Guest Lecture Series of the Office of the Prosecutor

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"The triggering procedure of the International Criminal Court, procedural treatment of the principle of complementarity, and the role of Office of the Prosecutor"

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Introduction: The Procedural System Contained in the ICC Statute

Unlike the ICTY and the ICTR Statutes that merely provide for a criminal procedure, the ICC Statute ("hereinafter" Rome Statute) provides up to three different types of procedures:

a. The Triggering Procedure contained in Arts. 13, 14, 15, 18, and 53.1, 3 and 4 Rome Statute

b. The Criminal Procedure provided for in Arts. 54 to 74, 76 to 78, 80 to 84, 103 to 108, and 110 to 111 Rome Statute; and

c. The Civil Procedure contained in Arts. 57.3 (e), 75, 79, 85 and 109 Rome Statute.

These three types of procedures are carried through seven different types of proceedings:

a. Three types of triggering proceedings that are respectively applicable to Security Council referrals, State Party referrals, and Art. 15.1 Rome Statute complaints;

b. Two types of criminal proceedings that are respectively applicable to the crimes contained in Art. 5 and Art. 71 Rome Statute; and

c. Two types of civil proceedings to ascertain the civil responsibility respectively provided for in Art. 75 and Art. 85 ICSS.

Within the procedural system provided for in the Rome Statute, the Triggering Procedure is an autonomous procedure whose object, parties and proceedings are perfectly distinguishable from object, parties and proceedings of the Criminal and Civil Procedures.

From the outset, it is important to keep in mind that the drafters of the Rome Statute did not have the opportunity of looking at the procedural system adopted in the Rome Statute as a whole. This is the result of the particular way in which the main features of the Triggering Procedure were negotiated. First, while the main elements of the Criminal Procedure were discussed in the Preparatory Committed for quite a long time before the Rome Conference, the main features of the Triggering Procedure (and particularly Arts. 15 and 18 Rome Statute) were proposed, or discussed for the first time, in the last session of the Preparatory Committed held in April 1998, immediately before the Rome Conference.

Second, during the Rome Conference the main features of the Criminal Procedure were dealt with in the Working Group on Procedural Matters, whereas the main elements of the Triggering Procedure were directly dealt with in the Committee of the Whole. Third, not only the main features of the Triggering and the Criminal Procedures were dealt with in different Working Groups by different delegates, but also the main elements of the Triggering Procedure were only agreed upon hours before the end of the

Rome Conference. As a consequence, the drafters of the Rome Statute did not have the opportunity of looking at the procedural system adopted in the Rome Statute as a whole, and particularly at the relation between Arts. 15 and 18 Rome Statute on the one hand and Art. 53 Rome Statute on the other hand, and at the implications of the main element of the Triggering Procedure in the procedural system contained in the Rome Statute.

Thus, one of the most important tasks after the approval of the Rome Statute consists of the systematic analysis of the several types of procedure and proceedings provided for in the Rome Statute. Within this framework, this paper intends to bring some light on the nature and main features of the Triggering Procedure provided for in Arts. 13, 14, 15, 18 and 53(1), (3) and (4) Rome Statute, and on its relationship with the Criminal Procedural, and particularly with Arts. 53(2) and 54 et *seq.* Rome Statute.

Only once the relationship between the Triggering Procedure and the Criminal Procedure is clear, we will be in a position to analyse the procedural treatment of the principle of complementarity in the different procedures provided for in the Rome Statute. Finally, the last part of the paper briefly deals with the role of the Office of the Prosecutor in the Triggering Procedure, and duties imposed upon the competent Chamber of the Court to control, *propio motu* or at the request of a party to the proceedings, that the Office of the Prosecutor is acting within the margin appreciation granted to it by the Rome Statute and in full respect of the substantive and procedural standards set out by the Rome Statute.

1. The Triggering Procedure of the International Criminal Court

In accordance with Arts. 5, 11 and 12 Rome Statute, the States Parties have granted to the ICC jurisdiction over the crimes provided for in the Rome Statute when they are committed in the territory of a State Party or by a national of a State Party, or when the Security Council refers to the ICC a situation of crisis in which such crimes appear to have been committed. But this does not necessarily mean that, after the alleged commission of such crimes, the ICC may directly exercise its jurisdiction over them. On the contrary, the States Parties have granted to the ICC a jurisdiction which is deactivated (hereinafter "potential jurisdiction") and that is only activated with regard to a particular situation of crisis defined by personal, territorial and temporal parameters when the following circumstances occur:

a. The personal, territorial and temporal parameters that define such a situation of crisis are included within the personal, territorial and temporal limits of the potential jurisdiction of the Court;

b. The available information provides a reasonable basis to believe that crimes within the material jurisdiction of the Court have allegedly been committed in such a situation of crisis;

c. The absence of action, the unwillingness, or the inability of national jurisdictions to properly investigate and prosecute the crimes allegedly committed in such a situation of crisis;

d. The absence of any Security Council request in accordance with Art. 16 Rome Statute not to activate the potential jurisdiction of the Court with regard to such a situation of crisis;

e. The sufficient gravity of the crimes allegedly committed in such a situation of crisis; and

f. The lack of substantial reasons to believe that, despite the gravity of the crime and the interests of victims, the activation of the potential jurisdiction of the Court with regard to such a situation of crisis would not serve the interests of justice.

Although the States Parties could have opted for the automatic activation of the potential jurisdiction of the Court with regard to a specific situation of crisis whenever the above-mentioned circumstances occur, they finally did not do so. On the contrary, Arts. 15.4, 18.2 and 53.1 Rome Statute provide for the activation of the potential jurisdiction of the Court with regard to a particular situation of crisis through a declaration of the competent organ of the Court. Such a declaration can only be issued after the competent organ of the Court has verified that all six above-mentioned circumstances occur in connection with such a situation of crisis. This verification is carried out through the Triggering Procedure.

As a result, the object of the Triggering Procedure can be said to be comprised of two main elements:

a. The petition of the Security Council, a State Party or the Office of the Prosecutor (hereinafter "OTP") to activate the potential jurisdiction of the Court with regard to a specific situation of crisis (hereinafter "activation request") ; and

b. The opposition of the concerned States to such a petition in accordance with Art. 18.1 and 2 Rome Statute.

The activation request and the opposition need to be based on the occurrence, or the lack of occurrence, of the six above-mentioned circumstances with regard to a particular situation of crisis.

But the Triggering Procedure is not only directed at the verification of the above-mentioned set of circumstances. On the contrary, the Triggering Procedure is also directed at the determination of the personal, territorial and temporal parameters of the situation of crisis with regard to which the ICC will first activate and then exercise its jurisdiction. The personal, territorial and temporal parameters contained in the activation request of the Security Council, a State Party or the OTP will be the starting point. However, as a result of verifying whether the above-mentioned set of circumstances concurs, the Court may end up modifying the personal, territorial and temporal parameters contained in the activation request.

The personal, material, territorial and temporal parameters of the jurisdiction of the International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR) have been precisely defined by the political body, the Security Council of the United Nations (Security Council), that created them. Indeed, due to the fact that both international criminal tribunals have been created to deal with specific situations of crisis, they have been characterized as *ad hoc* Tribunals. Conversely, the States Parties to the Rome Statute have not defined with any comparable degree of precision the jurisdiction of the ICC. The latter is defined as a "permanent institution" (Art. 1 Rome Statute) which could potentially

exercise its jurisdiction over the crimes of genocide, crimes against humanity and war crimes committed in situations[2] that takes place after the entry into force of the Rome Statute into the territory of (i) a State party; or (ii) any State, if the crimes have been allegedly committed by the national of a State Party or the ICC acts at the request of the Security Council.

