

Paper on some policy issues before the Office of the Prosecutor

This policy paper defines a general strategy for the Office of the Prosecutor, highlights the priority tasks to be performed and determines an institutional framework capable of ensuring the proper exercise of its functions. This is a redrafted version of a paper discussed at the public hearing of the Office of the Prosecutor convened from 17 to 18 June 2003 at The Hague. It has been revised in the light of the comments made at the hearing and other comments; it also includes points made within the Office of the Prosecutor. Some comments made at the hearing are not reflected in this paper; they need further consideration and could be reflected in other papers or guidelines to be prepared by the Office. Many precise suggestions will be reflected in the revised Regulations.

The Office of the Prosecutor considers that Regulations are essential to ensure its independence and accountability. For this reason, it will adopt ad interim Regulations to guide the decisions and practice of the Office, taking into consideration the comments received in the public hearings and throughout the consultation process. The Office considers that in the elaboration of the final Regulations, it will be indispensable to also take into account the views of the staff members that will be recruited and the experience gained by the Office in its first months of operations. The Office envisages adopting these Regulations during the first semester of 2004.

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I. General remarks and summary

For a proper understanding of the functions of the Prosecutor of the International Criminal Court, it is important to recall that the Prosecutor operates on a different basis from national prosecution systems and within a very different environment. In principle, a national prosecutor acts within a State which has the monopoly of force in its territory. The enforcement agencies of the State are subject to the rule of law and are at the disposal of the national prosecution system.

Neither of these two assumptions applies to the Prosecutor of the International Criminal Court. Given the nature of the crimes within the jurisdiction of the Court, the Prosecutor

may be called upon to act in a situation of violence over which the State authorities have no control. His Office can be present in the country concerned only at great risk. The protection of witnesses, gathering of evidence and arrest of suspects will be difficult if not impossible. The Prosecutor may also be asked to act in a situation where those who have the monopoly of force in a State are the ones to commit the crimes. It goes without saying that in such a case the enforcement authorities in that State will not be at the Prosecutor's disposal.

What does this mean for the work of the Office of the Prosecutor? It is clear in the first place that no investigation can be initiated without having careful regard to all circumstances prevailing in the country or region concerned, including the nature and stage of the conflict and any intervention by the international community. Furthermore, the Prosecutor will have to take into account the practical realities, including questions of security on the ground. It will also be necessary to consider whether there are available to the Prosecutor the necessary means of investigation and possibilities for protection of witnesses. Will the necessary assistance from the international community be available, including on matters such as the arrest of suspects? In short, will it be possible in all reality to initiate an investigation at all? These are not matters which need normally trouble a domestic prosecutor, but they are all relevant to an ICC prosecution and they all underline the necessity of State support for the Office of the Prosecutor in the bringing of any investigation. In other words, the Prosecutor will need the support of national or international forces in order to investigate *in situ*. If these forces are not available, the Prosecutor will need to investigate from outside and rely on international co-operation for the arrest and surrender of the alleged perpetrators.

In other cases, of course, crimes within the jurisdiction of the Court may be committed within States or by State agencies which have normally functioning institutions. Here the complementary nature of the Court is overriding. National investigations and prosecutions, where they can properly be undertaken, will normally be the most effective and efficient means of bringing offenders to justice; States themselves will normally have the best access to evidence and witnesses. To the extent possible the Prosecutor will encourage States to initiate their own proceedings. As a general rule, the policy of the Office of the Prosecutor will be to undertake investigations only where there is a clear case of failure to act by the State or States concerned.

Close co-operation between the Office of the Prosecutor and all parties concerned will be needed to determine which forum may be the most appropriate to take jurisdiction in certain cases, in particular where there are many States with concurrent jurisdiction, and where the Prosecutor is already investigating certain cases within a given situation. The Office is already developing formal and informal networks of contacts, including with national prosecutors, for this purpose.

