The Procedure of the ICC: Status and Function of the Prosecutor

Volker Röben

A. von Bogdandy and R. Wolfrum (eds.),
Max Planck Yearbook of United Nations Law, Volume 7, 2003, 513-552.

I. Introduction

The Rome Statute progressively develops international judicial procedure in criminal matters and, by implication, international procedural law generally. In designing the permanent Court's procedure the international community has confirmed many important choices that the UN Security Council made when it set up the *ad hoc* Tribunals for the Former Yugoslavia and Rwanda.

The legal bases of the Court's procedure are its foundational treaty, the Statute (ICC or Rome Statute),[1] and the Rules of Procedure and Evidence (RPE).[2] The procedure applies across the range of crimes within the jurisdiction of the Court, which guarantees the consistent application of the law.[3] The Statute defines the procedure of the Court mainly in its Part 5 entitled "Investigation and Prosecution" and in its Part 6 on "The Trial", although the provisions of Part 1 on the exercise of the Court's jurisdiction and on the admissibility of cases are important as is Part 9 of the Statute that deals with cooperation between the Court and the States parties. The Statute's provisions are complemented by the RPE[4] and the Regulations of the Court. The RPE spell out many procedural questions that were left to judge-made law under the regime of the *ad hoc* Tribunals. The RPE of the *ad hoc* International Criminal Tribunals were the first international procedural and evidentiary codes

---

1 Rome Statute of the International Criminal Court, Doc. A/CONF.183/13 Vol. I. Reprinted in this Volume, see Annex.

2 Rules of Procedure and Evidence, Doc. A/CONF.183/13 Vol. II.

3 And thus, under a classic reading of this formula: N. Luhmann, *Das Recht der Gesellschaft*, 1993, 214 – 238.

4 See article 51 (4) (5) of the Statute. The Explanatory Note to the RPE specifies that, "The Rules of Procedure and Evidence are an instrument for the application of the Rome Statute of the International Criminal Court, to which they are subordinate in all cases. ... Direct references to the Statute have been included in the Rules, where appropriate, in order to emphasize the relationship between the Rules and the Rome Statute. ... In all cases, the Rules of Procedure and Evidence should be read in conjunction with and subject to the provisions of the Statute".

ever adopted and they had to be amended gradually. Under the ICC Statute such judicial rule-making is only marginally possible.[5] The RPE may be proposed by the Court but must be adopted by the Assembly of States parties (article 51 of the ICC Statute).

The purpose of this article is first to analyze the procedure of the Court as it emerges from the said legal bases, for lack of any Court practice at this point in time. The article will start by briefly looking at the organization of the Court (II.). It will then focus on the fundamental policy choices that were made in setting up the Court's procedure (III.), before turning to presenting the resulting structure of the Court procedure and the position of the participants of the procedure (IV.). This will be put in the context of the procedures of the *ad hoc* Tribunals (V.). The article concludes that this procedure ensures the legitimacy of the Court and also that of the UN Security Council and the States parties to the Rome Statute (VI.). The article will thus address two of the criticisms often levied against the ICC: that it actually is counterproductive to the objective of international human rights and humanitarian law enforcement for its chilling effect on states, in particular non parties to the Statute and for its presumed ineffectiveness.

II. Organization of the Court

The Statute contains a number of organizational choices that shape the Court's procedure. The organizational design of the Statute allows for the separation and allocation of distinct powers and functions and thus for the working of the Court according to the maxims of the Court's procedure.[6]

---

5 Article 51 (3) of the Statute provides: "After the adoption of the Rules of Procedure and Evidence, in urgent cases where the Rules do not provide for a specific situation before the Court, the judges may, by a two-thirds majority, draw up provisional Rules to be applied until adopted, amended or rejected at the next ordinary or special session of the Assembly of States Parties". Furthermore, the RPE contain an unusual recognition of the concept of judicial precedent. Article 21 (2) of the Statute provides that "the Court may apply principles and rules of law as interpreted in its previous decisions".

6 See discussion under III.

1. The Court

The ICC is an international organization. The Rome Conference has opted for a system that ensures that the 18 judges making up the Court are independent. The Statute itself specifies the qualifications that the judges must have, detailed provisions on the disqualification of judges (article 41 of the Statute), the removal of judges from the office (article 46), and disciplinary measures (article 47). The RPE further specify the cases and guarantees under which a judge, the Prosecutor, a Deputy Prosecutor, the Registrar and a Deputy Registrar shall be removed from office or shall be subject to disciplinary measures in a case of serious misconduct.[7] The Court's internal organization is functional. The Court is composed of six organs – the Presidency, an Appeals Division, a Trial Division, a Pre-Trial Division, the Office of the Prosecutor, and the Registry (article 34). The Court's judicial function shall be carried out by Chambers (Pre-Trial Chamber, Trial Chamber and Appeals Chamber[8]).[9] The Trial Chamber renders both the decision on conviction or acquittal and, upon conviction, the sentence. The Assembly of States parties that the Statute provides for is not an organ of the Court but rather a separate institution that has important legislative and administrative but not judicial powers under the Statute.[10] The competence of the Assembly of States parties to change both the substantive law (Elements of Crime) and the procedure (RPE) in fact renders the Court more autonomous. The autonomy of a judicial institution relates to the ability of the legislator to change the law it is to apply.[11]

---

7 See Rule 24.

8 See article 39.

9 Although the office of the prosecutor is an organ of the Court, it exercises executive rather than judicial functions. Cf. Morrison v. Olson, 487 U.S. 654.

10 See D.A. Mundis, "The Assembly of States Parties and the Institutional Framework of the International Criminal Court", *AJIL* 97 (2003), 132 et seq.

11 See N. Luhmann, *Legitimation durch Verfahren*, 1983. In entrusting the collectivity of the States parties with legislative powers, the Rome Statute follows institutional developments pioneered, i.e., in modern international environmental law. See V. Röben, "Institutional Developments under Modern International Environmental Agreements", *Max Plack UNYB* 4 (2000), 363 et seq.

2. The Office of the Prosecutor

Article 42 of the Statute provides for the Office of the Prosecutor as an organ of the Court.[12] The Office is headed by a Prosecutor elected by the Assembly of States parties.[13] The Prosecutor operates in personal and substantive independence of both the Court and the States parties.[14] It is well known that two tendencies clashed at the Rome Conference.[15] Some states[16] wanted to grant the power to set investigations and prosecutions in motion to states and the Security Council only; the group of the so-called like-minded countries were advocating the institution of an independent prosecutor capable of initiating *proprio motu* investigations and prosecutions. The final result was a compromise. First of all, the right to carry out investigations and prosecutions was not left to the authorities of individual states or entrusted to a commission of inquiry or similar bodies. Instead, a prosecutor was envisaged. States had two options: the Nuremberg model, whereby the Prosecutor is an official of the state that has initiated the investigation and prosecution, and is therefore designated by that state and remains under its control, and the Yugoslavia and Rwanda model, whereby the prosecutor is a totally independent body. As an independent and impartial body, the Prosecutor was granted the power to investigate and prosecute *ex officio*.[17]

---

12 See article 42 entitled "The Office of the Prosecutor".

13 Following months of lengthy consultations, the States parties to the Rome Statute elected at the resumed session of the Assembly of States parties, 21-24 April 2003, Mr. Luis Moreno Ocampo of Argentina as prosecutor of the ICC. See Statement for the Press by the President of the Assembly of States Parties to the Rome Statute of the International Criminal Court, HRH Prince Zeid Raad Al Hussein.

14 But see A. Klip, "State Security and Obtaining Evidence Independently by the Defence", in: H. Roggemann/ P. Sarcevic (eds), *National Security and International Criminal Justice*, 2003, 127 et seq. (131).

15 A. Cassese, "The Statute of the International Criminal Court: Some Preliminary Reflections", *EJIL* 10 (1999), 144 et seq. (161).

16 Including the United States, China and others.

17 Rule 11 RPE secures the independence in detail. According to this Rule, the Prosecutor may delegate his or her functions exclusively to full staff members of his office but not to so-called gratis personnel within the meaning of article 44 (4) offered by States parties, inter-governmental or non-governmental organizations to the Prosecutor's office.

III. Maxims of the ICC Procedure

In designing the Court procedure, States parties had to make a number of fundamental policy choices concerning the initiation of a process, its conduct and form, and evidence. These choices may be best analyzed through the grid of procedural maxims (or principles) that each denotate certain conceptual choices that a legislator faces in designing a code of criminal procedure. By opting for each maxim the States parties at Rome necessarily rejected an alternative conception of the Court's procedure.

1. Fair Trial

The fair trial principle is part of a substantive understanding of the rule of law that comprises fundamental rights. For a trial to be fair, the accused needs to be a subject of the process, not merely its object. He or she has to have the procedural rights and remedies meaningfully to influence the trial, both with respect to evidence and to matters of law. The principle of equality of arms, that is often counted among the relevant principles, is not absolute but relative to the structure of the procedure.[18] Fair trial contains several elements specifically important to the defence before International Criminal Tribunals. These include the right to a hearing, assistance of learned counsel, adequate time and facilities for the defence preparations, cross-examination of prosecution witnesses and examination of one's own witnesses. As a legal norm, fair trial is first of all a general standard in need of concretization. Its foremost addressee is the legislator. In interpreting and applying their procedure, courts and tribunals have to ensure that the accused receives a trial that is fair overall. Because of this normative quality of the fair trial principle, it allows judicial oversight of whether a trial has been conducted according to the rule of law.