This marks a significant difference between ICTY and ICTR on the one hand, and ICC on the other. As a consequence, a Triggering Procedure has been established to determine the personal, territorial and temporal parameters that define the situations of crisis with regard to which the ICC will, first, activate and then exercise its jurisdiction. Only after defining the situation of crisis in question, and after verifying that all six above-mentioned circumstances occur in connection with that situation of crisis, the competent organ of the Court will activate the jurisdiction of the Court. Then, and within the boundaries of the situation of crisis for which the jurisdiction of the Court has been activated, the Court will carry out its investigation (Art. 54 Rome Statute) and subsequent prosecutions. It is only at this stage when the notion of case, which refers to investigations and prosecutions of identified suspects for the commission of specific crimes, becomes applicable.

The Rome Statute uses the expression "situation" in articles 13(a) and (b), 14.1, 15.5 and 6, 18.1 and 19.3, to refer to exceptional circumstances – not structural ones – that constitute a departure from the status quo. Some examples include the armed conflicts that took place in the former Yugoslavia and Sierra Leone since 1991; the grave violations of international humanitarian law that took place in Rwanda and its neighbouring countries between 6 April 1994 and early July of that same year; and the events in East Timor on the thirty days following the celebration of the referendum on independence on 30 August 1999. These exceptional situations are defined by personal, temporal and territorial parameters, and are easily distinguishable from the more restrictive content of the expression "case".

The origin of this distinction is to be found in the fact that States Parties – given the importance of the functions attributed to the OTP in the Rome Statute and their fear at their accumulation in the person of the Chief Prosecutor[3] – decided to introduce certain safeguards against the initiation of politically motivated investigations which could result from an abuse of his powers by the Chief Prosecutor.[4] Among these safeguards, the most significant ones are:

a. The distinction between situations of crisis and cases as the object of the Triggering and Criminal Procedures, respectively;[5]

[2] The Rome Statute uses the term "situation/s" as opposed to "cases" in Arts. 13(a) and (b), 14 (1), 15 (5) and (6), 18 (1), and 19 (3)).

[3] BERGSMO, M./HARHOFF, F., *Article 42. The Office of the Prosecutor*, in Commentary to the Rome Statute of the International Criminal Court, Thriftier, O. (Coord.), Ed. Nomos, Baden-Baden, 1999, pp. 627-636, p. 631.

[4] As FERNANDEZ DE GURMENDI, S.A., *The Role of the International Prosecutor*, en The International Criminal Court. The Making of the Rome Statute. Issues, Negotiations, Results, Lee, R. (Coord.), Ed. Kluwer Law International, The Hague/London/Boston, 1999, pp. 175-188, p. 181, has stated: "Those who argue against granting *propio motu* powers to the Prosecutor feared an overzealous or politically motivated prosecutor targeting, unfairly or in bad faith, highly sensitive political situations. Sometimes [the I.C.C. Prosecutor] was feared as a 'lone ranger running wild' around the world with excessive powers".

[5] Regarding the introduction of the notion of "situations" as the object of the Triggering Procedure, FERNANDEZ DE GURMENDI, S.A., *The Role of the International*

b. The mechanisms of control of the exercise by the OTP of his jurisdictional functions by the Pre-Trial and Appeal Chambers under article 53.3 Rome Statute; and

c. The character of the OTP as a party in the Triggering Procedure when the latter is not set in motion by the Security Council.

As a further guarantee against the potential for political misuse of the ICC by States Parties or the Security Council, articles 13(a) and (b), 14.1 and 19.3 Rome Statute provide that the object of the activation request – introduced by the referrals of States Parties or the Security Council in accordance with articles 13(a) and (b) – is to be a situation and not concrete facts.[6] Similarly, article 18.1 Rome Statute provides that the object of the decisions adopted by the OTP in accordance with article 53.1 Rome Statute regarding the existence of "reasonable basis to proceed" are the situations referred by a State Party.[7]

Due to the fact that victims and witnesses have scare resources at their disposal for the purposes of an investigation of which are the personal, temporal and territorial parameters that define the situations in which the crimes of which they are aware have been committed, Arts. 13(c) and 15.1 Rome Statute allow any physical or legal person to directly communicate to the OTP concrete facts that appear to constitute any of the crimes provided for in the Statute. However, with a view to preventing the initiation of politically motivated criminal investigations, Art. 15.5 and 6 Rome Statute establishes that those situations of crisis in which the facts complained of have taken place constitute the object of both the preliminary examination[8] and the OTP's request for authorisation to initiate an investigation.[9]

Prosecutor...p. 180, states: "The main reason for this support was that many States were uneasy with the regime provided for in the ILC draft, which allowed a State Party to select individual cases of violations and lodge complaints with the Prosecutor with respect to such cases. This could, in their view, encourage politization of the complaint procedure".

[6] As YEE, L., *The International Criminal Court and the Security Council*, in The International Criminal Court. The Making of the Rome Statute, Issues, Negotiations, Results, Lee, R. (Coord.), Kluwer Law International, The Hague/London/Boston, 1999, pp. 143-152, p. 147, has stated: "Many felt that the Council should only be empowered to refer a general matter or situation rather than a specific case to the Court in order to preserve the Court's independence in the exercise of its jurisdiction". In the same way, FERNANDEZ DE GURMENDI, S.A., *The Role of the International Prosecutor*, Lee, R. (Coord.), *op cit*, at pp. 180-182, holds that "[t]his proposal [U.S. proposal to change the content of the 'notitia criminis' communicated by States Parties from cases to situations to be found at 1996 PrepCom Report, Vol. II, at 109, par. 2.], which was ultimately included in Article 14 of the Rome Statute, did have the effect of broadening the role of the Prosecutor who in this way obtained the power to investigate a 'situation' referred to him or her by the Security Council or by a State Party". The same explanation is offered by WILMSHURome StatuteT, E., *Jurisdiction of the Court*, in Lee, R. (Coord.), *op cit*, pp. 127-142, p. 131.

[7] As HOLMES, H.T., *The Principle of Complementarity*, in Lee, R. (Coord.), *op cit*, pp. 41-78, p. 71, states on footnote 40, referring to the term "situation" in article 18 Rome Statute: "The word 'situation' was used to replace 'matter' in light of the change of terminology on questions of jurisdiction".

[8] Art. 15.2 Rome Statute.

[9] Art. 15.5 Rome Statute provides that "[t]he refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation." Article 15.6 "[i]f,

Finally, due to the simplified and summary proceeding provided for in Arts. 13(b) and 53.1, 3 and 4 Rome Statute for cases in which the Security Council refers a situation of crisis to the OTP, Art. 18.1 Rome Statute is not applicable, and, thus, the Rome Statute does not expressly stipulate that situations should be the object of the OTP´s decision to proceed or

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after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence." Thus, although physical and legal persons may communicate to the ICCOP concrete facts allegedly committed by identified persons, the ICCOP is under the obligation to practice the article 15.2 preliminary examination for the purposes of obtaining the information necessary to decide whether a request for authorisation for the initiation of an investigation is warranted with respect to the crisis situation in the context of which the facts complained of were committed. HALL, C.K. seems to reach the same conclusion in *Article 19. Challenges to jurisdiction to admissibility*, in Triffterer, O. (ed.), Commentary on the Rome Statute of the International Criminal Court, Ed. Nomos, Baden-Baden, 1999, p. 407.