The Prosecutor will encourage States and civil society to take ownership of the Court. The external relations and outreach strategy of the Office will develop a network of relationships between the Prosecutor, national authorities, multi-lateral institutions, non-governmental organisations and other entities and bodies, to ensure that in any kind of situation in which the Prosecutor is called upon to act, practical resources are made available to enable an investigation to be mounted. Agreements with States will be necessary, supporting the Court's efforts by providing security, police and investigative teams, and giving intelligence and other evidence. One important area of investigation will involve financial links with crimes. The investigation of financial transactions, for example for the

purchase of arms used in murder, may well provide evidence proving the commission of atrocities. Here again the interaction between State authorities and the Office of the Prosecutor will be crucial: national investigative authorities may pass to the Office evidence of financial transactions which will be essential to the Court's investigations of crimes within the Court's jurisdiction; for its part, the Office may have evidence of the commission of financial crimes which can be passed to national authorities for domestic prosecutions. Such prosecutions will be a key deterrent to the commission of future crimes, if they can curb the source of funding. And all assistance of this kind provided by national authorities to the Office of the Prosecutor will help to keep the Court cost-effective.

The Court is an institution with limited resources. The Office will function with a two-tiered approach to combat impunity. On the one hand it will initiate prosecutions of the leaders who bear most responsibility for the crimes. On the other hand it will encourage national prosecutions, where possible, for the lower-ranking perpetrators, or work with the international community to ensure that the offenders are brought to justice by some other means.

The strategy of focusing on those who bear the greatest responsibility for the crimes may leave an "impunity gap" unless national authorities, the international community and the Court work together to ensure that all appropriate means for bringing other perpetrators to justice are used. In some cases the focus of an investigation by the Office of the Prosecutor may go wider than high-ranking officers if, for example, investigation of certain types of crimes or those officers lower down the chain of command is necessary for the whole case. For other offenders, alternative means for resolving the situation may be necessary, whether by international assistance in strengthening or rebuilding the national justice systems concerned, or by some other means. Urgent and high-level discussion is needed on methods to deal with the problem generally.

To put an end to impunity there needs to be consensus between the Court and the international community. The existence of the Court has already encouraged States to incorporate as domestic law the crimes within the jurisdiction of the Court. Even before the initiation of any investigation by the Court itself, the use of this legislation will be a major step in bringing to justice the perpetrators of atrocities. In addition, the aspiration must be that the Court may itself assist in preventing the commission of atrocities; the statements, policies and operations of the Office of the Prosecutor will make its own contribution in this context.

The organisation of the structure and work processes of the Office of the Prosecutor is based on the assumption that the Office should endeavour to maximise its impact while operating a system of low costs.

With this goal in mind, the operations are informed by three basic principles. First, the permanent structure of the Office is composed of a core of senior staff. Second, the Office draws extensively on the use of external resources. Third, in order to deal with situations in different regions, it functions with a variable number of investigation teams.

II. Principles and goals

1. The complementary nature of the International Criminal Court

The effectiveness of the International Criminal Court should not be measured only by the number of cases that reach the Court. On the contrary, the absence of trials by the ICC, as a consequence of the effective functioning of national systems, would be a major success.

1.1. The principle of complementarity

The ICC is not intended to replace national courts, but to operate when national structures and courts are unwilling or unable to conduct investigations and prosecutions.

Unlike the *ad hoc* Tribunals for the former Yugoslavia and for Rwanda, the ICC does not have primacy over national systems. The ICC is complementary to national systems. Thus, in cases of concurrent jurisdiction between national systems and the ICC, the former have priority.

The principle of complementarity represents the express will of States Parties to create an institution that is global in scope while recognising the primary responsibility of States themselves to exercise criminal jurisdiction. The principle is also based on considerations of efficiency and effectiveness since States will generally have the best access to evidence and witnesses. Moreover, there are limits on the number of prosecutions the ICC can bring.

Consequently, in deciding whether to investigate or prosecute, the Prosecutor must first assess whether there is or could be an exercise of jurisdiction by national systems with respect to particular crimes within the jurisdiction of the Court. The Prosecutor can proceed only where States fail to act, or are not “genuinely” investigating or prosecuting, as described in article 17 of the Rome Statute.