Fair trial is a fundamental human right enshrined in numerous international conventions and part of general international law.[19] As such it is binding on the States parties to the Rome Statute. Consistently with this situation, the Statute contains the fair trial principle positioned prominently in article 67, close to the opening of Part 5 of the Statute

---

18 See under IV. 1.

19 See R. Wolfrum/ D. Weissbrodt, (eds), *The Right to a Fair Trial*, 1998.

on the trial.[20] States parties were bound both to respect the fair trial requirements in designing the Court's procedure and to include it as a positive norm relevant for the Court's operations.[21] The Court's organs, namely its judicial divisions and the Prosecutor, have to interpret and apply the Statute and the RPE accordingly. The provision of article 69 (4) of the Statute that the Court may rule on the relevance or admissibility of any evidence on the basis of fair trial understands the principle in this sense. Consistently with the understanding of fair trial as a standard for the overall conduct of a trial, the Statute provides that the accused, or the Prosecutor on his or her behalf, may appeal the decision or the sentence of the Trial Camber on any ground that affects the fairness or reliability of the proceedings or decision (article 81 (1) (b) (iv) of the Statute). Decision or sentence may be reversed if the Appeals Chamber considers that the proceedings appealed from were unfair in a way that affected the reliability of the decision or the sentence (article 83 (2) of the Statute). Beyond the individual rights protection, the guarantee of the fairness of the Court's procedure has a second function. It assures states that their action in the interests of the enforcement of international standards pursuant to a UN Security Council mandate will be limited only to the extent prescribed by the applicable international law standards[22] rather than having to fear that any service members be prosecuted unfairly by the international court.

The fair trial requirements as implemented by the ICC Statute are thus international democracy in a nutshell. They demonstrate that the interest of the States parties supporting the Court is not necessarily directed at efficiency but rather at fairly trying individuals accused of the atrocities that shock the international conscience. This emphasis on procedural fairness implies that, for procedural reasons, a person considered guilty by many may go free. The idea conveyed is thus that the

---

20 See arts 21 ICTY Statute, 14 ICPR, 6 ECHR.

21 The applicable rationale here has been most succinctly articulated by the European Court of Human Rights in Strasbourg, which is charged with upholding the European Convention on Human Rights. The Court says that the States parties to the Convention cannot free themselves from their obligations under the Convention by setting up international organizations and transferring powers onto them that would otherwise be exercised at the national level. As a consequence, the Court asserts jurisdiction over the acts of the international organization or at least over its foundational (international law) act. This includes the European Union. See Matthews v. United Kingdom, Judgment of 18 February 1999.

22 Chief among them the laws of war.

rule of majority and its power is limited by individual rights. Clearly, the human rights guarantees in the trial also strongly reflect on the pre-trial procedure and the legitimacy and — by extension of the effectiveness — of the powers that the Court may exercise at that stage.[23]

2. Prosecution by Public Authority (Officiality Maxim)

Under the officiality maxim, it is exclusively for the competent public authority to initiate and conduct criminal proceedings. Private rights of criminal action do not exist. The Statute vests the Court with the authority to prosecute the crimes enunciated in article 5 of the Statute.

The Prosecutor itself may start an investigation (article 15 (3) of the Statute). This is not thwarted whenever the Security Council decides, under article 16 of the Statute, to request the Court to defer any investigation or prosecution for a period of 12 months or a shorter period. For the powers of the Security Council are not unfettered. The request may only be made by a resolution adopted under Chapter VII of the UN Charter. Hence the Security Council may request the Court to defer his activity only if it explicitly decides that continuation of his investigation or prosecution may amount to a threat to the peace. The reference in article 16 of the Statute to Chapter VII of the UN Charter indicates that the Security Council acts in a specific capacity that does not interfere with the position of the Prosecutor within the judicial machinery that is the ICC. This does not mean that the international court is vested with the exclusive authority to prosecute these crimes. In fact, the Statute's principle of complementarity indicates that this authority is shared between the Court and the States parties. Investigations may be initiated at the request of a state, but then the Prosecutor must immediately notify all other states, so as to enable those which intend to exercise their jurisdiction to rely upon the principle of complementarity. Investigations may be initiated by the prosecutor but a Pre-Trial Chamber must authorize them and they must be notified to all states. Investigations may be initiated at the request of the Security Council, and in this case the intervention of the Pre-Trial Chamber is not required nor is notification to all states.

Clearly, however, the authority to prosecute resides with public authority, be it international or national, to the exclusion of private in-

---

[23] On the legitimacy function of the ICC procedure see the discussion under V.

dividuals. Private individuals, in particular the victims of atrocities, may not initiate any proceedings and they may also not challenge the decision of the Prosecutor not to initiate an investigation based on information provided by private individuals. The Court is designed to prosecute the most serious crimes of international concern only, crimes that transcend the personal interests of individuals.

3. Accusation Maxim

Under the pure inquisitorial system of criminal justice, the (trial) court itself commences and conducts the investigation of the case. The sole participants in the criminal procedure are the court investigating and deciding the case and the accused. Instituting a prosecutor and making the commencement of the trial depend on his or her charges (accusation) combines the effectiveness of the official prosecution of crimes and the fairness of the pure adversarial system. Protection of the accused is ensured if two independent organs need to reach the conclusion that the accused is guilty of the crimes under investigation. The Statute, without exception, realizes the accusation maxim. Part 5 of the Statute contains the two important hallmarks of the maxim: the trial of an accused depends on the Prosecutor investigating the case and formally bringing charges against the accused.

The Statute allocates the investigative function to the Prosecutor exclusively. States parties and the UN Security Council may request the Prosecutor to initiate an investigation (article 13 of the Statute (a) and (b)).[24] But this power of the States parties and of the UN Security Council is limited. In the instance of such referral, it remains for the Prosecutor to assess, in full independence, whether there is a reasonable basis to commence the investigation (article 53 (1) of the Statute).[25] This is the conclusion one arrives at when looking at article 53 (3) which provides that the Pre-Trial Chamber upon application of the Security Council or the state may review the decision of the Prosecutor not to

---

[24] Article 14 of the Statute clarifies that the State party may refer the situation to the Prosecutor for the purpose of determining whether one or more persons should be charged with the commission of such crimes. The same is true for a referral by the Security Council.

[25] See F. Hoffmeister/ S. Knoke, "Das Vorermittlungsverfahren vor dem Internationalen Strafgerichtshof – Prüfstein für die Effektivität der neuen Gerichtsbarkeit im Völkerstrafrecht", *ZaöRV* 59 (1999), 785 et seq.

proceed with an investigation. The Statute also ensures the continuing exclusive control of the Prosecutor over the investigation by force of article 53 (2) of the Statute. Under this provision, the Prosecutor may decide that there is not a sufficient basis for a prosecution at any point after the commencement of the investigation. The Statute therefore assigns to the Prosecutor the role of an independent and impartial organ responsible for seeing to it that the interests of justice and the rule of law prevail. The Prosecutor may thus bar any initiative of states or even any referral by the Security Council which may prove politically motivated and contrary to the interests of justice. Article 56 (3) (a) of the Statute on the power of the Pre-Trial Chamber to take certain investigative measures on its initiative is only a seeming exception. The Pre-Trial Chamber asserts a function as a matter of urgency that the Statute in principle assigns to the Prosecutor.

Further to the results of the investigation, the Prosecutor needs to charge the accused with specific crimes. This manifestation of the principle of accusation in the Statute entails that the charges as confirmed by the Pre-Trial Chamber at the confirmation hearing are binding for the Trial Chamber. The Trial Chamber may not expand the trial to other persons than the accused and it may not expand it to other crimes of the accused. This is confirmed by article 61 (9) of the Statute, which provides for amendment of the charges confirmed up to the start of the trial. The Court needs to confirm the charges and to commit the accused to trial, thus marking the transfer of control over the proceedings from the prosecutor to the Court. In a direct expression of this transfer of control, article 61 (9) of the Statute requires the permission of the Trial Chamber for the Prosecutor to withdraw the charges after commencement of the trial. Hence, the Prosecutor, the Pre-Trial Chamber and the Trial Chamber independently of each other need to reach the conclusion that the accused is guilty for there to be a conviction.

4. Obligation and Discretion to Prosecute (Legality and Opportunity Maxims)

The legality maxim provides that the prosecution is under a strict legal obligation to investigate and to charge each crime that has been committed. The conceptual counterpart of this maxim would grant discretion to the prosecution not to investigate or not to bring charges even if there is a high probability that the accused will be convicted of a crime if tried (opportunity maxim). The legality maxim is often thought to be

the expression of the rule of law, which would encompass enforcing the law whenever it is violated, and in equality before the law, which would require that equal treatment of the perpetrators of crimes necessitates their equal prosecution. A separate function of the legality maxim is to ensure the independence of the Prosecutor, whose legal obligation to prosecute shields him or her from political pressure not to take certain cases. But the obligation to prosecute crimes cannot be absolute. The case may be of a nature that the prosecution would disproportionately impact upon the accused or that the prosecution would inefficiently allocate the sparse resources of the criminal justice system. The Statute provides for a system of prosecution that may be best described as based on the legality maxim tempered by substantial opportunity elements.[26]

The Statute distinguishes between the commencement of an investigation and its conduct. According to article 13 of the Statute, the referral of a case by the UN Security Council or a State party and the initiation of an investigation *proprio motu* by the Prosecutor will trigger the Court's jurisdiction. Article 53 (1) of the Statute provides that in such case the Prosecutor shall commence the investigation unless he or she concludes that there is no reasonable basis to do so. No reasonable basis exists if, at this point, (a) the information available provides no 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 inadmissible, 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 decision of the Prosecutor not to proceed with the investigation is subject to review by the Pre-Trial Chamber (article 53 (3) (a) of the Statute). Once the investigation is commenced, the Prosecutor may decide not to proceed with it under the conditions set forth in article 53 (2) of the Statute. Article 53 clearly states that there is an obligation to prosecute any case that the Prosecutor is seized of by a state or by the Security Council or of which the Prosecutor takes cognizance *proprio motu*. The Prosecutor shall initiate proceedings unless the Court is without jurisdiction over the crime, the case is inadmissible or not reasonably founded on the facts, article 53 (1) (a), (b) and article 53 (2) (a), (b) of the Statute.