For these reasons, we consider that the term "case" in article 15.4 Rome Statute should not be in isolation but, rather, in the context of the rest of article 15. Thus, when read together with the references to the concept of situation in articles 15.5 and 15.6 Rome Statute and in view of the drafters´ intention of introducing adequate safeguards against the opening of politically motivated investigations – in particular when the *notitia criminis* is communicated by physical or legal persons other than States Parties or the Security Council – one cannot but conclude that, in spite of the literal reference to the term "case" in article 15.4 Rome Statute, the object of the article 15 proceedings is also situations defined by personal, temporal and territorial parameters.

Furthermore, it is also necessary to point out that the content of the expression "case" in the Statute is, in our view, quite confusing. Article 17, for example, in defining the concepts of admissibility or inadmissibility, refers exclusively to "cases". However, these concepts are applicable both in the context of situations of crisis in the framework of the triggering procedure and in the context of "cases" in the framework of the criminal proceedings. This confusion is owed to the following reasons:

a. Art. 17 Rome Statute was drafted before the distinction between situations and cases, and the elements of the Triggering Procedure (Arts. 15 and 18 Rome Statute particularly) were introduced. As seen above, the main elements of the Triggering Procedure were proposed, or discussed for the first time, in the last session of the Preparatory Committee in April 1998.
b. The main features of the Triggering and the Criminal Procedures were dealt with in different Working Groups by different delegates, and the main elements of the Triggering Procedure were only agreed upon hours before the end of the Rome Conference;
c. Given the adoption of a broad package of provisions in the last day of the Rome Conference – there was no time, subsequently, to adjust the definition of the concepts of admissibility and inadmissibility to the new distinction between "situations" and "cases" (see WILLIAMS, S.A., Article 17. Issues of Admissibility, in Triffterer, op cit, pp. 383-394, pp. 387-388). As a result, each time the Rome Statute or the Rules of Procedure and Evidence refer to the concepts of admissibility or inadmissibilitiy they use the term "admissibility of the case" or "inadmissibility of the case" (see e.g. article 53.1(b) Rome Statute and Rule 48). Now, as it has just been explained, this does not mean that the Rome Statute did not adopt the distinction between "situations" and "cases". In this same sense, see HALL, C.K., *Article 19* …, p. 408, footnote 242.

not to proceed with respect of Security Council referrals. Despite this – and bearing in mind that article 13(b) Rome Statute requires the Security Council to refer situations to the OTP, and that in the other two variants of the Triggering Procedure the standard "reasonable basis"[10] is applied to situations– it may be concluded that the object of the simplified and summary proceedings provided for in Arts. 13(b) and 53.1, 3 and 4 Rome Statute, too, are situations of crisis defined by personal, temporal and territorial parameters. This interpretation is also consistent with the intention of the negotiators of the Statute of reducing as far as possible the risk of politically motivated investigations.

Additionally, the so called "preliminary" character of the admissibility rulings adopted by the competent organs of the ICC under Art. 18 Rome Statute is only meaningful when Art. 18 Rome Statute proceedings are considered the second part of the Triggering Procedure initiated by a referral by a State Party or *proprio motu* by the OTP. Thus, what the expression "preliminary" in the heading of article 18 Rome Statute means is that the Pre-Trial Chamber decisions regarding the admissibility of situations of crisis are not final decisions regarding the admissibility of "cases" consisting of a limited set of facts occurred within the broader context of those situations. Logically, since the Triggering and Criminal Procedures have different objects, the admissibility decisions adopted with respect to the former cannot be final decisions with respect to the latter.

Similarly, given that the object of the admissibility analysis under Art 18 Rome Statute is a situation, the expression "preliminary" also refers to the fact that the scrutiny of the ensemble of proceedings initiated in the national jurisdictions of affected States with respect to the crimes allegedly committed in such a situation can not be as detailed as it can be when the admissibility analysis focuses on a single case. In other words, hypothetically, the scrutiny of the criminal proceedings carried out by the Croatian jurisdictional organs regarding crimes committed by General Blaskic in the Lasva Valley in the spring of 1993 can not be the same when the object of the admissibility analysis is the ensemble of the proceedings carried out by the Croatian jurisdictional organs regarding the situation of crisis existing in the former Yugoslavia between 1991 and 1995, as when the object of such admissibility analysis are the proceedings of the Croatian jurisdictional organs with respect of crimes allegedly committed by General Blaskic in the Lasva Valley in the spring of 1993.

Consequently, given that the degree of scrutiny is different, the level of information required to proceed with such scrutiny is also different. For this reason, we do not share the fears expressed by some like-minded States about whether the Rome Statute allows affected States to give two bites to the same apple.[11] On the contrary; we believe we are before two different apples or, to be more precise, before two different procedures whose objects that can be easily differentiated.

The "preliminary" character of the decisions adopted by the OTP and the Pre-Trial and Appeals Chambers under Art. 18 Rome Statute is limited to the dimension referred to above; it does not affect the final character of such decisions insofar as they bring to an end the Triggering Procedure. In the same sense, we can not forget that these decisions, depending on their content, have the effect of overturning partially or totally, or of confirming and giving finality to, those other decisions adopted in the first part of the Triggering Procedure.

[10] Arts. 15.3 and 4, and 53.1 Rome Statute.
[11] NTANDA NSEREKO, D.D., *Article 18. Preliminary Rulings Regarding Admissibility*, in Triffterer, *op cit*, p. 404; and HOLMES, J.T., *The Principle of Complementarity*, in Lee, *op cit*, pp. 72-73.

Accordingly, the concept of "situation" is well established in the regulation of all three variants of the procedure through which the ICC´s jurisdiction is triggered. In this way, if we take as a hypothesis the situation that led to the establishment of the Special Court for Sierra Leone,[12] the Triggering Procedure would have as an object the civil war that took place in Sierra Leone from 1991 until the signature of the Lomé peace agreement of 7 July 1999.[13] In addition, some of the criminal proceedings that could be opened as a consequence of the triggering of the ICC´s jurisdiction over such a situation of crisis could have as their object the crimes allegedly committed by the Revolutionary United Front during the siege of Freetown on 1 January 1999, or the crimes committed by Mr. Sankoh (former leader of the Front) until his detention by the Nigerian authorities near the end of 1996.

Additionally, just like in the ICTY and ICTR – where the Office of the Prosecutor investigates and prosecutes the crimes committed by all parties involved in the situations that took place, respectively, in the territory of the former Yugoslavia since 1991, and in Rwanda and its neighbouring States during 1994 – Art. 54 Rome Statute requires the OTP to exercise its investigative and prosecutorial functions in respect of crimes committed by all parties involved in the situations of crisis for which the jurisdiction of the ICC is triggered.