Article 17 provides exceptions to the primacy of State jurisdiction. The Court will be able to declare a case to be admissible when a State is unwilling or unable genuinely to carry out the investigation or prosecution.

A State is *unwilling* if the national decision has been made and proceedings are or were being undertaken for the purpose of shielding the person concerned from criminal responsibility; there has been an unjustified delay which is inconsistent with an intent to bring the person concerned to justice; or the proceedings were not or are not being conducted independently or impartially.

To assess whether a State is *unable* to act, the Prosecutor will need to determine whether “due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings”. This provision was inserted to take account of situations where there was a lack of central government, or a state of chaos due to the conflict or crisis, or public disorder leading to collapse of national systems which prevents the State from discharging its duties to investigate and prosecute crimes within the jurisdiction of the Court.

There is no impediment to the admissibility of a case before the Court where no State has initiated any investigation. There may be cases where inaction by States is the appropriate course of action. For example, the Court and a territorial State incapacitated by mass crimes may agree that a consensual division of labour is the most logical and effective approach. Groups bitterly divided by conflict may oppose prosecutions at each others' hands and yet agree to a prosecution by a Court perceived as neutral and impartial. There may also be cases where a third State has extra-territorial jurisdiction, but all interested parties agree that the Court has developed superior evidence and expertise relating to that situation, making the Court the more effective forum. In such cases there will be no question of "unwillingness" or "inability" under article 17.

It should however be recalled that the system of complementarity is principally based on the recognition that the exercise of national criminal jurisdiction is not only a right but also a duty of States. Indeed, the principle underlying the concept of complementarity is that States remain responsible and accountable for investigating and prosecuting crimes committed under their jurisdiction and that national systems are expected to maintain and enforce adherence to international standards. This principle is emphasised in the Preamble of the Rome Statute, recalling that "*it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes*".

1.2. What does complementarity imply for the Office of the Prosecutor?

Given the many implications of the principle of complementarity and the lack of court rulings, detailed, exhaustive guidelines for its operation will probably be developed over the years. As a general rule, however, the policy of the Office in the initial phase of its operations will be to take action only where there is a clear case of failure to take national action.

A major part of the external relations and outreach strategy of the Office of the Prosecutor will be to encourage and facilitate States to carry out their primary responsibility of investigating and prosecuting crimes. In any assessment of these efforts, the Office will take into consideration the need to respect the diversity of legal systems, traditions and cultures. The Office will develop formal and informal networks of contacts to encourage States to undertake State action, using means appropriate in the particular circumstances of a given case. For instance, in certain situations, it might be possible and advisable to assist a State genuinely willing to investigate and prosecute by providing it with the information gathered by the Office from different public sources.

The exercise of the Prosecutor's functions under article 18 of notifying States of future investigations will alert States with jurisdiction to the possibility of taking action themselves. In a case where multiple States have jurisdiction over the crime in question the Prosecutor should consult with those States best able to exercise jurisdiction (e.g. primarily the State where the alleged crime was committed, the State of nationality of the suspects, the State which has custody of the accused, and the State which has evidence of the alleged crime) with a view to ensuring that jurisdiction is taken by the State best able to do so.

2. The global nature of the International Criminal Court

Despite all efforts deployed to promote State action, it is clear that there will be cases in which national systems will not be able or willing to fulfil their principal duty of investi-

gating and prosecuting the most serious crimes of concern to the international community as a whole. In such cases, the ICC must fill the gap created by the failure of States to satisfy their duty to investigate and the Office of the Prosecutor will need to exercise its investigative powers with firmness and efficiency, using the means and procedures provided by the Statute.