The Statute then deals in detail with, first, the admissibility of the case, i.e. the substantive standards, the notification requirements and

---

26 See G. Dahm/ J. Delbrück/ R.Wolfrum, *Völkerrecht*, Volume I/3, 2nd edition, 2002, § 199.

the preliminary rulings and other judicial control procedures (arts 17, 18 and 19 of the Statute).[27] Article 19 of the Statute sets forth the procedure for separately challenging the Court's jurisdiction.[28]

This obligation to prosecute is tempered by the important article 53 (1) (c) and article 53 (2) (c) of the Statute which provide that the Prosecutor need not initiate an investigation if he or she reaches the conclusion that "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". This is essentially a discretionary decision that needs to balance interests and to prioritize the overall limited resources of time and personnel. The Statute allocates this power to both the Prosecutor and the Pre-Trial Chamber.[29] For the Pre-Trial Chamber may review the Prosecutor's discretionary decision not to proceed with an investigation on its own initiative.[30] In contrast, any review of the Prosecutor's decision not to commence or not to proceed with an investigation because of lack of substantial basis,

---

27 See M.H. Arsanjani, "Reflections on the Jurisdiction and Trigger-Mechanism of the International Criminal Court", in: H. von Hebel (ed.), *Reflections on the International Criminal Court, Essays in Honour of Adriaan Bos*, 1999, 57 et seq. (68-70).

28 Any challenge to the jurisdiction of the Court or the admissibility of a case shall take place prior to or at the commencement of the trial (article 19 (4) of the Statute). Prior to the confirmation of the charges, challenges to the admissibility of a case or challenges to the jurisdiction of the Court shall be referred to the Pre-Trial Chamber, thereafter to the Trial Chamber (article 19 (6) of the Statute). Challenges to the jurisdiction of the Court or the admissibility after the commencement of the trial require the leave of the Court (Rule 133 RPE).

29 See Rule 110 (2) RPE pursuant to which the decision of the Pre-Trial Chamber not to confirm the decision taken by the Prosecutor under article 53 (1) (c) or (2) (c) of the Statute has the effect that he or she "shall" proceed with the investigation or prosecution. This is different from the effect of the Pre-Trial Chamber's decision under article 53 (3) (a) of the Statute as defined in Rule 108 (2) RPE. Under this latter Rule, the Pre-Trial Chamber may request the Prosecutor to review his or her decision not to initiate an investigation or not to prosecute.

30 Article 53 (2) of the Statute obligates the Prosecutor to inform the Pre-Trial Chamber of the decision not to proceed with an investigation that has been commenced. Rule 105 (4) RPE provides that the Prosecutor shall inform the Pre-Trial Chamber in writing of his or her decision not to commence the investigation if this decision is taken on the basis of article 53 (1) (c) of the Statute.

lack of jurisdiction or inadmissibility can take place only upon application by a party that has standing. The obligation to prosecute any crime over which the Court is exercising its jurisdiction does not suffer an exception because of article 15 (4) of the Statute. Under this provision, the Pre-Trial Chamber needs to authorize the commencement of the investigation initiated *proprio motu* by the Prosecutor.[31] But this serves to confirm judicially that the pre-conditions of a reasonable basis, jurisdiction and admissibility for prosecution of a case are actually met.

Under the Statute, the legality and the opportunity maxims operate on the international and the national levels. The Statute acknowledges that the states' prosecution of the crimes with which the Statute is concerned enjoys priority over the international prosecution.[32] However, states have to actively assert their priority jurisdiction. Thus, States parties have to prosecute or to hand over the suspect to prosecution by the Court. Their discretion to choose between these two alternatives is unfettered under the Statute; the Statute does not set forth any further requirements in this respect and neither do the RPE.[33] Article 17 of the Statute provides that the case shall be inadmissible where it is being investigated or prosecuted by a state which has jurisdiction over it, unless the state is unwilling or unable genuinely to carry out the investigation. Over the course of the investigation, the case needs to be admissible for the investigation to proceed. The Prosecutor has several avenues to clarify the admissibility of a case. This issue will be considered by the Pre-Trial Chamber when it is asked to authorize an investigation initiated *proprio motu* (article 15 (4) of the Statute). Upon application by the Prosecutor, the Pre-Trial Chamber may also authorize an investigation started by a referral from a state if that or another state has requested the Prosecutor to defer to it within one month of receipt of the notification of the referral by a state (article 18 (2) 2nd sentence of the Statute). The Prosecutor may also review a deferral after six months if the state is unwilling or unable to carry out the investigation and com-

---

31 The authorization of the investigation initiated *proprio motu* needs to be obtained prior to the notification of states of the investigation which article 18 (1) of the Statute imposes on the Prosecutor.

32 See Cassese, see note 15, 158; N. Gillhoff, "National State and International Criminal Justice – How much Sovereignty has to be transferred?", in: Roggemann/ Sarcevic, see note 14, 91.

33 Rule 51 RPE permits a State party challenging the admissibility of a case to introduce evidence as to the functioning of its court system.

mence his or her own investigation (article 18 (3) of the Statute).[34] After the confirmation of the charges, the admissibility of the case remains open to challenge. Under article 19 (4) the admissibility of a case may be challenged only once. The challenge shall take place prior to or at the commencement of the trial. A state is not barred from bringing the challenge because it neglected to request the Prosecutor to defer to the state's investigation pursuant to article 18 (2) of the Statute.

The Statute seeks to ensure that the competent jurisdiction to prosecute and to try be prescribed by law as precisely as possible. This involves the Court's jurisdiction, the determination of the competent division of the Court, and the designation of the concrete Chamber that is to make the ruling. The Court shall satisfy itself that it has jurisdiction in any case brought before it (article 19). Article 19 of the Statute provides for a special procedure to judicially control the jurisdiction of the Court or the admissibility of a case. The jurisdiction of the Court may be challenged by the accused and by states having jurisdiction (article 19 (2)). The Prosecutor's role as an objective administrator of justice is put into relief by the fact that he or she may seek a ruling. The Statute provides for the Pre-Trial Chamber to rule on any challenge prior to the confirmation of the charges while the Trial Chamber is competent after this point in time. Decisions of either Chamber may be appealed to the Appeals Chamber in accordance with article 82 of the Statute. The Statute puts the decision on the precise composition of the competent Chambers into the hands of the Presidency.

5. Evidence

The Court's evidence procedure is autonomous from state procedures.[35]

---

[34] The Statute does not say explicitly that the Prosecutor's decision to commence the investigation pursuant to article 18 (3) needs authorization by the Pre-Trial Chamber. However, article 18 (2) 2nd sentence on the authorization by the Pre-Trial Chamber for an investigation to commence in spite of deferral request would apply by analogy to article 18 (3). At any rate, any investigation initiated by the Prosecutor *proprio motu* under arts 13 (c) and 15 of the Statute needs to be authorized by the Pre-Trial Chamber.

[35] Rule 63 (5) provides that the Chambers shall not apply national laws governing evidence, other than in accordance with article 21.

a. Examination of Facts and Evidence

As a matter of principle, a criminal justice system may impose on the courts the obligation to seek to establish the facts of the case pursuant to the objective of substantive truthfulness. The counter-model is satisfied with the mere formal truth of the facts that have been established pursuant to an overall trial based on the equality of arms of prosecution and the accused.

The Statute does not contain any comprehensive obligation for the Trial- or the Pre-Trial Chamber to establish the facts through its own investigation of the case. Article 64 (2) of the Statute on the functions and powers of the Trial Chamber provides that the Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses. But, in performing its functions prior to trial or during the course of trial, the Trial Chamber may, as necessary, order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties (article 64 (6) (d) of the Statute). Article 69 (3) of the Statute on evidence says that the Court shall have the authority to request of the parties the submission of all evidence that it "considers necessary for the determination of the truth". This is corroborated by the conception of the Prosecutor, an organ of the Court, as an impartial truth seeker or organ of justice.[36] These provisions, and in particular article 69 (3) of the Statute, obligate the Trial Chamber to base its decision on the objective or substantive truth not on the formal truth that emerges from the action and initiative of the parties. Consistent with this analysis, the Court is not bound by agreements between the parties on evidentiary issues. Under Rule 69 RPE there can be agreement between the Prosecutor and the defence that a particular piece of evidence is not contested. Accordingly, a Trial Chamber may consider such alleged fact proven. But the Chamber may also require a more complete presentation if it considers it to be in the interests of justice, in particular the interests of the victims. The Trial Chamber is also not bound by a guilty plea by the accused.

---

[36] See article 54 (1) (a) of the Statute, which provides that "[i]n order to establish the truth", the Prosecutor shall "extend the investigation to cover all facts and evidence related to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally".