The Triggering Procedure is an autonomous procedure because not only it has its own distinctive object, but it also has its own distinctive parties and proceedings. With regard to the parties in the Triggering Procedure, it is important to notice that they vary depending on whom initiates it by making the activation request (the Security Council, a State Party, or the OTP on the basis of a complaint made by any legal or natural person). As a result, the Security Council (Art. 13(b) St), a State Party (Arts. 13(a) and 14 St) and the OTP (Art. 13(c), 15.1 and 15.3 St) may become petitioners, while the concerned States (be them States Parties or not) may oppose the activation request in accordance with art. 18.2 Rome Statute. However, when the Security Council becomes the petitioner by referring a situation of crisis to the OTP, the Triggering Procedure provided for in Art. 53.1, 3 and 4 Rome Statute is a *sui generis* procedure in which there is no opponent (Art. 18 Rome Statute proceedings are not applicable) and the OTP is entrusted with taking the final decision whether or not to activate the potential jurisdiction of the Court with regard to the situation of crisis referred to by the Security Council.

The structure of the Triggering Procedure also varies depending on who initiates it by making the activation request. Arts. 13(b) and 53.1, 3 and 4 Rome Statute provide for simplified and expedient proceedings when the Security Council is the petitioner, while Arts. 13(c), 15 and 18 Rome Statute provide for extremely complex proceedings, in which to two admissibility decisions of the Pre-Trial Chamber (Arts. 15.4 and 18.2 Rome Statute) and other two of the Appeals Chamber (Art. 81.1(a) and 18.4 Rome Statute) may well be

[12] Negotiations between the United Nations and the Sierra Leonese Government concluded on 16 January 2000, with an agreement for the establishment of the Special Court (*Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone*, concluded in Freetown on 16 January 2002). Article 1 of this Agreement defines the situation of crisis over which this new *ad hoc* tribunal can exercise jurisdiction in the following terms: grave violations of international humanitarian law and of the law of Sierra Leone committed in the territory of Sierra Leone after 30 November 1996.

[13] *Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone*, celebrated in Lomé on 7 July 1999.

necessary, when the OTP is the petitioner. Lastly, Arts. 13(a), 14, 18 and 53.1, 3 and 4 Rome Statute provide for proceedings which are of an intermediate level of complexity and expediency when a State Party is the petitioner. They, as some protective measures proceedings in national jurisdictions, are divided in two parts: Art. 15 and Art. 18 Rome Statute proceedings.

The interpretation of Art. 18 proceedings as a second part of the Triggering Procedure when a State Party or the OTP are the petitioners is reinforced by the following elements:

a. The object of Art. 18 Rome Statute proceedings are those situations of crisis for which the competent organ of the Court has provisionally activated the potential jurisdiction of the Court in accordance with Arts. 15.4, 53.1 and 3, and 81.1(a) Rome Statute. Art. 18.1 Rome Statute imposes on the OTP the duty to notify all States Parties and the concerned States non-Parties of the decision by which the competent organ of the Court, at the request of a State Party or the OTP, provisionally activates the potential jurisdiction of the Court over a particular situation of crisis, so that to enable the concerned States to oppose such a decision by alleging, within a one month time-limit, the formal primacy of their national jurisdictions. Hence, the object of Art. 18 proceedings (situations of crisis defined by personal, territorial and temporal parameters) is perfectly distinguishable from the object of the Criminal Procedure in the ICCS (cases comprised of specific facts that allegedly amounts to one or more crimes within the jurisdiction of the Court);

b. Considering that the concerned States have been excluded from Arts. 15 and 53 Rome Statute proceedings, the *rationale* behind Art. 18 Rome Statute proceedings is to give an opportunity to the concerned States to oppose the activation of the potential jurisdiction of the Court on the basis of the investigations and prosecutions that their national jurisdictions are carrying out, or have carried out, with regard to the crimes allegedly committed within the situations of crisis referred to in the activation requests of the State Parties or the OTP. In this regard, Art. 18.2 Rome Statute provides that within one month of the above-mentioned notification, "a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdictions with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the notification to States";

c. Following the general rule in the triggering proceedings initiated upon an activation request of the Security Council or a State Party, Art. 18.2 Rome Statute entrusts with the OTP quasi-jurisdictional functions, such as to decide in first instance on the merits of the opposition of the concerned States. As a result, irrespective of the organ of the Court that has provisionally activated the potential jurisdiction of the Court over the situation of crisis referred to in the activation request, the OTP is granted the power to indefinitely suspend the efficacy of such a decision (Art. 18.2 Rome Statute), the OTP suspension decision not being reviewable by any of the chambers of the Court (Art. 18.2 Rome Statute). Only those OTP

decisions that reject the opposition of the concerned States are automatically reviewed by the Pre-Trial Chamber (Art. 18.2 Rome Statute, *in fine*); and

d. As we have seen above, the so-called "*preliminary*" character of Art. 18 Rome Statute rulings regarding admissibility can only be adequately understood if Art. 18 Rome Statute proceedings are considered the second part of the Triggering Procedure when a State Party or the OTP are the petitioners.

Only once the competent organ of the Court has activated the jurisdiction of the Court over a particular situation of crisis, the OTP must, in accordance with Art. 54 *et seq*. Rome Statute, investigate the crimes allegedly committed in that situation. At any time after the initiation of the investigation, the OTP may, as provided for in Art. 58 Rome Statute, request the Trial Chamber to issue a warrant of arrest or a summons to appear against a given person for the commission of certain specific crimes. It is then when, if the criteria provided for in Art. 58 Rome Statute are met, the competent Chamber of the Court will formally open the Criminal Procedure against the person concerned by issuing an arrest warrant or a summons to appear.

Hypothetically, each crime allegedly committed in the situation of crisis for which the jurisdiction of the Court has been activated may be the object of a different criminal procedure. Therefore, the OTP may initiate several criminal procedures with regard to crimes committed within the same situation of crisis. Each of these criminal procedures, unlike the Triggering Procedure:

a. Has a penal nature because the ICC exercises through it the *ius puniendi* which has been entrusted to it by the Rome Statute;

b. Has an object composed of precise facts which allegedly amounts to one or several of the crimes within the jurisdiction of the Court;

c. Has two parties: The OTP and the person(s) investigated or accused (the competent chamber of the Court will determine on a case by case basis the level of participation of the victims); and

d. Is conducted through proceedings that are comprised of four stages: (i) an investigative stage; (ii) a pre-trial stage; (iii) a trial stage; and (iv) an appeals stage.

As a result, it can be stated that the Triggering Procedure is not only an autonomous procedure within the system devised in the Rome Statute, but it is also previous to, and necessary to, the initiation of any criminal procedure. It, therefore, constitutes a key component of the procedural system of the Rome Statute. While the ICTY and ICTR Statutes clearly define the situations of crisis over which the *ad hoc* Tribunals exercise their jurisdiction, the Rome Statute only defines the personal, temporal and territorial limits of the potential jurisdiction of the Court. The Triggering Procedure, unknown to the ICTY and ICTR, is precisely the procedure through which the ICC exercises its power to decide whether or not it is going to first activate and then exercise its jurisdiction over the crimes allegedly committed in a given situation of crisis, such as the ones currently taking place in Congo or Uganda.

II. A Practical Example of the Functioning of the Procedural System Contained in the ICC Statute: Procedural Treatment of the Principle of Complementarity.

