[Expert consultation process on general issues relevant to the ICC Office of the Prosecutor:]

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Prosecutorial Discretion – Some Thoughts on 'Objectifying' the Exercise of Prosecutorial Discretion by the Prosecutor of the ICC

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1. Introduction

It is necessary to identify the points at which the Prosecutor of the International Criminal Court can exercise discretion to investigate and to prosecute crimes within the Court's jurisdiction, and at all these points, it must be decided what the applicable criteria for guiding these choices are. What are the types of discretion that the prosecutor can exercise: legal, political, ethical/moral, practical/pragmatic, and how should the Prosecutor exercise this discretion?

Prosecutorial discretion can be situated somewhere between the poles of 'yes, if' and 'no, unless'. The first option – 'yes, if' – is what in some jurisdictions is called the legality principle. In the beginning of the Court it may be tempting to choose for this first option, investigating and subsequently prosecuting as much cases as possible, to guarantee that within the first 7 years of its existence at least some substantive cases are dealt with before the court, and thus proving its importance. However, if not from the start then within a short time, there will be limits to the Court's capacity. The Court, for this and other reasons, will have to decide what its purpose, role, capacity and limitations in a particular situation are; decisions that will, in the first instance, have to be made by the Office of the Prosecutor (OTP). There are many possible criteria that the Prosecutor may use to guide him in deciding (1) whether to initiate an investigation and (2) whether to actually prosecute. The Prosecutor will have to decide what the guiding principles of the Court and of the OTP itself are. Some are mentioned in the Statute, of which complementarity is the best known. The complementarity criteria of inability and unwillingness seem to give the answer to the question which cases to investigate and prosecute. However, on second thought these criteria solve few problems, as they are much too vague. Moreover, many other factors can be considered when deciding on whether or not an investigation should be started. As far as possible, these should be based on objective ('scientific') rather than subjective (intuitive) factors, although obviously it will not be possible to make a clean separation between them, especially at the point of deciding whether or not to initiate an investigation, and, in the final analysis, the mix of relevant factors is such that there may be little that is 'scientific' about deciding to pursue a particular case.

Underlying the issue of prosecutorial discretion and when and how it can and should be exercised is the deeper and much more difficult question of what the Court is actually established to achieve: how does it (and the outside world) perceive its function? What is its role and what is its philosophy? The principle of complementarity seems to provide some answers to also these questions: the Court is there to investigate and prosecute cases where national jurisdictions are unable or unwilling to do so. Yet, the principle of complementarity, as it is merely sketched in the Statute, begs more questions again than it answers, and does not provide a satisfactory answer to the most fundamental questions concerning what the ICC is really for. And the complementarity principle may in fact obscure the real purpose of the ICC. For the ICC is not merely a court of last resort, there to step into the breach when national mechanisms for achieving justice fail. It could have *inter alia* an exemplary function; an educational function; a didactic function; a monitoring function; a consultancy function; and advisory function; and other purposes which will emerge with time and which must be determined.

Discovering what exactly the Court is for will be a gradual process and not merely the result of a flash of inspiration. How the Prosecutor exercises his discretion in deciding which investigations to initiate and which prosecutions to pursue will be critical in shedding light on this question. While political considerations will be inescapable, the choices that are made in the early stages, and the reasons behind those choices, will set the tone for years to

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come and will strongly influence public perceptions of the Court and what it is for. It is therefore of critical importance that the OTP gives long and hard thought to the issue of prosecutorial discretion and how it should be exercised.

In this submission we will try to shed some light on considerations which play a part with respect to prosecutorial discretion, subsequently, in the initiation of an investigation and of a prosecution, however without pretending to be able to give the answers.

2. Prosecutorial Discretion in the Initiation of an Investigation

2.1. Prosecutorial Discretion under Article 53(1)

Article 53(1) of the Statute of the International Criminal Court (ICC) sets forth the factors that the Prosecutor *shall* consider in deciding to initiate an investigation:

(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.

