32</sup>.

## Conclusion

This is not the place for a thorough evaluation of the efficacy of the powers of the Prosecutor under the ICC Statute. Our cursory review of the main provisions in the Statute concerning the powers, role, and accountability of the ICC Prosecutor, however, does reveal certain obvious weaknesses. At a bare minimum the Prosecutor depends on jurisdictional acceptance by either a territorial State or State of nationality and Pre-Trial Chamber authorization before he or she can start an investigation, unless there is a referral by the Security Council or a State Party. Both requirements represent hurdles which do not confront the Prosecutor in the *ad hoc* Tribunals for the former Yugoslavia and Rwanda, which are not treaty-based bodies, but the results of enforcement action by the Security Council under Chapter VII of the United Nations Charter. Additionally, the Prosecutor must be prepared to fight the admissibility battle against a territorial State, State of nationality or any other State with jurisdiction over the case under investigation if that State challenges the admissibility with the argument that a national jurisdiction is able and willing to genuinely investigate the case. The burden of proof rests on the Prosecutor in such disputes. Proving unwillingness or inability will require the preparation and presentation of evidence of complex systemic facts in a dispute between the Prosecutor and a State. Needless to say, this places the ICC Prosecutor in a situation somewhat different from that of the Prosecutor of the *ad hoc* Tribunals and the Nürnberg and Tokyo Tribunals.

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<sup>32</sup> Article 87(5) concerns non-States Parties.

The deficiencies in the State co-operation regime of the ICC Statute are maybe more serious. The ICC Prosecutor has no Statutory right to control the gathering of evidence for his or her investigations. States may conduct relevant investigative steps within their territories through the national police and judiciary based on national legislation in response to requests for assistance from the ICC Prosecutor. The problems this will lead to, especially in cases involving territorial States which do not support the work of the Court, need no further elaboration. It must be expected, however, that Security Council referral of situations to the ICC under Chapter VII of the Charter will remedy this problem, insofar as it is fair to assume that the Security Council will use its competence under the Charter, Article 103 included, to invest the ICC Prosecutor with at least the same powers as those of the Prosecutor of the *ad hoc* Tribunals. It is actually difficult to see how the ICC Prosecutor will be able to investigate and prosecute effectively without such a strengthening of his or her powers. Chapter VII referral also removes the requirement of State acceptance of jurisdiction pursuant to Article 12 and the resource-demanding admissibility disputes under Article 17.

In any event, even if it were to take considerable time before the Security Council and the ICC develops a constructive partnership, the ability of the ICC Prosecutor to seek and analyse information *proprio motu* at an early stage of conflicts involving serious violations of international humanitarian law is very significant. By seeking and analysing material from a variety of reliable sources and receiving written and oral testimony at the seat of the Court, the Prosecutor may be able to preserve evidence which would otherwise not be subsequently available. One also should not underestimate the preventive effects of a permanent Office of the Prosecutor with the capacity to monitor events as armed conflicts threaten or break out.