The procedural treatment of the principle of complementarity in the ICCS is rather complex. The first controls of admissibility take place within the Triggering Procedure. As seen in the preceding section, the Triggering Procedure is directed at ascertaining whether or not the following circumstances concur with regard to the situation of crisis referred to in the activation request:

a. Whether a *prima facie* case can be made that the personal, territorial and temporal parameters of such a situation (¨reasonable basis to believe¨) fall within the jurisdiction *ratione materiae, personae* and *temporis* of the Court;

b. Whether a *prima facie* case can be made that the contextual elements of the crimes within the jurisdiction of the Court contained in articles 7.1 and 8.1 of the Statute and in elements 6(a)(4), 6(b)(4), 6(e)(4) of the Elements of Crimes have taken place in such a situation of crisis (this would provide a reasonable basis to believe that crimes within the material jurisdiction of the Court have been committed in such a situation of crisis);

c. Whether the States concerned have initiated investigations or prosecutions of the factual circumstances that underline the contextual elements of the crimes within the jurisdiction of the Court that have allegedly taken place in such a situation of crisis; or are unable or unwilling to carry out the investigations or prosecutions already initiated; or were unable or unwilling to adequately carry out the investigations or prosecutions already completed;

d. Whether the crimes allegedly committed in such a situation of crisis reach the required level of gravity;

e. Whether a Security Council, in accordance with art. 16 Rome Statute, has made a request not to activate the potential jurisdiction of the Court with regard to such a situation of crisis; and

f. Whether there exist circumstances that, in accordance with the jurisprudential definition of the expression "interest of justice", would advice not to activate the potential jurisdiction of the Court with regard to such a situation of crisis.

In addition, when Art. 18 Rome Statute is applicable, the initial determination to activate the jurisdiction of the Court with regard to a given situation of crisis, may be subjected – at the request of the concerned States – to the scrutiny of the Trial and Appeals Chambers from a pure admissibility perspective. In that case, A decision to activate the jurisdiction of the Court can only be confirmed if the Trial or the Appeals Chamber affirmed the admissibility of such situation of crisis.

Activated the jurisdiction of the Court with regard to a certain situation of crisis, the OTP must, in accordance with Art. 54 *et seq*. Rome Statute, investigate the crimes allegedly

committed in that situation. At any time after the commencement of the investigation, the OTP may request the Trial Chamber to issue a warrant of arrest or a summons to appear against a person if, having examined the evidence obtained against such person through the investigation, it is satisfied that:

a. A *prima facie* case can be made that the person has committed a crime within the jurisdiction of the Court;

b. The crime(s) allegedly committed by the person concerned falls within the personal, temporal and territorial that define the situation of crisis over which the Court has activated its jurisdiction;

c. The States concerned have not initiated investigations and/or prosecutions of the crime(s) allegedly committed by the person concerned; or are unable or unwilling to carry out the investigations and/or prosecutions already initiated; or were unable or unwilling to adequately carry out the investigations or prosecutions already completed;

d. The Security Council has not made a request, in accordance with Art. 16 Rome Statute, not to formally initiate a criminal procedure against the person concerned;

e. The crime(s) allegedly committed by the person concerned reach the required level of gravity; and

f. There exist no circumstances that, in accordance with the jurisprudential definition of the expression "interest of justice", would advice not to formally initiate a criminal procedure against the person concerned;

In addition, upon the receipt of the OTP's request, and if the above-mentioned criteria provided for in Art. 58 Rome Statute are met, the competent Chamber of the Court will formally open the Criminal Procedure against the person concerned by issuing an arrest warrant or a summons to appear.

Apart from the above-mentioned mandatory controls of admissibility, the Court may, on its own motion, determine the admissibility of a case in accordance with Art 19 Rome Statute;[14] the Office of the Prosecutor may seek a ruling from the Court regarding the question of admissibility;[15] and, unless otherwise provided, the admissibility of a case may be challenged only once by any accused or person for whom a warrant of arrest or summons to appear has been issued, or by a State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case, or has done so, or whose acceptance of jurisdiction is required under Art 12 Rome Statute.[16] These challenges shall take place, unless otherwise provided by the Court, prior to or at the commencement of the trial; and the aforementioned States must make such challenges at the earliest opportunity.[17]

[14] Article 19.1 Rome Statute.
[15] Article 19.3 Rome Statute.
[16] Article 19. 2 and 4 Rome Statute.
[17] Article 19.5 Rome Statute.

From the above-mentioned procedural treatment of admissibility issues, it can be concluded that, depending on the stage of the ICC proceedings, the control of admissibility may be carried out against the backdrop of either situations or cases.

Logically, the required level of scrutiny of the investigations and/or prosecutions carried out by the States concerned with regard to the factual circumstances that underline the contextual elements of the crimes within the jurisdiction of the Court that have taken place in a situation of crisis cannot be as detailed as the required level of scrutiny of the investigations and/or prosecutions carried out by the States concerned with regard to the crimes allegedly committed by the person investigated or accused. This phenomenon is recognized in the heading of Art. 18 Rome Statute when referring to "preliminary" rulings on admissibility by the Trial and the Appeals Chambers. Logically, the different scope of the control of admissibility undertaken in articles 15, 53 and 18 Rome Statute, the different level of scrutiny and the different level of necessary information to carry it out impede that the declarations by the Trial and Appeals Chambers of the admissibility of a situation have efficacy of *res iudicata* with regard to subsequent controls of the admissibility of cases under articles 19 and 53.2., 58, 61 and 64 Rome Statute. Therefore, it is submitted that the level of specificity of the control of admissibility of situations is lower than that required for the control of admissibility of cases. As a consequence, it is submitted that different standards for the assessment of the admissibility of situations and cases are required.

As seen above, in accordance with the principle of complementarity, the ICC can only activate and exercise its jurisdiction if national courts have not taken any action, or if they were, or are, "unable" or "unwilling" to properly conduct their investigations and prosecutions (article 17). But, what national courts are relevant for the purpose of the application of the principle of complementarity? In order words, is the activation and exercise of the ICC's jurisdiction exclusively dependant on the lack of action of the national courts of those States directly concerned with a given situation of crisis, i.e. the territorial State, the State of nationality of the alleged perpetrators, or the State of nationality of the victims? Or is the activation and subsequent exercise of jurisdiction also dependent on the lack of action of the national courts of whichever State that has adopted in its national legislation the principle of universal jurisdiction over the crimes within the jurisdiction of the Court?

The answer to this question must be derived from what it is submitted constitutes the cornerstone principle of the Rome Statute. The ICC does not substitute any of the existing mechanisms of investigation or prosecution of the "most serious crimes of international concern" at the international nor the national level. Therefore, the entry into force of the Rome Statute does not affect the content of the obligations *aut dedere aut iudicare* of the States Parties to the Geneva Conventions,[18] its First Additional Protocol[19] and the

[18] Art. 49 of the Geneva Convention (No. I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 UNTS 31; Art. 50 of the Geneva Convention (No. II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 UNTS 85; Art. 129 of the Geneva Convention (No. III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 238, Art. 129; and Art. 146 of the Geneva Convention (No. IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 UNTS 287.

[19] Art. 85 (1) of Protocol Additional I to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 UNTS 3.