The Statute thus reflects a certain understanding of justice. Equality is the core content of the contingency formula justice. A system that runs its internal operations by way of pieces of information always has several options for doing so; the system's choice is contingent and justice is the contingency formula of the legal system.[37]

b. Immediacy

The Trial Chamber shall take immediate cognizance of all evidence that it will base the judgment on. The Statute provides for three different methods of taking the testimony of witnesses. First, the witness testifies in person before the Court. Second, evidence may be given by means of testimony through video or audio linkage in a place outside the courtroom where the witness is present. Finally, witness depositions may be taken outside the courtroom. The use of such depositions as evidence is subject to restrictions. A preference should be entered for hearing witnesses in full court since that will allow the Court to form an opinion on the witness' reliability. The presence of the witness at the trial affords the best guarantee for respecting the accused's right to examine witnesses against him, as enshrined in article 67 (1) (e) of the Statute.

c. Free Assessment of all Evidence

Article 66 of the Statute defines the general standard of proof. The accused must be proved guilty beyond reasonable doubt. The burden of proof is on the Court. A direct consequence is the *in dubio* principle under which a fact about which the Trial Chamber remains uncertain needs to be considered not proved. The Trial Chamber is free in the assessment of the evidence submitted by the parties within the confines of the strict evidentiary norms that the Statute and the RPE provide for. The rules of evidence shall apply in proceedings before all Chambers. A Chamber shall have the authority to assess freely all evidence submitted in order to determine its relevance or admissibility (Rule 63 (2) RPE). Corroboration shall not be imposed (Rule 63 (4) RPE). This does not free the Chamber from the obligation to substantiate its findings. The Chamber's judicial assessment does not cover scientific questions. Certain evidence may not be admissible for reasons considered to be of superior interests. The privilege of the accused against self-incrimination is chief among them (article 67 (1) (g) of the Statute). The admissibility

---

37 Luhmann, see note 3, 222-226.

of evidence obtained illegally is subject to the conditions set out in article 69 (7) of the Statute.

6. Form

a. Public and Oral Hearing

The Statute prescribes public and oral hearings in the presence of the accused for the important stages of a proceeding (arts 61 (1), 63, 64 (7), 67 (1) of the Statute). This concerns the confirmation hearing and the trial itself. The Statute foresees a proceeding *in absentia* for the confirmation of the charges before trial. The Pre-Trial Chamber may, upon request of the Prosecutor or on its own motion, hold trial in the absence of the person charged to confirm the charges on which the Prosecutor intends to seek trial when the person has waived his or her right to be present; or fled or cannot be found and all reasonable steps have been taken to secure his or her appearance before the Court and to inform the person of the charges and that a hearing to confirm those charges will be held (article 61 (2) of the Statute).[38] In that case, the person shall be represented by counsel where the Pre-Trial Chamber determines that it is in the interest of justice. The importance of the principle of a public and oral hearing is confirmed by the narrow conditions under which proceedings *in camera* are permissible.[39] The Statute does not prescribe hearings for the decisions that the Court may have to take during the Pre-Trial phase of the Court's procedure. This includes the authorization of the commencement of an investigation (article 15 (4) of the Statute) and the review of the Prosecutor's decision not to proceed with an investigation (article 53 (3) of the Statute). The Chamber may hold a hearing.[40]

---

38 The procedure to be followed is set out in detail in Rules 123-125 RPE.

39 See arts 64 (7), 68 of the Statute. Under Rule 72 RPE there may be an *in camera* procedure to consider the relevance or admissibility of evidence with respect to alleged crimes of sexual violence.

40 Rule 50 on the procedure for authorization of the commencement of the investigation; Rule 55 on proceedings under article 18 (2); Rule 58 on proceedings under article 19.

b. Efficiency of the Proceeding

The Court is to conduct the process efficiently. Both the Statute and the RPE leave ample room for the competent Chamber to decide on the procedure in each case at hand taking into account the requirements of justice and speediness. In the absence of specific guidance by the Statute, the RPE leave it to the discretion of the competent Chamber to decide on the procedure to be followed.

7. Cooperation

A maxim of evidence specific to the Rome Statute is the cooperation of the ICC with the States parties to the Statute. There are two basic models of cooperation. First, the inter-state model, whereby the relations between the international court and states are shaped on the pattern of inter-state judicial cooperation in criminal matters. The second model could be termed supra-state. Under this model, the international court is empowered to issue binding orders to states and, in case of non-compliance, may set in motion enforcement procedures. The international court is given the final say on evidentiary matters: states are not allowed to withhold evidence on grounds of self-defined national interests or to refuse to execute arrest warrants or other court orders. The ICTY and ICTR based on the Chapter VII authority of the Security Council follow this coercive model through judge-made rules on the general bases of their statutes.[41] The specific practice as it relates to arrest warrants and orders for transfer of an accused, requests for assistance, subpoenas to whom they may be addressed, the required breadth and specificity, the penalties for non-cooperation, were left to the judges to define. In contrast, the ICC follows a largely state-centred approach. In the case of the ICC, state cooperation is crucial to the effectiveness of the judicial process.[42] The decisions, orders and requests of international criminal courts can only be enforced by others, namely national authorities. The Court's enforcement jurisdiction is not limited to the State party having delegated its territorial or personal jurisdiction to the ICC. Rather, it extends to all States parties. States parties have to

---

41 Article 29 ICTY Statute and article 28 ICTR Statute.

42 Cassese, see note 15, 164-167.

cooperate.[43] They have to provide for proper forms of cooperation under their respective national laws. In any event, the Court's requests for cooperation are self-executing and are to be complied with (article 93 of the Statute). The Statute assumes that the taking of evidence, execution of summons and warrants is to be undertaken by state officials. In the event of non-cooperation, article 87 (7) provides that "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".[44]

A crucial provision for the effectiveness of the Court's procedure is article 90 of the Statute on competing extradition requests. The provision distinguishes between several scenarios. If the requesting state is a State party, the requested state shall give priority to the request from the Court, (article 90 (2)). If the requesting state is not a State party the Statute provides for a general priority of the Court's request (article 90 (4)). If there is an international extradition treaty and thus formally conflicting international law obligations, then the requested state has to balance the interests involved, (article 90 (6) 2nd sentence). This is the traditional rule for resolving conflicting extradition requests under the general international law of judicial cooperation. The Statute does not specify a hierarchy in case of competing requests for extradition. The Court's request thus does not automatically prevail. Under article 90 (6), (7) of the Statute, a State party may decide between compliance with the request from the Court and compliance with the request from a non-party State with which the State party has entered into an extradition treaty. The Court may take preliminary measures.[45] A crucial point of the ICC procedure, particularly given the nature of the cases that come under the jurisdiction of the Court is the bar of national security to any taking of evidence.[46] A direct consequence of the ICC's

---

43 Nothing stands in the way, however, for the Security Council to consider an instance of non-cooperation a threat to international peace and security even if the Council had not previously referred the case to the Court.

44 First enunciated by the ICTY in the Appeals Chamber decision in Blaskic (subpoena) Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, Appeals Chamber.

45 The Statute and the RPE do not specify whether these preliminary requests are binding on the States parties. In analogy to the argumentation of the ICJ in the LaGrand case the answer must be in the affirmative.

46 See article 72 of the Statute on "Protection of national security information"; O. Triffterer, "Security Interests of the Community of States, Basis and Justification of an International Criminal Jurisdiction versus Protec-

presumption that the primary responsibility for the prosecution of the crimes that fall under the Statute, is that the Statute imposes an obligation on the Court to assist national authorities.

IV. Participants of the ICC Procedure

These maxims yield the structure and the position of the participants of the ICC procedure.

1. Structure of the ICC Procedure

The Statute marks three distinct procedural phases: pre-trial, trial, and appeal.

The pre-trial phase may be subdivided in two phases, the investigation and the confirmation hearing.[47] The end of the pre-trial phase is marked by the decision of the Prosecutor to bring formal charges or not at the close of the investigation. The decision not to proceed with the investigation is solely within the competence of the Prosecutor. No confirmation by the Pre-Trial Chamber is needed. The decision to discontinue the case does not have *res iudicata* effect (article 53 (4) of the Statute). The judicial review procedures provided at this stage primarily have a subjective purpose. They serve to enforce the rights that each State party and the Prosecutor have to trigger an investigation by the Prosecutor. For there to be enforcement of the objective legality maxim, the Statute would have had to grant standing to each State party. In case the investigation has not led to discontinuation of the case, article 61 of the Statute prescribes a confirmation hearing the object of which being the judicial confirmation of the charges to be brought by the Prosecutor. This intermediate procedure chiefly serves a control function. The separate judicial decision opens up the chance for the accused to be spared the main trial and the stigma it carries. In line with this purpose, the public may be excluded from the hearing. The Statute allocates the function to the Pre-Trial Chamber so that the Trial Chamber will not be

---

tion of National Security Information, Article 72 Rome Statute", in: Roggemann/ Sarcevic, see note 14, 53.

47 In order to emphasize the importance of the confirmation hearing one may speak of an intermediate phase.

prejudiced for the actual trial.[48] For the accused's procedural position, the importance of the intermediate proceeding lies in the fact that he or she will receive a copy of the document containing the charges, be informed of the Prosecutor's evidence and thereafter have the chance to present fresh evidence in his or her defence. In deciding whether to confirm the charges, the Pre-Trial Chamber shall apply a standard obviously higher than the reasonable basis test that needs to be met for the investigation to proceed: there needs to be sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged (article 61 (7) of the Statute). The Pre-Trial Chamber needs to be convinced of the Court's jurisdiction and the admissibility of the case. Upon confirmation of the charges, the Pre-Trial Chamber *uno actu* commits the accused to trial. The President of the Court will then designate the Trial Chamber for the case. It corresponds to the spirit of the competence of the Pre-Trial Chamber for the confirmation hearing that the actual Trial Chamber designated for the case does not comprise any judge that sat on the Pre-Trial Chamber. The confirmation of the charges marks the transfer of competence from the Pre-Trial Chamber to the Trial Chamber Division of the Court to rule on preliminary issues of jurisdiction and admissibility (article 19 (6) of the Statute). The decision of the Pre-Trial Chamber to confirm the charges is not subject to appeal. The decision not to confirm the charges may be appealed by the Prosecutor. Trial is mandatory.