The language of Article 53(1) (*shall*) suggests that the three stipulated bases for considering to proceed with an investigation are mandatory and exhaustive and not merely illustrative. Moreover, they are cumulative, insofar as the Prosecutor must at least *consider* all of them. However, as is clear from the last sentence of paragraph (1), the Prosecutor may decide not to proceed with an investigation solely on the basis of subparagraph (c), in which case he or she shall inform the Pre-Trial Chamber. This is logical, since if the conditions set out in the preceding subparagraphs are not met, there can be no question of any exercise of prosecutorial discretion under subparagraph (c). It is clear that within the limits stipulated in Article 53(1), considerable prosecutorial discretion remains in deciding whether or not to initiate an investigation. The enumerated criteria for deciding whether to initiate an investigation rely largely on subjective decision-making by the Prosecutor. It is he who must make the subjective calculation what is 'reasonable' under subparagraph (a), whether the case is admissible under Article 17 – an article which itself allows for the exercise of extensive prosecutorial discretion – whether there are 'substantial reasons' for believing that an investigation would not serve the interests of justice, and what are all the relevant circumstances to be considered. What is relevant in one situation may not be relevant in another, and it is up to the Prosecutor to make this determination.

Considering that the work of the Court, and the work of the Prosecutor in particular, will be the subject of extensive public scrutiny, and that perceptions of the Prosecutor's work and how his mandate is executed are as important as facts, particularly in the early phase of the Court's work, the need for 'objectifying' or pinning down the largely subjective criteria articulated in Article 53(1) seems obvious.

To avoid fuelling any already existing perceptions of the ICC as a political court, to minimise any accusations of bias, and to increase transparency and boost the credibility of the Court as a strictly judicial institution, it is necessary to identifying the guiding principles underpinning the exercise of prosecutorial discretion and to identify criteria which can be applied in each instance in order to determine whether the conditions of Article 53(1) have been fulfilled.

2.2. Article 53(1)(a)

Subparagraph (a) would seem to present the least difficulty. Information will be available to the prosecutor indicating that ICC crimes may have been committed.

A first impression, with respect to the problem of discretionary power, is that the question is not whether a crime has been committed, but rather which crime, out of the huge pile of cases presented to the prosecutor, to investigate. On second thought however, also the question whether a crime has been committed can turn out to be a highly political question, e.g. in cases where alleged crimes have been committed by peacekeepers. The process of labelling certain facts as a 'crime within the jurisdiction of the court' is therefore not to be neglected.

Moreover, while it is difficult to define what is 'reasonable' in this context, one could imagine that the Prosecutor should be convinced that there is at least prima facie evidence that crimes within the Court's jurisdiction have been committed.

One consideration must be whether an investigation is feasible, and further, what is meant by feasible in this context? The volume and quality of evidence? The cooperativeness of the country involved? Here, ethical and pragmatic considerations may conflict.

2.3. Article 53(1)(b) and Article 17

For an investigation to proceed, the case must be admissible under Article 17. The latter is a provision that allows for considerable prosecutorial discretion. Given that the potential investigatory caseload is vast, and that the decision-making capacity may not be concentrated in a single individual, it is vital that the OTP lays out detailed criteria for deciding whether a case is admissible under Article 17 and when it is clearly not admissible so uniformity in decision-making can be realised.

Subparagraphs (2) and (3) of Article 17 provide some insight into the meaning of 'inability' and 'unwillingness', but still leave room for a large degree of prosecutorial discretion. For example, deciding what amounts to 'an unjustified delay', under Article 17(2)(d) is no straightforward task. Neither is the meaning of the words 'to bring the person concerned to justice'. Does the latter mean the indictment or arrest of a suspect? Or the commencement of trial? Or the conclusion of the criminal justice process? Which standards should apply here? Those set by other international criminal courts, for example, the ICTY, are hardly exemplary. Even such a guardian of human rights standards as the European Court of Human Rights permits states, particularly those experiencing states of emergency, a generous margin of appreciation. Is it just to hold states emerging from armed conflict, or indeed those still in the throes of conflict, to the same standards are those at peace, with fully functional criminal justice systems? Clearly, a sliding scale of what constitutes an unjustified delay should be adopted if genuine unwillingness is to be discerned.