Convention Against Torture.[20] In addition, the content of the principle of universal jurisdiction over the "most serious crimes of international concern", is not affected by the Rome Statute either. On the contrary, the Rome Statute strengthens the legitimacy of such a principle inasmuch as it creates an international judicial body entrusted with the function of making sure that the investigations and prosecutions undertaking on the basis of the principle of universal jurisdiction are properly conducted by national Courts. As a consequence, it can be concluded that the investigations and/or prosecutions undertaken by the national Courts of any State, Party or not-Party to the Rome Statute, preclude the activation and exercise of its jurisdiction by the ICC in as much as such States have introduced in their national legislation the jurisdictional links (territoriality, nationality of the accused or of the victim, principle of universal jurisdiction) that they are claiming to remain seized with a given matter. In this case-scenario, the ICC could only activate and exercise its jurisdiction if such national Courts are found to be "unable" or "unwilling" to carry out their investigations and/or prosecutions. From what has been said, it would seem to follow that the jurisdiction of the ICC is not complementary, but subsidiary, with regard to the jurisdiction of national Courts.

However, the Rome Statute not only allows the ICC to activate and exercise its jurisdiction when national Courts are not doing their job properly, but it also empowers the ICC to *decide* whether national Courts are doing their job properly. To give one example: had the Rome Statute come into force by the time it was adopted, the ICC would have had the power to decide whether or not the proceedings undertaken against General Augusto Pinochet by Chilean Courts, and, especially, the decision of the Santiago Court of Appeals of 9 May 2001, on the case of the Caravan of Death, where the court declared Pinochet medically unfit to stand trial, were independent, impartial and intended to bring General Pinochet to justice. Therefore, the Rome Statute has created a "watchdog court" that will take over when it considers that the national courts are not up to their job of investigating and prosecuting crimes of genocide, crimes against humanity and war crimes. From this perspective, there can be little room for doubt with regard to the *de facto* primacy of the ICC over national jurisdictions.

Finally, from a temporal perspective, the drafters had to choose between a static and a dynamic configuration of the principle of complementarity. According to the static configuration, the principle of complementarity would only operate up until the moment in which either national jurisdictions or the ICC initiated proceedings regarding a given situation. Thus, in light of the negative definition of the criteria of Art. 17.1(a) - (c) Rome Statute, the ICC and national jurisdictions would be on equal footing and whichever initiated proceedings first with respect to a given matter would acquire exclusive jurisdiction over it.

In contrast, according to the dynamic configuration of the principle of complementarity, the scope of application of the principle could be extended while the national jurisdictions or the ICC exercised their respective functions: investigation, prosecution, declaration of the individual criminal responsibility derived from crimes within the jurisdiction of the Court and enforcement of sentences.

The solution finally adopted by the negotiators in Arts. 15.4, 17, 18, 19 and 20 and 53.1 Rome Statute includes a dynamic configuration of the principle of complementarity which extends to the above-mentioned functions undertaken by national jurisdictions and the ICC, excluding the enforcement of sentences. Therefore, once a final judgement is pronounced

[20] Art. 5 (2) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 UNTS 85.

by the ICC, the latter assumes exclusive jurisdiction, which precludes any and all action by national jurisdictions in respect of the crimes coming within the Court's jurisdiction. Likewise, if a final judgement is rendered by a State, the latter acquires exclusive jurisdiction regarding its execution, so long as the ICC does not declare that any of the circumstances provided for in article 20.3 Rome Statute concur in the national jurisdiction's judgement.

In my opinion, the solution given by the Rome Statute on this point is the most adequate. The extension of the dynamic configuration of the complementarity principle to the enforcement stage would have inevitably led to problems of *non bis in idem*. Thus, the extension of the dynamic configuration would either have to imply the automatic acknowledgement of judgements pronounced by national jurisdictions for the purposes of their enforcement by the ICC, or the ICC would have to carry out a new prosecution of the crimes that were the object of the final judgements pronounced by national jurisdictions (and in which, furthermore, none of the circumstances provided for in article 20.3 Rome Statute concur) before proceeding to enforce its own final judgement. In this way, the same crimes would be prosecuted twice and could give way to two different final judgements.

In this sense, it must be underscored that it is true that the *non bis in idem* principle contained in article 14(7) of the International Covenant on Civil and Political Rights (ICCPR) has traditionally been interpreted as being limited to the criminal proceedings carried out in a particular jurisdiction. But it is also true that the degree of guarantees offered by the *non bis in idem* principle in articles 10 of the ICTY Statute, 9 of the ICTR Statute and 20 Rome Statute is greater than that which is traditionally offered by article 14(7) of the ICCPR.[21]

But additionally, the extension of the dynamic consideration of the principle of Complementarity to the enforcement stage would have led to the provisional suspension of the enforcement of the ICC's final judgements as a consequence of State investigations and prosecutions of those crimes which were the object of the ICC's final judgements. In this way, it must not be forgotten that the dynamic character of the complementarity principle acts in a double sense insofar as it not only affects the proceedings of national jurisdictions but, also, those of the ICC.

Finally, it must also be borne in mind that the power to grant pardons is part of the most intimate content of State sovereignty and that, additionally, the extension of the dynamic character of the Complementarity principle to the enforcement stage would be of very difficult practical application. In this regard, only a minority of States authorise the trials in absentia for crimes as grave as those provided for in the Rome Statute. Hence, it is to be assumed that a State which pronounces a final judgement and then grants a pardon to the authors of such crimes would be the State in whose territory the perpetrators are to be found. In this way it would be unlikely for this State to be willing to surrender them to the ICC – despite being obligated to do so, as a State Party – more so since no sanction is expressly provided for in the Rome Statute for cases of non-compliance with its obligations to co-operate with the ICC.

For the foregoing reasons, I believe that the best way to deal with the problem of pardons to perpetrators of the "most serious crimes of concern to the international community" is by the establishment – in the Rome Statute – on the one hand, of an unequivocal obligation to

[21] See in this regard JONES, J.R.W.D, *The Practice of the International Criminal Tribunals for the Former Yugoslavia y Rwanda*, Segunda Edición, Transnational Publishers, Irvington-on-Hudson (Nueva York), 2000, pp. 151-154 y 504-505.

enforce the sentences imposed by national jurisdictions upon the perpetrators of these crimes; and, on the other, of a set of sanctions for cases of non-compliance similar to the one provided for in article 12.8 Rome Statute for cases of non-compliance by States Parties of their obligations to finance the ICC (automatic suspension of political rights in the international organisation created by the Rome Statute).

Quite different is the case of amnesty laws which, by their own nature, would result either in the total inaction of national jurisdictions when they are not accompanied by truth commissions, or in *a posteriori* inaction following the conclusion of an investigation that may be conducted through a truth commission. Thus, in my view, amnesty laws that do not go hand in hand with truth commissions will not prevent, in any case, the triggering of ICC jurisdiction over the situation that such laws have as their object. On the other hand, in the case of amnesty laws accompanied by truth commissions, the initiation of investigations by such commissions would only preclude the triggering of the ICC jurisdiction if it is considered that: a) their development is not motivated by the purpose of shielding the persons concerned from criminal responsibility; and b) they are carried out independently or impartially or in a way that is compatible with the intention to make the persons concerned face justice. Additionally, in any case, finalized the investigation by the truth commission, and once its report is presented, all impediments to the triggering of the ICC jurisdiction based on the principle of Complementarity would disappear, insofar as – provided there are reasonable indicia of criminality against the alleged authors of the ICC crimes – amnesty laws would prevent national jurisdictions from undertaking their prosecution.