For the structure of the trial phase, a crucial first juncture is the decision to have a unitary process where the court (the Trial Chamber) decides both on the verdict and, in case of a conviction, the sentence, on the basis of a single hearing. The overall structure is rather modelled on the civil law system insofar as the trial and sentencing phases are integrated.[49] There is no separate sentencing phase. The Court's procedure

---

48 Under the German criminal justice system, the trial court is competent to confirm the charges but only the professional judges not the jurors will sit on the court for this purpose. While in some criminal justice systems in the United States the same judge who tries a case is likely to have reviewed the minutes of the prior grand jury proceeding, the evidence presented to the grand jury is usually only the bare minimum necessary to obtain the indictment. Although there may have been hearings before the trial, such hearings generally relate to the admissibility of evidence, and they rarely permit or require the attorneys to explore the merits of the substantive case.

49 The ITCY originally followed the different model of designing the trial and the sentencing phases as separate procedural phases.

under the ICC combines structural elements of the inquisitorial and the adversarial processes.[50]

The inquisitorial process puts both the investigation and the actual conduct of the trial into the hands of the court. In the two principal models of criminal justice, the adversarial and the inquisitorial, the role of the judge differs. The adversarial model, exemplified by the American and British systems, assumes that justice is best served by giving the prosecutor and defense counsel primary responsibility for the development and presentation of their own cases. In this model, the judge is a neutral and detached magistrate whose function is to mediate and resolve the opposing parties' inevitable conflicts. Reacting to both the legal and evidentiary presentations and contentions of the parties, the judge determines the law and, when required, finds the facts. In the inquisitorial model, exemplified by the French and German criminal justice systems, the judge has primary responsibility not only for determining the relevant facts but also for gathering and eliciting those facts. The parties assist the judge in this task, but their role is only secondary and supportive.[51] The different approaches of the two models are most striking in the context of a trial. In an inquisitorial trial, the initiative for both calling and questioning witnesses lies with the judge, who relies on a dossier compiled (at least theoretically) under judicial supervision in the pre-trial investigative and charging phases. The prosecutor and defense counsel aid the judge in developing the facts. In an adversarial trial, each side calls its own witnesses and vigorously cross-examines those called by the other. The judge supervises the presentations of the parties, assuring that the trial is fair and that it adheres to the applicable rules of procedure and evidence. If the trial is by jury, the judge pro-

---

50 On the contrasts between the inquisitorial and adversarial (or accusatorial) models, see A.S. Goldstein/ M. Marcus, "The Myth of Judicial Supervision in 'Three Inquisitorial' Systems: France, Italy and Germany", *Yale L. J.* 87 (1977), 240 et seq. (242-243) note 7, and the literature cited therein. In 1989 Italy abandoned its inquisitorial system in favor of an adversarial one. See L.S. Fassler, "The Italian Penal Procedure Code: An Adversarial System of Criminal Procedure in Continental Europe", *Colum J. Transnat'l L.* 29 (1991), 245 et seq.

51 There is substantial literature though detailing that in these systems, too, the use of practical legal and extra-legal compromises which permit shortcuts to full-blown fact-finding at trial and which substantially limit judicial control of the investigative, pre-trial and trial process. See J.H. Langbein/ L.L. Weinreb, "Continental Criminal Procedure: Myth and Reality", *Yale L. J.* 87 (1978), 1549 et seq.

vides the jury with legal guidance, and the fact-finder — whether the judge or jury — determines the verdict based solely upon the evidence presented by the opposing parties.

Without a dossier or its equivalent, the judge in the adversarial system — like the jury — usually knows little more than the broad outlines of the evidence until it is presented during the trial. The differences between the inquisitorial and adversarial models are equally evident in their attitude toward the disposal of cases without trial. At least as a theoretical matter, the inquisitorial model requires that every case receives a full judicial inquiry and that the disposition of the case be whatever the facts so found demand. It does not permit a compromise in which a defendant's admissions and an agreed upon disposition substitute for a trial and verdict. By contrast, the reliance the adversarial model places upon the parties to protect and advance their respective positions makes permissible, and even desirable, an outcome upon which they can mutually agree through the guilty plea and plea bargaining. It is clear, however, that in order to function effectively, a system based on either model must assure that the model's assumptions have some basis in fact and, to the extent that they do not, that some compensation is made for the inadequacies of court or counsel. The effectiveness of the inquisitorial process, however, is outweighed by the danger that the court will be psychologically disposed to lean towards a guilty verdict. The pure adversarial model where the investigation is left to the parties and the court's role is limited to leading the proceeding, cannot ensure that the verdict is based on substantive factual truth as opposed to purely procedural factual truth. In an adversarial system, on the other hand, if one or both of the parties are not effective advocates, a judge seeking to be "neutral and detached" might fail to take a more active role in the proceedings. Thus, important factual or legal aspects of the case, favoring either or both sides, might remain inadequately explored or even entirely undeveloped.

The ICC procedure is structured on the adversarial process model but contains such substantial elements of the inquisitorial model that it yields a mixed process system. The Statute follows the adversarial process model by allocating the tasks of investigation and actual trial to two different bodies, i.e. the Prosecutor and the Court (the Pre-Trial Chamber). This section will examine to what extent the ICC procedure limits the judge to the reactive role contemplated by the adversarial model, and it will examine whether and how judicial intervention may compensate for the failures of the parties to play their assigned roles ade-

quately in a particular case.[52] The main structural provision of the Statute of the trial phase is contained in article 64 (8) (b). This provision defines the court's role at the trial. It gives the presiding judge of the Trial Chamber the task of giving directions for the conduct of proceedings. Only if the presiding judge does not give directions under article 64 (8) of the Statute, the Prosecutor and the defense shall agree on the order and manner in which the evidence shall be submitted to the Trial Chamber (Rule 140 RPE). The Trial Chamber is not charged with examining the case and raising relevant evidence. Rather the parties, the Prosecutor and the accused are to submit the evidence supporting their case. The procedure is thus adversarial in that the Prosecutor and the accused control the proceeding including the presentation of evidence at trial.

But the adversarial system is strongly attenuated by two structural elements. First is the role that the Statute assigns to the Court. The court does not examine the case in order to assess whether there is criminal responsibility. But it gives the court powers that preclude control of the parties over the facts and evidence. Chief among these is the power of the Court to request the parties to provide additional evidence and the power of the court to block any evidentiary understandings of

---

52 Throughout the American criminal justice system, the principles of the adversarial model are respected by the assumption that at trial the prosecutor and the defense attorney can themselves best present the opposing views of fact and law. On the one hand, trial and appellate rules generally uphold convictions even if they result from defense strategies that seem, at least in retrospect, to have been unhelpful to the defendant's case. On the other hand, convictions are reversed in which the court has unnecessarily intervened in the course of the trial. In some cases, however, judicial intervention is deemed necessary either to enhance the truth-seeking process or to protect the accused's right to an effective defense. Certain state systems recognize a more active role to the judge. The New York Court of Appeals, for instance, has recognized a variety of situations in which judicial intervention is appropriate: "when it clearly appears to the judge that for one reason or another the case is not being presented intelligibly to the jury, the judge is not required to remain silent. On the contrary, the judge may, by questions to a witness, elicit relevant and important facts". A trial judge may "seize the affirmative, when proper and necessary, to clarify perplexing issues, to develop significant factual information, to enforce propriety, orderliness, decorum and expedition in trial". All of these observations by the New York Court of Appeals, however, carry with them a warning: "In the last analysis ... [the judge] must be guided by the principle that his function is to protect the record, not to make it".

the Parties. These powers of the court correspond to the structural decision of the Statute for a single court to conduct the proceeding and to enter the verdict. A second structural element of inquisitorial process is that the Statute does expressly bar the Prosecutor from the role of the incriminator.[53] The "parties" to the ICC procedure are asymmetrical both with respect to their rights and to their obligations. And there are other participants as well. The ICC procedure can thus be described as semi-adversarial.

The accused acquires a right to an acquittal as a result of a full trial. There is also the possibility for appeal (article 82 of the Statute). Appeal and enforcement of the jugdment may be added depending on the outcome of the trial.

2. The ICC and the National Courts

It is clearly the task of the judicial divisions of the Court to safeguard the rights of all participants. This includes the rights of the individual (the accused and other persons).

Any investigative measure involving the infringement of the right to personal freedom requires permission by the Pre-Trial Chamber. Also, the exceptional power of the Prosecutor to take specific investigative steps within the territory of a State party without having secured the cooperation of that state under Part 9 is subject to confirmation by the Pre-Trial Chamber (article 57 (3) (d) of the Statute).[54] Witnesses are currently the most important type of evidence in front of the *ad hoc* Tribunals. The laws of all International Criminal Tribunals provide judges with the power to order the attendance of witnesses. The judges' power to order the attendance of witnesses is contained in the Statute and the Rules. The ICC has the power to issue arrest warrants.[55] However, the

---

53 Aside from the obligation to investigate the exculpatory facts and evidence and the extensive disclosure obligation the Prosecutor's special role is also evidenced by the fact that the Prosecutor may appeal a Trial Chamber decision of acquittal or conviction or against sentence on its own behalf and on behalf of the accused (article 81 (1),(2) of the Statute).