The ICC Prosecutor must also determine the relationship between unwillingness and inability. What might appear as unwillingness may be de facto inability. Assistance by the ICC or other bodies or states to transitional states seeking to overcome obstacles to prosecute could minimise instances of inability or perceived unwillingness, and a major question for the ICC itself will be deciding what role it should play in rehabilitating or in encouraging the rehabilitation of the criminal justice systems of states that appear to be unable or unwilling. While understandably, the ICC at first sight might perceive such a role as going beyond its mandate, in fact, it may well come to realise that at least part of its inherent role lies in being a sort of 'ombuds-court'. For if the ICC is to take on the caseload of even a fraction of

the cases of states that are manifestly unable or unwilling to prosecute, it could quickly find itself log-jammed. Inability and unwillingness of themselves are obviously not the only justifications for the ICC to assume jurisdiction, but, if the ICC is to fulfil its side of the complementarity bargain, it might consider a role for itself in assisting states that are unable and persuading and encouraging states that are unwilling. Rather than assume such a role itself, in a hands-on way, it could alternatively consider the possibility of a role for itself in guiding or directing others (including states, acting, for example, through diplomatic channels) more in a position to offer this sort of assistance. It can also address the inability question by means of establishing standards that states can follow in fulfilling their side of the complementarity pact. The question then arises of how best to stimulate national prosecutions and what to do with alternative dispute resolution mechanisms.

It should be obvious that many states, including states that are not in a state of conflict or a transitional stage, may have vested political interests in not pursuing a particular investigation or prosecution, and an interest in 'off-loading' tricky or inconvenient cases to the ICC. There may be a genuine public interest, including at the international level, in seeing particular persons investigated, yet the ICC, for a plethora of reasons, including the purely practical, may not be best-placed to assume that burden. The ICC could quickly become overburdened by tricky yet worthy cases. The danger looms large however that the Court will be used as an instrument in a national political battle, thereby becoming politicised.

To address cases such as these, where there is a risk of certain individuals not being prosecuted at either the national or international levels, the ICC should establish standards that can be applied in a consistent way to determine whether states are positively meeting the requisite national standards to enable them to prosecute at the national level, as opposed to meeting a negative standard, that would enable the ICC to decline jurisdiction.

Another extremely difficult issue is how a court, with limited resources, headquartered in The Hague, will actually set about determining inability and unwillingness from a practical viewpoint. The Prosecutor will lack the resources to monitor all trials of ICC crimes, although it could to some extent achieve this ambition by working with local NGOs, including those that already have a good knowledge of the Court through their membership of the NGO Coalition for the International Criminal Court, for instance.

Because the question of inadmissibility under Article 17 is defined in the negative, while the Statute gives some sense of what cases the ICC should not prosecute, it is not obvious which cases the ICC should investigate and ultimately prosecute. It is important that the Court, at the earliest possible stage, give serious consideration to what types of cases it should be pursuing, all other questions of admissibility being settled.

2.4. Article 53(1)(c)

Subparagraph (c) is characterised by its vagueness. Notwithstanding the fact that the information available indicates that there is a reasonable basis to believe that an ICC crime has been committed, and the case would be admissible under Article 17, and irregardless of the gravity of the crime and the interests of victims, the prosecutor may decide not to proceed to an investigation where he considers that it 'would not serve the interests of justice'. The question is, what is meant by justice here, what serves the interest of justice. And for whom is justice served? The victims? The state affected? International lawyers? The world? It could well be decided in a particular case that justice is served not by prosecuting before the ICC or even by stimulating prosecution in a particular case but by the encouragement of alternative disputes mechanisms.

