THE POWER OF THE PROSECUTOR IN INITIATING INVESTIGATIONS

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Introduction

With the establishment of the Rome Statute, the international community has created a global system of international criminal justice. The concept of complementarity aims to bring national and international efforts into a framework characterised by interaction, cross-fertilization and cooperation. Rather than imposing a vertical relationship from the outside (as in the *ad hoc* Tribunals for the former Yugoslavia and Rwanda), the Rome Statute invites States to voluntarily submit to the Court's jurisdiction on the condition that an effectively functioning national system will always be given priority.

The complementarity regime of the ICC is the centrepiece of the Rome Statute. While confirming the notion of concurrent jurisdiction, it emphasises a preference for the exercise of domestic jurisdiction over international crimes. In establishing the relationship between the ICC and national courts, the preamble to the Statute emphasises that the Court is intended to be "complementary to national criminal jurisdictions" rather than a replacement to them. As such, the Court's jurisdiction will only be called into effect exceptionally where national authorities are unwilling or unable to hold genuine proceedings. In particular, the Court is guided by principles of partnership and dialogue, encouraging genuine national proceedings, while remaining vigilant should such efforts fail. This paper will explore the implications of this system for the interaction between the ICC and national authorities, with a particular focus on the authority of the ICC Prosecutor to bring investigations and prosecutions. It will look at the legal framework governing the exercise of such powers as well as the policies of the Prosecutor.

The Statutory framework

During the negotiations of the ICC Statute, while States were quick to achieve consensus over the principle of complementarity, differences persisted over how this should be exercised. These debates displayed different views over the relationship between national and international law. Some States started from the perspective that international courts are designed to address the failings of national courts by exercising jurisdiction in a non-selective, non-partisan and genuine manner free from political interference. Others held that granting intrusive powers to international judges and prosecutors would represent an inappropriate infringement on State sovereignty. There was also the view that it would be inefficient if national jurisdictions were not given ownership.

One important area in which these views were expressed was on the issue of how a case could be brought before the ICC: Who should be able to trigger the ICC's jurisdiction? Should complainants be able to refer allegations against individuals, crimes or situations? And what safeguards should be put in place to guard against frivolous complaints and politicised prosecutions?

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The first limitation on the initiating of cases is the scope of the ICC's jurisdiction, which extends only the territories and nationals of countries that have ratified or acceded to the ICC Statute or otherwise accepted the jurisdiction of the Court. The only exception to this rule is in the event of a Security Council referral. Moreover, the Court can only hear cases related to events occurring after the Statute's entry into force on 1st July 2002, and in relation to those express crimes defined under article 6-8 of the Statute.

As stipulated in article 13 of the ICC Statute, the Court may be triggered into action via three routes: a referral from a State Party or the Security Council, or by the Prosecutor acting on his own initiative. In this regard, the Statute clarifies that a State Party and the Security Council can only refer a "situation" to the Court (e.g. the situation in the Democratic Republic of Congo) and not individuals or particular crimes. This was deemed necessary in order to prevent the politicisation of the referral procedure through the targeting of pre-selected individuals or of the parties to a particular side of a conflict. As a result, the procedure of the actual selection of cases forms part of the judicial process whereby legal determinations are to be made by the Prosecutor and, upon confirmation, by the Court. Thus, even where situations are referred by States or the Security Council, the Prosecutor must make an independent assessment on jurisdiction, admissibility and the interests of justice when deciding whether to initiate an investigation or prosecution.

As noted above, States Parties can refer situations. A non-Party State, however, can also declare that it accepts the jurisdiction of the Court on an *ad hoc* basis in relation to a specific situation, thereby granting the Court jurisdiction to proceed.[2] In relation to the State referral procedure, concern was expressed during negotiations over its likely limited invocation given the traditional reluctance of States to lodge complaints against their peers under other international State-based complaint mechanisms.[3]

With regard to referral by the Security Council, from the outset, one of the central purposes of establishing a permanent court was to avert resort to creating further *ad hoc* tribunals.[4] Importantly, on the basis of its powers under Chapter VII of the UN Charter, the Security Council can refer to the ICC situations also involving States not party to the ICC Statute.[5] Concern was equally expressed during negotiations, nonetheless, that the referrals from the Security Council would likely be highly exceptional and could be selective, subject to potential politicisation due to veto wielding.

Faced with the possibility of State or Security Council inaction, many considered it vital for the successful and impartial exercise of the Court's jurisdiction to enable the Prosecutor of the ICC to act also in the absence of a State or Security Council referral. What became known as the exercise of *proprio motu* powers by the Prosecutor was widely seen as a vital test for the independence of the ICC. The aim was to ensure the truth-seeking dimension of the Court by guaranteeing that the

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[2] Article 12(3), ICC Statute and Rule 44, ICC Rules of Procedure and Evidence

[3] Although State complaints under the ICC Statute deal with individual and not State liability, the political repercussions of referrals were anticipated to induce an equal measure of reluctance.