The circumstances in which the Office of the Prosecutor will act will differ from situation to situation. Because of the nature of the crimes within the jurisdiction of the Court, the Prosecutor may be called upon to act in an environment very different from those experienced by national prosecutors. He may for example have to act in a situation of violence over which the State authorities have no control. The Prosecutor may also be asked to act in a situation where those who have the legitimate monopoly of force in a State are themselves the ones to commit the crimes, and the enforcement authorities in that State will consequently not be available to the Prosecutor. In circumstances such as these the Prosecutor will not be able to exercise his powers without the intervention of the international community, whether through the use of peacekeeping forces or otherwise; the Prosecutor will not be able to establish an office in the country concerned without being assured of its safety. He will also have to be assured that there will be the means available for investigation, protection of witnesses and arrest of suspects.

The Office of the Prosecutor will encourage States Parties to take ownership of the Court in a number of ways. They can enter into agreements to provide such support. They may of course refer a situation directly to the Court under article 14. They can support the Court's efforts by themselves conducting investigations that are connected with crimes within the jurisdiction of the Court, such as those concerning the financial aspects of a conflict. Evidence of financial transactions, for example for the purchase of arms, may well provide evidence which proves the commission of atrocities. Further, domestic prosecutions of crimes such as money laundering may in certain circumstances be a key deterrent to the commission of future atrocities if they curb the source of funding.

2.1. *Who should be prosecuted?*

In light of its permanent and global nature, the Office might be seized with more than one situation at a time, some or all of them involving an untold number of victims as well as many alleged perpetrators. Some of these situations could indeed be similar in magnitude to those that precipitated the establishment of the *ad hoc* Tribunals.

The Office of the Prosecutor will need to design a strategy that takes into account the global nature of the ICC, thus allowing it to handle concurrently several situations while respecting limited resources.

There might be situations where the number of suspects will be limited. But by their nature, it is very probable that situations might involve a large number of victims and alleged perpetrators. In these cases the design of a prosecutorial policy or strategy must take into account not only the challenge raised by the number of victims and perpetrators but also the fact that the crimes within the jurisdiction of the Court may have been committed by individuals acting as part of a group or organisation.

Should the Office seek to bring charges against all alleged perpetrators? The Statute gives some guidance to answer this question. The Preamble affirms that "*the most serious*

crimes of concern to the international community as a whole must not go unpunished". It continues that States Parties to the Statute are determined to establish a "permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole". Accordingly, the Statute provides in article 5 that, "[t]he jurisdiction of the Court shall be limited to the most serious crimes of concern to the international criminal community as a whole". Article 17, dealing with admissibility, adds to the complementarity grounds one related to the gravity of a case. It states that the Court (which includes the Office of the Prosecutor) shall determine that a case is inadmissible where "the case is not of sufficient gravity to justify further action by the Court". The concept of gravity should not be exclusively attached to the act that constituted the crime but also to the degree of participation in its commission.

Furthermore, the Statute gives to the Prosecutor the power not to investigate or not to prosecute when such an investigation or prosecution would not serve the interests of justice.

The global character of the ICC, its statutory provisions and logistical constraints support a preliminary recommendation that, as a general rule, *the Office of the Prosecutor should focus its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility, such as the leaders of the State or organisation allegedly responsible for those crimes.*

2.2. Dealing with the "impunity gap"

The strategy of focussing on those who bear the greatest responsibility for crimes within the jurisdiction of the Court will leave an impunity gap unless national authorities, the international community and the Court work together to ensure that all appropriate means for bringing other perpetrators to justice are used. In some cases the focus of an investigation by the Office of the Prosecutor may go wider than high-ranking officers, if investigation of certain type of crimes or those officers lower down the chain of command is necessary for the whole case. For other offenders, alternative means for resolving the situation may be necessary, whether by encouraging and facilitating national prosecutions by strengthening or rebuilding national justice systems, by providing international assistance to those systems or by some other means. Urgent and high-level discussion is needed on methods to deal with the problem generally.

In this context, complementarity once again may play a part in preventing impunity. If the ICC has successfully prosecuted the leaders of a State or organisation, the situation in the country concerned might then be such as to inspire confidence in the national jurisdiction. The reinvigorated national authorities might now be able to deal with the other cases. In other instances, the international community might be ready to combine national and international efforts to ensure that perpetrators or serious international crimes are brought to justice.