Notwithstanding the fact that there is information indicating that an ICC crime has been committed and it is clear that the case is, in principle, admissible, what might be the criteria guiding the prosecutor in deciding to investigate a case? The guiding principle here, according to the Statute, is what serves the interests of justice. Determining what serves the interest of justice (and whose interest is ultimately to be served by this determination) is an extraordinarily difficult if not impossible task. From which and whose perspective is this determination to be made? What serves the interest of the wider society—issues of peace and security, for instance—may not serve the interests of victims, yet both are factors to be weighed in considering whether justice is being served. What is meant by justice here? Justice in the narrow sense of criminal justice, or justice in the broader, restorative, sense? Justice in terms of the rights of the accused? Justice in terms of the right of individuals the world over to live in peace and safe from international crimes? Given that one role of the Court is to act as a deterrent, the choices that the Prosecutor makes (for example, prosecuting only a few 'examples'), could impact its success in terms of deterrence.

We may conclude that Article 53(1) sets out two positive criteria which must be satisfied as a bare minimum: the facts (information available to the Prosecutor) must provide a reasonable basis to believe that an ICC crime has been or is being committed; and that the case is admissible under Article 17. The third factor mentioned in subparagraph (c), far from assisting the Prosecutor in the decision to proceed with an investigation, is a factor to weigh in the decision not to launch an investigation, notwithstanding the existing of other factors favouring an investigation. Yet it is subparagraph (c) that will probably be relied upon most by the Prosecutor in deciding to investigate or not, given that it is the provision that allows him most scope for discretion. At least this paragraph is the least transparent of the three, giving no direction whatsoever, as the first two paragraphs do.

3. Prosecutorial Discretion in the Initiation of a Prosecution

The decision of the Prosecutor to proceed with a prosecution is founded on negative rather than positive criteria. Article 53(2) enumerates the criteria the Prosecutor, having undertaken an investigation, should consider in deciding not to proceed to prosecution:

(a) There is not a sufficient legal and factual basis to seek a warrant or summons under article 58;
(b) The case is inadmissible under Article 17, or
(c) The prosecution is not in the interests of justice, taking into account all the relevant circumstances, including the gravity of the crime, the interests of victims, the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime.

The use of the word 'including' in subparagraph (2)(c) suggests that the enumerated criteria are merely illustrative and not exhaustive and that the prosecutor not only can but must consider *all* the relevant circumstances.

3.1. The Role of Non-States Parties in the Exercise of Prosecutorial Discretion

The principle which must always be foremost in the Prosecutor's mind is that of complementarity: the fact that the ICC is not intended as a forum to prosecute each and every violation of the crimes included in the Statute but only there as a forum of last resort when national jurisdictions are unable or unwilling to prosecute.
Not clear from the Statute is the ICC's role in relation to third states: if a third state indicates its willingness to prosecute a person for an ICC crime – whether under the principle of universal jurisdiction or another, more traditional basis of jurisdiction – and is able to do so, should this be a valid factor for the prosecutor to consider in deciding not to initiate an

investigation or a prosecution? The Statute makes no provision in this regard; on the other hand, it is a factor that should not be discounted by the Prosecutor. One of the raisons d'être of the Court is to 'put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes'. If prosecution of a person accused of the core crimes can properly be undertaken in another jurisdiction, this lessens the need for the court to fulfil its role as forum of last resort. The ICC's position and role is that of default: it should be there to fulfil the prosecutorial role when there are no other available and adequate options. The Prosecutor might well consider that available options outside the ICC regime can be considered in making his or her determination to prosecute.