54 The investigative measures may be authorized only if the state is clearly unable to execute a request for cooperation due to the unavailability of any authority or any component of its judicial system competent to execute the request for cooperation under Part 9 of the Statute.

55 As do the *ad hoc* International Criminal Tribunals.

rights of the accused require certain safeguards for the issuance of such warrants. These safeguards are often reflected in the law of the International Criminal Tribunals by providing for specific procedures, such as the requirement that the accused be provided with certain minimum information during his or her arrest. In the ICTY and ICTR only judges have the power to issue arrest warrants.[56] The right of the participants to challenge a Court decision is the technical mechanism through which the Statute ensures that the various participants may actively enforce the rights and the position they have under the Statute. It is an indispensable tool for ensuring that the proceedings be under the rule of law as adjudicated autonomously by the Court.

This can be demonstrated with the arrest power crucial both for the effective proceeding of the Court and the fairness of the trial that is better served by trial in the presence of the accused. The Statute therefore provides for a detailed arrest procedure. Article 58 provides that solely the Pre-Trial Chamber may issue a warrant of arrest of a person. This power of the Court is made conditional on an application by the Prosecutor. The standard is the reasonable basis test that is the prevalent in the pre-trial phase. As an alternative to seeking an arrest warrant, the Prosecutor may submit an application requesting that the Pre-Trial Chamber issue a summons for the person to appear (article 58 (7) of the Statute). The Statute does not provide for an emergency power of the Prosecutor.[57] The crucial arrest proceedings in the custodial state are regulated separately in article 59, which refers to the general provisions on cooperation between the Court and the States parties contained in Part 9 of the Statute. This provision addresses the State party that has actual control over the person regardless of whether that state, being a party to the Statute, fulfills the precondition to the exercise of the Court's jurisdiction within the meaning of article 12 of the Statute. In fact, the state requested need not be a party to the Statute at all but may enter into an *ad hoc* arrangement, an agreement or any other appropriate basis on the basis of article 87 (5) of the Statute. Article 59 (2) pro-

---

56 In contrast to the International Military Tribunals in Nuremberg and Tokyo, where only the prosecutors had such power. Under the IMT's Statutes, the power of the judges was provided only after the commencement of the trial procedure. During the investigation, the prosecutors of the four Allies were solely responsible for the designation of the accused persons and for the preparation and even the final approval of the indictments. Arts 14 (b) and (c), art. 15 (b) and (c) Nuremberg Statute.

57 As it is foreseen under, e.g., the human rights standards of the German Basic Law, article 13.

vides a second judicial protection insofar as the person arrested in the custodial state shall be brought promptly before a judicial authority. Based on the concept of judicial protection through inter-level cooperation,[58] the person arrested shall be brought promptly before the competent national court. That court will have to rule on the external legality of the arrest,[59] not on its internal legality decided previously by the international court. The model is not just that of classic horizontal judicial cooperation. Part 9 provides for an important reserve function of the Assembly of the States in the actual operation of the Statute. For the Court may refer a case of non-cooperation by a state to the Assembly of States. The decision of that body is binding on the state concerned. While neither the Statute nor the RPE provide so explicitly, this is the sound interpretation of the Court's procedure. Article 87 (7) lists the Security Council and the Assembly of States Parties as the relevant venues for the Court to turn to after finding a state to be in non-compliance with the request for cooperation. Most importantly, direct investigative steps may be carried out by the Prosecutor. The Prosecutor in fact assumes a reserve or subsidiary function here that is very much in line with the Statute's approach to the issue of jurisdiction allocation between the international and the national level.

Secondly, the Court is in charge of safeguarding the sovereign rights of States parties. Investigative steps of the Prosecutor on the territory of a State party are thus subject to prior authorization by the Court, thus safeguarding the right of States parties, the institutional equilibrium of Prosecutor, States parties, the Assembly of States Parties, and the Trial Chamber.

---

58 Vertical inter-level judicial cooperation has been a long-standing feature of European integration. See V. Röben, *Die Einwirkung der Rechtsprechung des Europäischen Gerichtshofs auf das Mitgliedstaatliche Verfahren*, 1998. Recently, the German Federal Constitutional Court has relied on this concept to explain the applicable constitutional standards for prosecution of an alleged case of genocide in the Former Yugoslavia in the German courts.

59 See article 59 (2) (a) of the Statute that the warrant applies to that person, (b) the person has been arrested in accordance with the proper procedures and (c) the person's rights have been respected. This needs to be read in conjunction with article 88 of the Statute according to which States parties shall ensure that there are procedures available under their national law for all forms of cooperation specified.

3. The Parties

a. The Prosecutor

The central function of the Prosecutor is executive, that is the investigation of crimes under the Statute. In addition, the Prosecutor may propose amendments to the Elements of Crimes (article 9 (2) (c)) and to the RPE (article 51 (2) (c) of the Statute). The position of the Prosecutor under the ICC procedure hinges on three elements: the independence in the conduct of an investigation, the judicial control of important decisions of the Prosecutor, and the obligation on the prosecutor of objectivity.

aa. The Prosecutor's Functions and Powers to Investigate

Arts 13 (c), 15 in conjunction with arts 53, 54 of the Statute set out the function and powers of the Prosecutor in the investigative phase of the case. The Statute does not define what it considers an "investigation and prosecution". It indicates, however, that "investigation" involves an action that may be taken with respect to a situation or an individual while "prosecution" involves actions taken with respect to a specific person, in other words a prosecution is an investigation at a more advanced stage.[60]

According to article 15 (3) of the Statute, the Prosecutor may initiate investigations *proprio motu* that trigger the jurisdiction of the Court under article 13 (c). After evaluating the available information and irrespective of the source of the relevant information, the Prosecutor must initiate the investigation, unless there is no reasonable basis to proceed under the Statute (article 15 (3) and article 53 (1) of the Statute, Rule 48 RPE). The Prosecutor is independent from the UN Security Council. Under article 13 (b), the UN Security Council can trigger the jurisdiction of the Court by alerting the prosecutor to situations in which one or more of the crimes listed in article 5 "appears to have been committed". But the further decisions of the Prosecutor to initiate an investigation, and to proceed with it, are subject to the criteria set forth in the Statute only and cannot be overridden by the Security Council acting under Chapter VII of the Charter. The Statute accords the Prosecutor the power to initiate an investigation and to collect evidence upon his

---

60 Cf. arts 13, 14, 15, 18 (1) (2), 19 of the Statute.

or her interpretation of both the law and the facts.[61] Once commenced, the Prosecutor must proceed with the investigation unless there is no reasonable basis to do so.

bb. The Requirement of Objectivity

The Prosecutor may, on behalf of the accused, appeal the decision or the sentence of the Trial Chamber on any ground that affects the fairness or reliability of the proceedings or decision (article 81 (1) (b) (iv) of the Statute).

cc. Judicial Review of the Prosecutor's Actions

Many of the important decisions of the Prosecutor can be challenged in the Pre-Trial Chamber. Importantly, the power of the Prosecutor to commence an investigation *proprio motu* is subject to authorization by the Pre-Trial Chamber applying the same standard as the Prosecutor (arts 15 (4) and 53 (4) of the Statute). This is true with respect to decisions of the Prosecutor negatively not to proceed with an investigation which are subject to control by the Pre-Trial Chamber, which shall apply the same standards as the Prosecutor. The Pre-Trial Chamber's ruling is definitive only with respect to the issue of the reasonable basis for an investigation. The assessment of jurisdiction and admissibility is expressly designated as preliminary by the Statute. The Pre-Trial Chamber reviews the Prosecutor's decisions upon request only. But the Prosecutor's decisions not to proceed with an investigation based on the ground that "the prosecution is not in the interests of justice" (article 53 (1) (c) and (2) (c)) are an exception since the Pre-Trial Chamber may review them on its own initiative. The decision of the Prosecutor to discontinue an investigation started *proprio motu* on the ground that there is no reasonable basis for a case is not open to review. However, if either a State party or the UN Security Council then refers this situation to the Prosecutor they would have standing to challenge any discontinuation of the investigation. Given these mechanisms the Statute thus

---

61 The Statute permits the Prosecutor to do the following: Conduct a preliminary examination, evaluate the information made available, seek "information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate", and receive "written or oral testimony at the seat of the Court" (article 15 (2) of the Statute).

assumes that the work of the Prosecutor is closely followed if not monitored by the States parties and the UN Security Council. This co-operation assumption works two ways.[62] Through this cooperation, the Statute implements the officiality maxim as implemented through complementary prosecution on the international and the national level. According to article 17 (1) of the Statute it is for the Court to rule that the case is inadmissible for reasons of complementary action at the national level. In order to have certainty on this issue, the Prosecutor may seize the Pre-Trial Chamber. This forces the potentially competent States parties to declare their intentions with regard to the case concerned. Specific investigative actions may be challenged in court and thus may be subject to judicial review.