2.3 Modalities of investigation

In order to prove the responsibility of leaders, the investigation must put emphasis on a comprehensive analysis of crimes committed, in order to piece together patterns and chains of command, and to collect the type of evidence making it possible to establish the criminal responsibility of those who designed the plans, gave the orders or otherwise supervised or failed to prevent the commission of crimes, in accordance with the Statute.

This is the model of investigation that guides the organisation of the structure of the Office of the Prosecutor, which is described in Part III below. It should allow the Office not only to establish the commission of individual crimes, but also to determine the way in which such crimes were perpetrated in co-ordinated action, as well as proving leadership responsibility.

III. Organisation of the Office of the Prosecutor

The Office of the Prosecutor needs to organise its activities using the most advanced and sophisticated management tools at its disposal. To this end, it will make appropriate consultations with relevant experts of private and public institutions.

Geographical and gender representation will be maintained in the Office through a variety of ways. It will be an issue borne in mind during the recruitment process. A multi-cultural and interdisciplinary composition of the Office is highly desirable but, at the same time, may make communications and understandings more difficult. The Office will work towards achieving an institutional framework to ensure smooth interaction and an environment of mutual respect.

The Office of the Prosecutor is divided in three key areas: the Immediate Office of the Prosecutor in charge of the external relations and communications; the Investigation Division and the Prosecution Division. These operational areas are supported by the legal and technical services provided by sections and units in the Office.

The organisation of the structure and work processes of the Office of the Prosecutor is based on the assumption that the Office should endeavour to operate a cost-effective system.

With this goal in mind, the operations are informed by three basic principles. First, the permanent structure of the Office is composed of a core of senior staff. Second, the Office draws extensively on the use of external resources. Third, in order to deal with situations in different regions, it functions with a variable number of investigation teams.

First, the permanent senior staff leads the operations of the Office within their respective competencies. They set the quality standards, develop policies and give continuity and coherence to the investigations carried out in different situations and cases. This staff is comprised of experts in different disciplines, who will support the different teams in all situations in which the Office is involved. They coach the junior and temporary staff and support the personnel of the field offices from the ICC headquarters.

Second, in order to make the most efficient use possible of its limited resources, the Office will make extensive use of existing external resources. This means that much of the Prosecutor's work will be carried out in co-operation with national investigators and prosecutors, individually or as part of international networks with which the Office interacts.

This approach is consistent with the principle of complementarity informing the mandate of the International Criminal Court, insofar as it acknowledges that national investigators and prosecutors are often best placed to carry out some of the tasks assigned to the Of-

Office of the Prosecutor. The use of external resources also enables the Office to encourage action by national systems.

The third principle informing the operations of the Office is the existence of a variable number of investigation teams, the size and composition of which will also fluctuate. This approach will provide flexibility in the management of investigations. It will enable the Office to expand its capacity as needed, and subsequently shrink it back to the core permanent staff level within reasonable time.

The number of investigation teams in operation will vary in accordance with the needs of the Office. The size and composition of each team assigned to analyse information and subsequently conduct an investigation in the Office will change as its work progresses through a number of phases. At an advanced phase of the analysis of information, a Special Prosecutor will be appointed to lead the team until the beginning of the trial. In his or her appointment, the specificities of the situation to be investigated will play a significant role. These include the language relevant to the situation, the knowledge of the factual background and the familiarity with the local legal system. The Special Prosecutor will direct the investigation in co-ordination with the Senior Prosecutor, who will be responsible for presenting the case before the Chambers of the Court.

To the extent possible, individuals who joined the team in its early stages will remain part of it until the end of the trial, in order to ensure that the knowledge of the situation acquired during the different phases remains accessible to the team.

Investigation teams will include staff members who are nationals of the countries targeted by the investigations, taking care not to recruit individuals whose background or political affiliation may compromise the integrity and objectivity of the investigations. This inclusive strategy will help the OTP have a better understanding of the society on which its work has the most direct impact, and will allow the team to interpret social behaviour and cultural norms as the investigation unfolds.