Support for the proposition that the role of third states can legitimately be considered by the ICC Prosecutor in considering whether or not to exercise prosecutorial discretion can be found in the provisions of the Preamble which recall 'that it is the duty of every State [and not only States Parties] to exercise its criminal jurisdiction over those responsible for international crimes' and affirm 'that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation'. There is no reason to believe that the references to 'States' include only States Parties to the ICC Statute. Furthermore, the Preamble emphasises 'that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions'. Again, this does not exclude national criminal jurisdictions of non-States Parties. Finally, support for the proposition that a valid prosecution in a non-State Party should be a factor in deciding not to proceed with a prosecution before the ICC can be found in Article 17(1)(a) and (b), dealing with admissibility criteria. There is nothing in the language of these provisions to indicate that it is restricted to prosecutions in States Parties. A logical reading would indicate that a legitimate prosecution in *any* state, including a non-State Party should be sufficient to find a case inadmissible before the ICC. Thus, arguably, under both paragraphs (1) and (2) of Article 53, in considering whether to investigate a case or proceed to prosecute, the existence of an investigation in a non-State Party and a decision by that state not to prosecute are valid grounds for a finding of admissibility by the Prosecutor. Similarly, there is no reason to suppose that the *ne bis in idem* principle only applies with respect to prosecutions conducted in States Parties. To subject a person who has been legitimately tried by a non-State Party to prosecution by the ICC would seem to be in violation of fundamental principles of justice and human rights.

3.2. A Duty to Prosecute?

A key question is whether, under certain circumstances, the ICC actually has a duty to prosecute. If, for example, a State Party was found to be either unable or unwilling, and a third state was not willing to assume jurisdiction, one could argue that there is a duty on the ICC to prosecute if the alternative is impunity. After all, one of the reasons for the existence of the Court is 'to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes'. Moreover, the Preamble affirms that 'the most serious crimes of concern to the international community as a whole must not go unpunished'. There is a duty on States Parties to the Geneva Conventions, for example, to prosecute grave breaches of the Conventions. Arguably, a similar duty binds Parties to the Genocide Convention. It remains an open question whether the jurisdiction to prosecute crimes against humanity is permissible or obligatory. Since the ICC has been established by states, most of which are parties to these Conventions, and it embodies jurisdiction which has been granted to it by states, it could be considered as having residual jurisdiction over the core crimes, and a residual duty to prosecute those crimes where no other state is able or willing to.

The question of whether there is a duty to prosecute in a particular case cannot be separated from the question of what justice requires. These two considerations could conflict. Justice may require a non-criminal process, but legally, there may be a duty to prosecute. This consideration will certainly arise at the level of states. States may be legally bound to prosecute individuals in respect of certain crimes, but the ICC Prosecutor might find that justice requires that this breach of international law is overlooked. A situation where the ICC Prosecutor is seen to be encouraging breaches of international legal obligations by states at the same time may not serve the broader requirements of justice (in a global, as opposed to a local, sense).

3.3. Identifying the Court's Constituents

The Court will have to decide who its primary constituents are. If, for example, victims were considered to be among the core constituents, rather than the general public in all states (including non-conflict states), this could produce a rather different outcome in terms of the exercise of prosecutorial discretion. The needs of victims in a conflict-riven or transitional state may also not coincide with and may in fact conflict sharply with those of non-victims within that state, or with the state as a whole. Justice for an entire society may mean individual injustices for victims. At the same time, ignoring or sacrificing the needs of individual victims may not serve the long-term interests of the society.

3.4. What Ends Are to be Served by Prosecutions?

The Prosecutor will be faced with making certain difficult choices, among which are whether to prosecute the greatest number of perpetrators or whether to try and set and adhere the highest possible standards in prosecutions. This is linked to the question of who are the Court's constituents.

If the Prosecutor were to decide that the role of the ICC is really as a sort of model court, then the greatest interest would lie in pursing selective prosecutions and in observing the highest possible standards, including in terms of fair trial. Trying to achieve both could be counter-productive.

If the ICTY is to serve as an example, it is clear that the more people that are prosecuted, the greatest the delays in the length of the trial of those persons who are accused. So, the ICC prosecutor could decide that the main benefit of the existence of the Court is to prosecute only a few, and to lead by example in terms of the application of fair trial standards. Of course, making this choice will mean that the Prosecution ends up having to make more 'political' choices about who to prosecute, with the inherent risk of accusations of political bias. In resolving these questions, the Prosecutor will have to consider the relationship between the ICC and the human rights courts and bodies, and whether it is bound by the standards they set.