Also quite different would be the fact that the promulgation of an amnesty law accompanied by the establishment of a truth commission could prevent the triggering of the ICC jurisdiction over the situation that is its object, according to article 53.1(c) Rome Statute and rule 104 of the Rules of Procedure and Evidence (hereinafter "RPE"), because the triggering would not result in the interest of justice. Now, in this case, the decision not to proceed would be exclusively based on the exercise of the principle of discretion by the competent organ of the ICC, and would have nothing to do with the principle of complementarity.

3. The Role of the Office of the Prosecutor in the Triggering Procedure

The Office of the Prosecutor has been given a key role in the Triggering Procedure, which, as seen above, constitutes an essential element of the procedural system adopted by the ICC Statute. This role includes, *inter alia*, the following functions:

a. Receiving Art. 13(a) and (b) Rome Statute activation requests made by the Security Council or States Parties;

b. Carrying out Rule 104 RPE preliminary examinations after receiving activation requests from the Security Council or State Parties;

c. Deciding whether or not to activate the potential jurisdiction of the Court over the situations of crisis referred to in the Security Council's activation requests (Art. 53.1 Rome Statute);

d. Deciding whether or not to provisionally activate the potential jurisdiction of the Court over the situations of crisis referred to in the States Parties' activation requests (Art. 53.1 Rome Statute);

e. Deciding, at the request of the Pre-Trial or Appeals Chambers, whether or not to reconsider its decision not to activate, or not to provisionally activate, the potential jurisdiction of the Court over the situations of crisis referred to in the Security Council's or States Parties' activation requests (Art. 53.3 (a) Rome Statute);

f. Deciding, on the basis of new facts or new evidence provided for by the Security Council or the States Parties, whether or not to reconsider its decisions not to activate, or not to provisionally activate, the potential jurisdiction of the Court over those situations of crisis referred to in the Security Council's or States Parties' activation requests (Art. 53.4 Rome Statute);

g. Receiving Art. 15.1 Rome Statute complaints from any natural or legal person:

h. Carrying out Art. 15.2 Rome Statute preliminary examinations after the filing of Art. 15.1 Rome Statute complaints with the OTP;

i. Requesting the Pre-Trial Chamber to take the appropriate measures to ensure the efficiency and integrity of the proceedings when there is a serious risk that it might not be possible for a testimony to be taken subsequently (Rule 47.2 RPE);

j. Deciding whether or not to make an activation request regarding those situations of crisis referred to in Art. 15.1 Rome Statute complaints (Art. 15.3 Rome Statute);

k. Notifying victims of its Art. 15.3 Rome Statute activation requests so as to enable them to make representation to the Pre-Trial Chamber in accordance with Art. 15. 4 Rome Statute (Rule 50 RPE);

l. Notifying complainants of its decisions not to make activation requests regarding those situations of crisis referred to in Art. 15.1 Rome Statute complaints (Art. 15.6 Rome Statute);

m. Deciding, on the basis of new facts or new materials provided for by the complainants, whether or not to reconsider its decisions not to make an activation request regarding the situations of crisis referred to in Art. 15.1 Rome Statute complaints (Art. 15.5 and 6 Rome Statute);

n. Deciding whether or not to appeal Art. 15.4 Rome Statute Pre-Trial Chamber decisions not to provisionally activate the jurisdiction of the Court over the situation of crisis referred to in OTP activation requests because of the lack of "reasonable basis to proceed" (Art. 82.1(a) Rome Statute);

o. Notifying all States Parties and affected States non-Parties of Arts. 15.4 and 53.1 Rome Statute decisions to provisionally activate the jurisdiction of the Court over the situations of crisis referred to in the States Parties' or OTP's activation requests (Art. 18.1 Rome Statute);

p. Deciding, on the basis of the merits of the concerned States' allegations relating to the formal primacy of their national jurisdictions, whether or not to indefinitely suspend the efficacy of the decisions to provisionally activate the potential jurisdiction of the Court over the situations of crisis referred to in the activation requests of the States Parties or the OTP (Art. 18.2 Rome Statute);

q. Supervising the continued willingness and ability of the concerned States to properly investigate and prosecute the crimes committed within those situations of crisis referred to in States Parties' or OTP's activation requests (Art. 18. 5 Rome Statute);

r. Periodically reviewing, on the basis of the new information gathered through the above-mentioned supervisory functions, its decisions (*OTP's deferrals*) to indefinitely suspend the efficacy of the decisions to provisionally activate the potential jurisdiction of the Court over the situations of crisis referred to in the activation requests of the States Parties or the OTP (Art. 18.3 Rome Statute).

s. Requesting the Pre-Trial Chamber for authorization to pursue necessary investigative steps in accordance with Art. 18.6 Rome Statute;

t. Requesting the Pre Trial Chamber confirmation of its decision to reject the opposition of the concerned States to the activation of the potential jurisdiction of the Court over those situations of crisis referred to in the activation requests of the States Parties or the OTP (Art. 18.2, *in fine* Rome Statute);

u. Deciding whether or not to appeal, in accordance with Art. 18.4 Rome Statute, the Pre-Trial Chamber's decision not to confirm the OTP's decision to reject the opposition of the concerned States to the activation of the potential jurisdiction of the Court over those situations of crisis referred to in the activation requests of the States Parties or the OTP; and

v. The adoption during the Triggering Procedure of the necessary measures to ensure the confidentiality of the information, the protection of victims and witnesses and the preservation of evidence (Rule 50 RPE).

The granting of these functions to the OTP has been accompanied by the imposition on it of a number of duties. Particularly relevant is Art. 15.2 Rome Statute which imposes upon the OTP the duty to "analyse the seriousness of the information received" from any legal or natural person, and enumerate a number of investigative steps that the OTP is empowered to carry out for the purposes of fulfilling such a duty (seeking additional information from

States, organs of the United Nations, intergovernmental or non-governmental organization, or other reliable sources, and receiving written or oral testimony at the seat of the Court).

In my view, three are the main goals to be achieved through the OTP's preliminary examinations provided for in Art. 15.2 Rome Statute:

a. Analysing the seriousness of the information received pursuant to Art. 15.1 St;

b. Determining the personal, territorial and temporal parameters that define the situations of crisis within which the crimes referred to in Art. 15.1 Rome Statute complaints have been allegedly committed; and

c. Verifying the occurrence of the above-mentioned six circumstances that must take place for the potential jurisdiction of the Court to be activated over such situations of crisis.

Therefore, Art. 15.2 Rome Statute preliminary examinations constitute the intermediate stage between the reception of Art. 15.1 Rome Statute complaints relating to specific crimes and Art. 15.3 OTP activation requests over those situations of crisis within which such specific crimes have allegedly been committed. In this regard, it is my view that Art. 15.2 OTP preliminary examinations play, to a certain extent, a similar role to the one played by the investigations that the Security Council and the States Parties have to carry out before making an activation request in accordance with Arts 13(a), 13(b) and 14 Rome Statute. However, while the Security Council and the States Parties may decide whether or not to make an activation request, and, thus, whether or not to undertake a previous investigation of a given situation of crisis, Art. 15.2 Rome Statute imposes on the OTP the duty to carry out preliminary examinations after receiving an Art. 15.1 Rome Statute complaint about specific crimes within the jurisdiction of the Court, leaving up to the OTP's technical discretion the determination of the specific investigative steps that must be carried out to comply with such a duty.