[4] A/49/10 (1994), 85

[5] *See also* Articles 12 and 13, ICC Statute; Article 25, UN Charter. An example is the referral of the situation in Darfur, Sudan (a non-Party State), S/RES/1593 (2005).

Prosecutor would not be restricted in his ability to gather, receive and act on information. There was considerable unease for some States, however, that the inclusion of such independent powers to initiate cases could lead to partiality, manipulation and politicisation by a possibly rogue Prosecutor. Apprehension was also voiced that provisions enabling the receipt of information from any source could overwhelm the Prosecutor with frivolous complaints.

As a result of these concerns, negotiating States turned to strengthening procedures, reducing the discretionary powers available to the Prosecutor, and setting high admissibility thresholds, rather than denying the Prosecutor an independent triggering capacity.

Pre-Trial Chamber authorisation

The most critical of these efforts was the proposal for judicial review and approval prior to the initiation of *proprio motu* investigations. As elaborated in article 15 of the Statute, a Pre-Trial Chamber (i.e. a three judge panel) will examine any *proprio motu* request by the Prosecutor to proceed with an investigation, together with any supporting documentation, in order to determine a reasonable basis to proceed. Victims also may make representations, while article 18 allows interested States to appeal any authorisation made by the Pre-Trial Chamber. Where the Pre-Trial Chamber refuses to authorise the initiation of a *proprio motu* investigation, the Prosecutor may present a subsequent request with regard to the same situation based on new facts or evidence. However, the Prosecutor must again obtain the sanction of Pre-Trial Chamber before proceeding. Moreover, before any case can go to trial, the charges presented by the Prosecutor must be confirmed by the Pre-Trial Chamber, which must be satisfied that each charge is supported with sufficient evidence to establish substantial grounds to believe that the accused committed the crime (article 61).

Assembly of State Parties

Additional procedures that limit, and allow significant oversight over, the Prosecutor's powers include provisions over the qualifications of the Prosecutor and his/her election by the Assembly of State Parties (ASP), together with the administrative and budgetary oversight exercised by the ASP. Moreover, the Statute stipulates that the Prosecutor and his staff must not seek or act on instructions from any external source.

Complementarity

Under the principle of complementarity, States have the right to challenge the jurisdiction of the Court in any case before it or to question the admissibility of a case.[6] In this way, effective and genuine proceedings on the same case by national authorities will serve to prevent further proceedings before the Court. Moreover, in order to grant States the earliest opportunity to exercise their own domestic jurisdiction, article 18 requires the Prosecutor to notify all States Parties and other States that would normally exercise jurisdiction over the crimes concerned of his determination to initiate an investigation, and to defer to investigations undertaken

[6] Articles 17 and 19, ICC Statute

at the national level. Where an investigation is deferred to a State, the Prosecutor may request periodic updates from the State concerned. In order to avoid abuse of the complementarity principle, however, the Statute enables the Court to authorise the Prosecutor to proceed where he can prove a lack of genuineness on the part of the State claiming jurisdiction.

The emphasis of the Rome Statute, thus, is on a presumption towards well functioning national systems and preference for action at the domestic level. As a result, States can, in effect, exercise strong checks over the cases heard before the Court by bringing forward their own genuine national proceedings.

The role of the Security Council

Article 16 provides "[n]o 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." The provision enables the Council to sequence peace and justice efforts where a particular ICC investigation or prosecution is determined to pose a threat to the promotion of international peace and security.

Frivolous complaints

As to the fear of frivolous litigation, an additional admissibility test is set by the Statute. This is the requirement under article 17(1)(d) that a case not only fall within the subject matter jurisdiction of the ICC, but that, in addition, it is "of sufficient gravity to justify further action by the Court". The provision serves as a filtering mechanism to prevent the Court from being burdened with minor cases. It is also consistent with the intent of the Rome Statute to address the most serious crimes of concern to the international community.

With regard to the fear of being flooded with complaints, the Office of the Prosecutor has already established an adequate filtering mechanism.[7] These factors, together with the detailed articulation and threshold for the applicability of crimes under the Statute, act as significant safeguards against abuse. As Kirsch and Robinson note:

> [a]lthough the concern was raised that this independent power could generate politically motivated or frivolous investigations, it would seem, given the numerous safeguards and requisite professionalism of the Prosecutor, that this is in fact likely to be the *least* politicized trigger mechanism. The Prosecutor is far more likely to exercise his or her power to dismiss ill-conceived referrals from State Parties with a political axe to grind than to be the originator of any frivolous investigations, wasting the valuable time and resources of the ICC.[8]

Thus, the exercise of the Prosecutor's powers is subjected at various instances to judicial oversight from the judges, administrative oversight from States Parties, and elements of executive oversight from the Security Council.