dd. The Functions and Powers of the Prosecutor at Trial

Part 6 on the Trial contains no specific provision regarding the Prosecutor. Rather, the functions and powers set out in the previous Part 5 on Investigation and Prosecution carry over. At trial, the Prosecutor has to present all the facts and evidence relevant to whether there is criminal responsibility under this Statute. This encompasses both incriminating and exonerating circumstances. The Prosecutor also has extensive disclosure obligations. Although structured symmetrically, the position of the Prosecutor under the Statute ensures that disclosure is primarily an instrument of the accused. It is quite consistent, then, that the Statute and the RPE set forth extensive disclosure provisions.[63]

b. The Accused

The Statute regards the accused as a subject of the proceedings. The accused necessarily is the object of the court's criminal jurisdiction and certain infringements of his personal freedom and bodily integrity. But the Statute ensures that the accused has active and passive procedural

---

62 See text at note 31.

63 See article 67 (2) of the Statute for the Trial and Rule 83 RPE. Rule 76 RPE provides for pre-trial disclosure relating to prosecution witnesses, Rule 77 RPE for inspection of material in possession or control of the Prosecutor. Rule 81 RPE is concerned with the restrictions on disclosure. Neither the Statute nor the RPE define the appropriate venue for judicially challenging the decisions of the Prosecutor under these Rules.

rights that allow him or her to influence the proceedings.[64] The position of the accused is firmly rooted in the principle of fair trial (article 67 of the Statute) that flanks the presumption of innocence (article 66). Equivalent protection is afforded to persons subject to an investigation (article 55 of the Statute).[65] Furthermore, the Statute contains a number of human rights guarantees applicable to the criminal proceedings. Among them is the right to personal freedom that is protected by the strict standards for any arrest procedures in the interest of personal freedom.[66]

Article 67 guarantees the accused the right to a fair trial.[67] The right to a fair trial contains several elements which are specifically important to the defence before International Criminal Tribunals. The most important of these rights are: the assistance of learned counsel, adequate time and facilities for the defence preparations, cross-examine prosecution witnesses and examine one's own witnesses. The use of the word "accused" in the Statute, instead of "everyone" in the conventions does not mean that only formally accused persons are beneficiaries of that right. The Statute leaves the terminology of accused for those whose charges have been confirmed. In article 61 (9) of the Statute on the confirmation hearing, the term "accused" appears for the first time, after a consistent use of the word "person" in the preceding paragraphs.[68] Article 67 (1) of the Statute summarizes the active rights of the accused at trial. Chief among them is the right of the accused to a public hearing. Under this principle, the Court may base its decision solely on facts and evidence on which the accused has had a chance to take a position. At the trial, the accused's right to be heard is pervasively guaranteed. At the pre-trial stage, the accused's right to be heard by the Court is guaranteed through standing to challenge the major decisions of the Prosecutor in court (Pre-Trial Chamber). The Statute does not allow trials *in absentia* (arts 63 (1), 67 (1) (d) of the Statute), except under the condi-

---

64 See, in particular, article 64 (2) of the Statute.

65 See, generally, on the human rights relevance of the pre-trial period, R. Grote, "Protection of Individuals in the Pre-Trial Procedure", in: Wolfrum/ Weissbrodt, see note 19, 699 et seq.

66 See article 58 of the Statute according to which solely a judicial authority not the prosecutor may issue the arrest warrant under conditions set forth by law (in the instance: international treaty law).

67 See article 21 ICTY Statute, article 14 ICCPR, article 6 ECHR.

68 See K.S. Gallant, "The Role and Powers of Defense Counsel in the Rome Statute of the International Criminal Court", *Int'l Law.* 34 (2000), 21 et seq.

tions set forth in article 63 (2).[69] However, when the accused is tried *in absentia*, counsel for the accused should be permitted to participate.[70] Further minimum guarantees are the defence rights, in particular to have adequate time and facilities for the preparation of the defence and to communicate freely with the counsel of the accused's choosing in confidence, (article 67 (1) (b) of the Statute). Important under the Statute's system, the accused has the right to examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her; the accused shall also be entitled to raise defences and to present other evidence admissible under this Statute, (article 67 (1) (e) of the Statute). The Prosecutor shall, of its own motion and as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of the prosecution evidence.[71] This fundamental premise is reflected in many provisions of the Statute. According to article 19 (2) (a), the accused may bring a challenge to the admissibility of a case on the grounds referred to in article 17 of the Statute or a challenge to the jurisdiction of the Court. The position of the accused is largely identical to that of a person for whom a warrant of arrest or a summons to appear has been issued un-

---

69 This procedure has been used in the proceedings against Karadzic, Mladic and several others. See S. Furuya, "Rule 61 Procedure in the International Criminal Tribunal for the Former Yugoslavia: A Lesson for the ICC", *LJIL* 12 (1999), 635 et seq.

70 But cf. ICTY proceedings against Karadzic.

71 This disclosure requirement of the Statute is considerably stricter than that under United States constitutional standards. The leading case on the prosecutorial duty is Brady v. Maryland. In separate trials, the petitioner and a companion were convicted of first degree murder and sentenced to death. At his trial, the petitioner admitted participating in the crime but claimed that his companion had done the actual killing. Prior to trial, the petitioner's attorney requested that the prosecution allow him to examine the companion's extrajudicial statement. One such statement, in which the companion admitted the actual killing, was withheld by the prosecution and did not come to the petitioner's attention until his conviction was confirmed by the state appellate court. The Supreme Court held that: "The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or the bad faith of the prosecution".

der article 58 of the Statute. The defence may raise the issue. Although one of the requirements of fair trial is the equality of arms of the parties, that principle needs to be interpreted in the light of the structural decisions of the Statute. The fact that the Prosecutor is an organ of the Court thus does not raise questions.[72] With regard to the position of the defence at a hearing in The Hague, an analysis of the provisions of the Statute and the RPE for the ICC indicate that the procedural position of the defence is equal to that of the prosecution. The Statute requires the defence to take the initiative regarding the collection of evidence in its own case. While the Statute is silent on the rights of the defence at this stage,[73] the RPE contain several important specifications. The defence must be entitled to submit requests of evidentiary action to the Prosecutor using the latter's special powers under the Statute. However, the Statute does not provide for judicial review of the Prosecutor's decision on such a request. Throughout the proceedings, the case presented by the prosecution has to satisfy a standard defined by the Court.[74] This is so with respect to the commencement of an investigation (article 15), the taking of certain particularly important investigative measures (warrant of arrest, summons to appear). The role of the defence counsel is to challenge the prosecutor's evidence and witnesses, its theory of culpability and occasionally the jurisdiction of the court itself.[75] The Court procedure supports the defence. This includes assisting arrested persons, persons to whom article 55 (2) of the Statute applies and assisting the accused in obtaining legal assistance. The Court procedure provides for the assignment of legal assistance (article 55 (2) (c) of the

---

72 But see A. Klip, "State Security and Obtaining Evidence Independently by the Defence", in: Roggemann/ Sarcevic, see note 14, 127 et seq. (131).

73 The existing law and practice of the ICTY may be instructive. The Court's RPE provide that a state, which has failed to comply with obligations under the Statute, may be reported to the UN Security Council by the President. The Prosecutor may conduct investigations and may request states to take provisional measures. At the request of either party, or *proprio motu* states must co-operate with the Tribunal promptly. Depositions may be taken at the request of either party, but only the Trial Chamber may so order.

74 In the Jelsisic case, the ICTY-Trial Chamber terminated the hearing after the initial presentation of the case by the prosecution on the ground that it had not satisfied the standards imposed by the Trial Chamber.

75 Gallant, see note 68.

Statute and Rule 21 RPE).[76] Rule 22 RPE sets out the conditions for appointment and qualifications of Counsel for the defence.[77] In the performance of their duties, Counsel for the defence shall be subject to the Statute, the Rules, the Regulations, and the Code of Professional Conduct for Counsel (Rule 22 (3) RPE). Rule 20 RPE obliges the Registrar to organize the staff of the Registry in a manner that promotes the rights of the defence consistent with the principle of fair trial as defined in the Statute.[78]

The accused is further protected by the active role that the Statute imputes for the Pre-Trial Chamber. Under article 57 (3) (b), the Pre-Trial Chamber may issue such orders upon the accused, including measures such as those described in article 56, or seek such cooperation pursuant to Part 9 as may be necessary to assist the person in the preparation of his or her defence. This is in parallel to the power of the Pre-Trial Chamber to issue such orders and warrants as may be required for the purposes of the investigation at the request of the Prosecutor (article 57 (3) (a)), which is extended to investigating any exonerating circumstances.

---

76 Subject to arts 55 (2) (c) and 67 (1) (d) of the Statute, criteria and procedures for assignment of legal assistance shall be established in the Regulations, based on a proposal for the Registrar, following consultations with any independent representative body of counsel or legal associations (Rule 21). The person shall freely choose his or her counsel from this list. The decision to refuse a request for assignment of counsel by the Registrar is subject to review by the Presidency of the Court whose decision shall be final.

77 A counsel for the defence shall have established competence in international or criminal law and procedure, as well as the necessary experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings.

78 According to Rule 20 RPE, the registrar has specific responsibilities relating to the rights of the defence consistent with the principle of fair trail. This includes providing support, assistance and information to all defence counsel appearing before the Court and, as appropriate, support for professional investigators necessary for the efficient and effective conduct of the defence. The Registrar is also to assist arrested persons, persons to whom article 55 (2) of the Statute applies, and the accused in obtaining legal advice and the assistance of legal counsel.

c. Parties and Participants of the ICC Procedure

This overview allows us to restate the point made earlier that the Statute models the positions not of the parties but of the participants. It needs to be stated clearly that this increases the impartiality of the procedure. The independence of the Court from the UN Security Council and the States parties, its commitment to the overall rule of law, and the substantive fairness of the Court's proceedings depend on the institution of the Prosecutor. The Statute and the RPE implement human rights standards, not just in standing for things like fair trial etc., but in actually devising new procedural mechanisms to flesh out the concept of human rights. The "participation" that is thus imputed to the accused is related to human dignity.