Arts. 13(a) and 53.1 Rome Statute have been drafted on the assumptions that:

a. The Security Council must have had to carry out an in-depth investigation before declaring that a situation of crisis constitutes a threat to international peace, a breach of international peace or an act of aggression; and

b. The Security Council, when making an activation request, will provide to the OTP the necessary material to determine whether or not the above-mentioned six conditions for the activation of the potential jurisdiction of the Court over the situation of crisis referred to in its activation request occur.

In addition, Art. 14 Rome Statute expressly imposes on the States Parties that make an activation request the duty to, as far as possible, "especify the relevant circumstances" and transmit to the OTP "such supporting documentation as is available" to them.

For this reason, Art. 53.1 Rome Statute, unlike Art. 15.2 Rome Statute, does not expressly provide for any OTP preliminary examination when the Security Council or a State Party make an activation request. However, Rule 104 RPE partially modifies the above-mentioned system by providing for OTP's preliminary examinations upon Security Council's or State Parties' activation requests. By doing so, the position of the OTP *vis-a-vis* the Security Council and the State Parties has been strengthened because it enables the OTP not to exclusively rely on the materials provided by the Security Council or the States Parties in deciding whether or not to activate the potential jurisdiction of the Court over the situations of crisis referred to in their activation requests.

Despite the fact that Rule 104 RPE grants to the OTP the same powers granted to it by Art. 15.2 Rome Statute, the scope of Rule 104 OTP's preliminary examinations should be far more limited than the scope of Art. 15.2 OTP's preliminary examinations because their only purpose is to obtain additional information to better decide, in accordance with Art. 53.1 Rome Statute, whether or not to activate the potential jurisdiction over situations of crisis referred to in the Security Council's or States Parties' activation requests.

The goals to be achieved through Art. 15.2 Rome Statute preliminary examinations and the fact that such preliminary examinations are carried out before any activation request has been made provide for some implicit limits to their scope. One of them is the limitation of the investigative steps that can be taken by the OTP to those of non-coercive nature. However, the language of Art. 15.2 Rome Statute leaves, in my view, room for the OTP to resort to many of the forms of State Parties co-operation provided for in Art. 93 Rome Statute, including:

a. The identification and whereabouts of persons or the location of items;

b. The voluntary questioning of victims and witnesses in the territory of the States Parties;

c. The service of documents, including judicial documents;

d. The provision of records and documents, including official records and documents;

e. The examination of places or sites, including the exhumation and examination of grave sites; and

f. Any other type of assistance not of a coercive nature which is not prohibited by the law of the requested state.

In this regard, it is my view, that Art. 86 Rome Statute States Parties duty to cooperate with the Court extends to all activities of the Court, including the preliminary examination and the Triggering Procedure. Except those investigative steps that can be carried out by the OTP in the seat of the Court, the rest will have to be conducted by the competent authorities of the requested States in accordance with the procedures established in their applicable national laws (Art. 99.1 Rome Statute). In addition, unless expressly prohibited by the national laws of the requested States, the procedures outlined by the OTP in its requests should be followed, and OTP personnel should be allowed to be present if the OTP so requests (Art. 99.1 Rome Statute).

Neither Art. 15.2 Rome Statute nor Rule 47 RPE provide for any express time-limit in the development of preliminary examinations by the OTP. However, both the purposes of Art. 15.2 Rome Statute preliminary examinations and the right of the complainants to be notified of the OTP's decisions not to make activation requests over the situations of crisis within which the specific crimes referred to in their complaints have allegedly been committed, require for such preliminary examinations to be completed by the OTP within a reasonable time.

Despite of the fact that the subject of Art. 15.2 Rome Statute preliminary examinations are situations of crisis (as opposed to cases) and that they are carried out before any activation request has been made, there is an undeniable risk that the OTP may abuse its Art. 15.2 Rome Statute powers to carry out Art. 54 investigations of particular suspects and crimes. This risk derives, in my view, from the following factors:

a. The experience of the ICTY and ICTR shows that the political and military leaders of the concerned States are likely to be actively or passively involved in the commission of the crimes being investigated. Rule 50 RPE notification of the OTP's activation requests to the victims, and Art. 18.1 Rome Statute notification to all States Parties and concerned States non-Parties of the decision to provisionally activate the jurisdiction of the Court, will put such leaders on notice of the risk of being targeted by the OTP. Therefore, the OTP may very well be tempted to confidentially carry out Art. 54 Rome Statute investigations as if they were part of its Art. 15.2 Rome Statute preliminary examinations;

b. Due to the fact that, except under the exceptional circumstances provided for in Arts. 57.3(d) and 99.4 Rome Statute, Art. 54 investigative steps must be carried out through the co-operation of the States Parties, the additional powers granted to the OTP in order to conduct its Art. 54 Rome Statute investigations are quite limited; and

c. The lack of precise time-limits to complete Art. 15.2 Rome Statute preliminary examinations.

Using Art. 15.2 Rome Statute powers to carry out Art. 54 investigations not only would violate the Rome Statute but it would also create the perception that the OTP might be conducting politically motivated investigations. Thus, these practices are likely to erode the trust of the States Parties on the fairness of OTP and, thus, to limit their cooperation with the OTP. As a consequence, and considering that, to a very important extent, the effectiveness of the OTP in the performance of its functions depends on the co-operation of the States Parties, and that most of the victims, witnesses, alleged perpetrators and evidence will be in the territory of the concerned States, the OTP could be put in an untenable situation.

Besides, Arts. 42 and 54 Rome Statute reject *in toto* the idea of a purely adversarial OTP that adopts a one-sided approach to the substantive and procedural legal standards provided for in the Rome Statute and RPE, and bring the OTP closer to the notion of a *custos legis*. This approach is reinforced by Arts. 15.4, 18.2 and 4, 19, 53, 57, 64 and 82.1 Rome Statute which combine:

a. The granting of an important margin of appreciation to the OTP in the exercise of its functions; with

b. The imposition on the competent Chamber of the Court of the duties to, *propio motu* or at the request of a party to the proceedings,:

   i. Control that the OTP carries out its functions within the margin of appreciation granted to it, and in full respect of the substantial and procedural legal standards set out in the Rome Statute and RPE; and

   ii. Take appropriate measures to correct any deviation by the OTP from them.

This is paper has been written for the purposes of the presentation to be given on March 26th in a series of Guest Lectures at the Office of the Prosecutor of the International Criminal Court.

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A more comprehensive and in-depth analysis of the issues addressed in this paper and many others related to the ICC Criminal Justice System, the Triggering Procedure and the General Powers of the Office of the Prosecutor can be found in: OLÁSOLO, H., Corte Penal Internacional: ¿Dónde Investigar? Especial Referencia a la Fiscalía en el Proceso de Activación, Tirant lo Blanch/Centro de Derecho Internacional Humanitario (Cruz Roja Española), Valencia, November 2003; OLÁSOLO, H., The Prosecutor of the ICC befote the Initiation of Investigations: A Quasi-Judicial or a Political Body, in Internacional Criminal Law Review, 2003/2, pp. 87-150; OLÁSOLO, H., Issues Regarding the General Powers of the ICC Prosecutor under Article 42 of the Rome Statute (available on http://www.icc-cpi.int/otp/otpinput.php); and OLÁSOLO, H., Reflexiones sobre el Principio de Complementariedad en el Estatuto de Roma, in Revista Española de Derecho Militar, March-April 2004.