The Prosecutor must decide if the Court's main function is to be more symbolic and exemplary than real. If its role is mainly symbolic, then obviously more consideration will have to be given to adherence to the highest possible standards of criminal justice. If its main function is to make a real impact on international criminality, then greatest weight might be given to prosecuting the greatest number of people possible.

Deciding whom to prosecute is not only a matter of choosing between different situations, different countries, different conflicts and different individuals, from the wide choice that will be available. If, for example, one end to be served by international prosecutions is to build an authoritative historical record of what happened in a particular case, this could also

influence the choice of whom to prosecute. However, in pursuing this goal, it might be better to leave this to a truth commission, which may be better equipped to give a full record of a situation as a whole, in stead of relatively isolated cases of crimes committed by individuals.

4. Some Concluding Remarks: Guidelines

Neither the Statute nor the Rules provide much guidance for the Prosecutor in deciding whether or not to initiate an investigation and to proceed with a prosecution. Article 53 sets out some criteria, but it begs more questions than it answers. Already many of such questions have been raised in the previous paragraphs. It seems to be of vital importance that guidelines are developed – and made public – giving direction to the decision either or not to initiate an investigation. 'Vital', as the danger looms large that the court is accused of starting investigations on entirely arbitrary grounds, and even based on political considerations.

Guidelines in the context of prosecutorial discretion are quite common in national jurisdictions wherein the prosecutor has wide discretionary power. However it is clear that the national criteria are almost entirely useless on the supranational level of the ICC. The futility of the facts for instance is unheard of as a factor in the context of the ICC, having to deal with the most atrocious crimes.

In the latter context, the Prosecutor might, for example, consider factors such as the scale of the crimes committed; the available evidence (difficult to assess in advance, and from a remote position); the level of public outrage (how outraged is the conscience of the world community?) and popular support for a particular investigation (subjective and hence difficult to assess); security issues (whether conflict is ongoing, and at what point in an ongoing conflict the ICC might step in and investigate crimes: not prosecuting during an ongoing conflict might prolong conflict; conversely, the prospect of being held accountable might encourage parties to keep fighting); threats to the security of a fragile transitional state by prosecuting key individuals; political issues, including the existence of a peace treaty, amnesties (distinguish between democratic and non-democratic societies/popular will and conditional and unconditional), and a TRC; the sincerity of alternative mechanisms, including TRC; sincerity/transparency of national exercise of prosecutorial discretion; existence of alternative mechanisms for achieving justice lack of infrastructure at the national level (inability); measuring inability and unwillingness (how do you?); the period of time since the cessation of conflict (if a country in transition has not initiated investigations of serious crimes or prosecutions of those accused of committing such crimes, is it unwilling or merely tending to greater priorities? Should countries be given a period of grace by the ICC in which to get its act together?); the wishes of the victims (where this can be determined); the appropriateness of prosecuting at all and at a particular moment. The Prosecutor must also give careful consideration to the role of the ICC and other bodies in stimulating national prosecutions, and the extent to which these efforts have been embraced, rejected or simply ignored by the national jurisdiction.

Considering the role of court, it is of course not necessarily a matter of making a straightforward choice or of choosing between two or several extremes. The work and role of the Court could be envisaged as evolving over a series of stages. In the first instance, greater emphasis might be accorded to the Court's symbolic and exemplary role, stressing the fairness of a trial and the importance of the rule of law. In a later phase, and as the Court hits its stride, more utilitarian functions, such as crime control and deterrence, might assume greater significance. The ICC may set itself goals that are both realistic and idealistic. Those goals will be influenced by but cannot be identical to those set for national criminal

courts. The ICC is not merely a criminal court on a larger, or an international scale. It is necessary to think outside of the national criminal law paradigm, and to consider what supranational criminal law can and should achieve. It is not merely national criminal law writ large, but an entirely new animal, whose purpose is still being figured out. It is not only a question of asking what is the ICC for, but what supranational criminal law is for.