4. Victims

The ICC Statute assigns the victims of atrocities a role in the procedure.[79] There cannot be a cause of action for the victims or a right to challenge the core function of the Court which is to take on crimes of concern to the international community. Victims can neither refer a situation to the Prosecutor nor do they have standing before the Pre-Trial Chamber for the review of the Prosecutor's decision not to proceed with an investigation. Victims may, of course, submit information to the Prosecutor in order for him or her to initiate an investigation on that basis. But the Statute acknowledges the fact that the Court proceedings affect the victims of alleged atrocities. Under article 65 (4), the Trial Chamber may request additional information if this is required "in the interests of the victims". Importantly, the Statute provides that the victim may make submissions and be represented at all stages of the Court proceedings. Article 15 (3) of the Statute provides that "victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence" regarding the reasonableness or otherwise of proceeding with an investigation. Under article 19, victims may also make submissions in proceedings with respect to jurisdiction or admissibility. Victims may also take part in the trial proceedings. First, they may set out in court their "views" and "concerns" on mat-

---

79 See Cassese, see note 15, 167; T. van Boven, "The Position of the Victim in the Statute of the International Criminal Court", in: Hebel, see note 27, 77 et seq. (85-90).

ters of fact and law pursuant to article 68 (3). The victims are allowed to take part in such proceedings either in person, or through their legal representative, on matters relevant to the proceedings.[80] The second modality of the victims' participation in the trial proceedings concerns the possibility for the victims to seek reparation, restitution, compensation or rehabilitation (article 75 (1) and (3) of the Statute).

5. States Parties

The Statute vests States parties with crucial roles in the procedure. Any State party may request the initiation of an investigation by referring a case to the Prosecutor. No further nexus is required. In particular, a state's referral power is neither hindered by nor does it depend on the state having jurisdiction over the case. Opening this avenue broadens the sources of information for the Prosecutor and turns the states into functional assistants of the Prosecutor.

The Statute is based on the idea that prosecution by the state having jurisdiction over the case is in principle preferable to prosecution by the ICC. Hence the complementarity principle allows that state to stop the Court from prosecuting any case as long as the state's own prosecution is genuine. Seen from the perspective of the Court, this issue concerns the admissibility of a case. It receives a separate treatment under the Statute. The admissibility of the Court's case depends on the action of the states. Their action could cover either the case of an ongoing investigation or a closed investigation. A State party may also take up investigating a case under examination by the Prosecutor thus rendering the case inadmissible. The Statute defines certain rights of the states at the trial. Finally, states have a large evidentiary role. They are to cooperate with the Prosecutor's or the Court's requests for the production of evidence. Moreover, the Assembly of States parties — the collective decision making body of the States parties — retains the important function of enforcing the obligation incumbent on States parties to comply with a request for cooperation by the Court.

---

80 Rules 89 through Rule 93 RPE contain specific provisions on the participation of victims in the proceedings. Under Rule 90 RPE, a victim may be represented by a legal representative.

6. The UN Security Council

The UN Security Council is put on a footing similar to the States parties. It may trigger an investigation, challenge its discontinuation and ensure that international cooperation works. However, these are functions essentially external to the judicial proceedings. The Prosecutor's – and by extension the Court's independence – is not called into question by the power of the UN Security Council, which may request the ICC not to investigate or proceed with a prosecution when it concludes that judicial action, or the threat of it, might harm the Council's efforts to maintain international peace and security pursuant to the UN Charter (article 16 of the Statute). This does not thwart the balanced relation between political entities (states and the Security Council) and the Prosecutor as an "administrator of justice" under the Statute. A Security Council deferral under article 16 does not cover steps that are considered proceedings undertaken before the commencement of the investigation.[81] Article 16 suggests that the Security Council may also stop an investigation or a prosecution that is already underway. The correct understanding of the effects of such a decision is procedural and preliminary.[82] A defendant thus remains indicted. Measures taken to ensure the protection of any person or to preserve evidence are not barred since they are based on action taken before the deferral procedure and thus come under the *status quo*.[83] Pursuant to arts 13 (c) and 15, the Prosecutor can initiate investigations *proprio motu* after the end of the initial 12-month deferral period. However, the Prosecutor is seriously hampered if Member States of the UN consider themselves prevented from cooperating with the Prosecutor under para. 3 of S/RES/1422.[84]

---

81 See M. El Zeidy, "The United States Dropped the Atomic Bomb of Article 16 of the ICC Statute: Security Council Power of Deferrals and Resolution 1422", *Vand. J. Transnat'l L.* 35 (2002), 1503 et seq. (1513).

82 See El Zeidy, see above, 1514.

83 See L. Condorelli, "Relationship of the Court with the United Nations", in: A. Cassese et al. (eds), The Rome Statute of the International Criminal Court, 2002, 654.

84 S/RES/1422 (2002) of 12 July 2002, in its operative part, states the following: "(1) [The Security Council requests], consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution

V. Comparison with the Procedure of the *ad hoc* Tribunals

No equivalent to these provisions allowing victims to have a role in the administration of justice before the Court exists in the ICTY and the ICTR Statutes. The *ad hoc* Tribunals are in a vertical relationship to all states. The basis for this vertical relationship lies in the creation of the *ad hoc* Tribunals through Security Council resolutions under Chapter VII of the Charter.

VI. Conclusions

The ICC serves to enforce judicially certain values considered indispensable for a peaceful world. This requires autonomy and transparency. This specific function of the Court is reflected in its procedure.

The autonomy is to a large extent the consequence of transparency. The legal bases of the Court's procedure structure the roles of the participants transparently because they can be explained and analyzed in terms of procedural maxims. The ICC procedure is the product of the effective use of the comparative law method. As such, the method injects a specific technical – legal – legitimacy to the Court. The core feature of the Court's procedure as analyzed here is that it provides legitimacy not only to the Court but also to efforts of the international community of states to legislate in this highly sensitive area of overlapping claims of national sovereignty, human rights and UN Security Council jurisdiction. There are two prominent — and overlapping — features of the ICC procedure that emerge from the analysis above and that bear highlighting for their legitimizing import. The first feature is that the Court procedure involves all relevant actors with a stake in whether, at which venue and how an atrocity is investigated and prosecuted. Because of the legal bases as laid out in this article, the Court will reach the verdict on an accused's guilt or innocence through highly elaborate proceedings with a prominent involvement of the accused. The obvious explanation would be the predominance of the common

---

of any such case, unless the Security Council decides otherwise. (2) [expresses] the intention to renew the request in paragraph 1 under the same conditions each 1 July for further 12 month-periods for as long as may be necessary. (3) Decides that Member States shall take no action inconsistent with paragraph 1 and with their international obligations".

law in international procedure in general and, specifically, the precedent of the *ad hoc* Tribunals' procedure. However, more fundamentally, this procedural choice enhances the functionality of the Court as a central institution of the international community of states. Proceeding adversarily also has a high chance to engage the participants and thus to enable them to accept the decision reached.[85] Proceeding adversarily renders visible the fact that the Court institutionalizes conflict and their collectively binding decisions.[86] With respect to this educational effect, aside from the crucial Non-Party states, the people who need to be convinced of the substantive values the violation of which is criminalized in arts 5 through 7 of the Rome Statute, are not just the perpetrators but also the population supporting the organization of which the perpetrator was part. Paradoxically, this also ensures that the procedure is concentrated on the correct application of the law. Since the role of all actors with a political interest is defined by the procedure, their potential impact on the procedure is confined. As such, the Court provides an indispensable function for the political enforcement of the same values. Through this set-up, the international community of states as the international legislator is legitimized. As such, its legitimacy depends on the openness to all relevant factors. In reality this cannot be the case. The permanent Court's procedure ensures that those concerned by the political decision will participate at least in its application. This provides legitimate avenues of critique and reduces the complexity of the political system.[87] But, through this set-up, the Court in fact has also an important function for the overall legitimacy of the Security Council. The limited role that the ICC procedure accords the UN Security Council should not be seen as an expression of distrust in the Council but rather as an expression of the proper understanding of the Council's operating as a political body. The fundamental political decision was for the Security Council to legislate through the Statutes of the *ad hoc* Tribunals and to design such tribunals as a means to restore peace and security to (civil) war ravaged areas. These choices were followed by the international community of states. Also novel, and worthy of comment is the balanced relation between the international community as a legislator,

---

85 See Luhmann, *Legitimation durch Verfahren*, 1989, 55-136.

86 The provision of a central institution for the articulation and decision presupposes that the world society is structured to a degree incompatible with a Hobbesian view of international relations.

87 Luhmann, see note 85, 242-248.

the Court, and the international community as judicial enforcer, the latter example showing that the cooperation is two way.

This procedure would appear to insulate the Court from two main objections levied against it in particular by the United States. The broad jurisdiction of the Court is balanced by the complementarity principle and the guarantee of a fair trial of the accused. Both structural elements are secured by the design of the Court's procedure. The second is that the Court's lack of effective enforcement machinery made its claim to law-based prosecution of human rights abuses a charade.[88] This genuine concern seems unfounded. The procedure's effectiveness has been demonstrated. The effectiveness will be enhanced by the Court's legitimacy that accrues to it because of the procedure as designed by the Statute and the Court's RPE.

---

88 See J. Goldsmith, "The Self-defeating International Criminal Court", *U. Chi. L. R.* 70 (2003), 89 et seq.