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[7] *See* Annex to OTP Policy Paper. See *Update on Communications Received by the Office of the Prosecutor* (10 February 2006) available at http://www.icc-cpi.int/organs/otp/otp_com.html

[8] P. Kirsch and D. Robinson, Initiation of proceedings by the Prosecutor, in: Cassese, Gaeta and Jones, eds., *The Rome Statute of the International Criminal Court* (2002), 663.

Prosecutorial policy

Beyond the legal framework created by the ICC Statute, the Prosecutor has adopted a number of policies that serve to promote predictability regarding his case selection strategy and at the same time serve to assuage concerns regarding the exercise of his powers.

Positive approach to complementarity

Among the most important of these is the adoption of a positive approach to complementarity**.** As the Prosecutor stated on his inauguration, the Office does not intend to 'compete' with States for jurisdiction. According to the Statute, States have the primary responsibility for punishing atrocities in their own territories. With this in mind, the Office has adopted a positive approach to complementarity, meaning that it *encourages* genuine national proceedings where possible within the limitations imposed by the Rome Statute; relies on national and international networks and international cooperation; and participates in developing an interdependent and mutually reinforcing international system of justice. It is hoped that this interaction can help maximise the goals of the Statute. To this extent, it may be interesting to note that the impact of the Court has already begun to manifest itself at the domestic level. To date, approximately forty States Parties have passed some form of implementing legislation for the ICC, thereby criminalising applicable offences under their own national laws, while armed forces all over the world are reportedly adjusting their military manuals, codes of conduct, rules of engagement and training systems to accord with the Rome Statute.

Focused investigations and prosecutions

Another principle guiding the Prosecutorial Strategy is that of focused investigations and prosecutions. Based on the Statute, the Office adopted a policy of focusing its efforts on the *most serious crimes* and, as a rule, on *those who bear the greatest responsibility* for those crimes. Selecting the most serious crimes for prosecution is based upon the condition in the Statute 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"[9] and the requirement that a case should be of sufficient gravity to justify action by the Court.[10] In practice, in determining whether the situation is of sufficient gravity, the Office will consider issues of severity; scale; systematicity; impact; and particularly aggravating aspects. The global character of the ICC, its statutory provisions and logistical constraints, in turn, support the policy decision of focussing, as a general rule, the Office's investigative and prosecutorial efforts and resources on those who bear the greatest responsibility for those crimes. Where the Court does not prosecute particular persons, impunity should not thereby result – the ICC is complementary to national efforts, and parallel national measures against other offenders will be essential to develop comprehensive anti-impunity strategies to ensure other perpetrators are brought to justice.

These policies help to ensure that intervention by the Office of the Prosecutor

[9] Article 5, ICC Statute

[10] Article 17(1)(d), ICC Statute

is exceptional – it will only step in when States fail to conduct investigations and prosecutions, or where they purport to do so but in reality are unwilling or unable to genuinely carry out proceedings – and it must be focussed on the most flagrant cases justifying ICC attention. The work of the Court to date in focussing its investigative efforts on the situations in the Democratic Republic of Congo, Northern Uganda and Darfur confirms this approach.[11] Moreover, the Office has already dismissed a large number of complaints. These have included the situation in Venezuela, where the information available did not provide a reasonable basis to believe that the alleged crimes fell within the jurisdiction of the Court;[12] and the situation in Iraq, where the Court can exercise jurisdiction only with respect to actions of States Parties nationals. In relation to Iraq, the information available supported a reasonable basis to believe that a limited number of instances of wilful killing and/or inhuman treatment had occurred. However, the alleged crimes committed by nationals of State Parties in Iraq did not appear to meet the required gravity threshold and, moreover, in view of complementarity, national proceedings had been initiated with respect to each of the relevant incidents.[13]

Conclusion

With the coming into force of the Rome Statute, a system of international criminal justice has been established between ICC and States subject to its jurisdiction. The overarching goal of the Rome Statute is to put an end to impunity for the most serious crimes of international concern and to contribute to the prevention of such crimes. In this sense, the treaty signed in Rome is not just about a Court, it is about a system; a global system based upon the interaction of international and national authorities. In this system, the functions and powers of the ICC Prosecutor, in particular the availability of *proprio motu* powers enabling him to independently initiate investigations, can act as an important catalyst to encourage State action. At the same time, the system ensures transparency and accountability in the exercise of such powers. This in turn serves to promote predictability, to generate support for the case selection strategy of the Prosecutor, and to galvanise international cooperation to support the work of the Court.

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[11] *See* http://www.icc-cpi.int/organs/otp/otp_public_hearing/otp_ph2.html

[12] http://www.icc-cpi.int/library/organs/otp/OTP_letter_to_senders_re_Venezuela_9_February_2006.pdf

[13] http://www.icc-cpi.int/library/organs/otp/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf