Strategies Governing the Prosecution Process in the Office of the Prosecutor of the International Criminal Court

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Abstract

Given the growing number of referrals and interactions between States and the International Criminal Court (ICC), developing a precise policy-making approach for selecting and pursuing situations and cases has become one of the essential operational requirements of the Office of the Prosecutor (OTP). In this regard, the OTP has so far adopted four core principles to guide its actions: focusing on investigative priorities, active reliance on the principle of complementarity, special consideration for the rights and interests of victims, and assessing the impact of the Office's activities on the realization of international criminal justice. The authors of this article, through a critical analysis of these principles grounded in the Rome Statute and the Court's jurisprudence, highlight the significance of the principle of "positive complementarity," which entails strengthening and cooperating with national systems to enable effective criminal prosecution. A notable example of such cooperation can be seen in the successful interaction between the OTP and the German judicial system in the prosecution of leaders of the FDLR group. This model of cooperation enhances the Court's capacity to combat impunity and increases the possibility of implementing justice at the national level. Nevertheless, there remains a need for the OTP to establish clearer criteria for selecting situations and prioritizing cases. From this perspective, formulating a comprehensive, modern, and efficient strategy for the new Prosecutor appears essential—one that, drawing on past experiences and existing strategic documents, can provide a coherent framework for the functioning of the Office.

Keywords: Impunity, International Criminal Court, Prosecution Strategy

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1. Introduction

The process of selecting and prioritizing cases to be prosecuted before the International Criminal Court (ICC) is considered essential—and legally legitimate—given the Court's limited capacity and its foundational goals of pursuing "the most serious crimes" committed by "those most responsible." However, if such selections are not made transparently, coherently, and rationally, they may undermine the Court's credibility and legitimacy. Case selection is a multi-stage and complex process that first requires distinguishing between the selection of *situations*—that is, locations where crimes under ICC jurisdiction are

likely to have been committed—and the extraction of *cases*, meaning the identification of specific individuals suspected of committing those crimes (see Regulations 34 et seq. of the Office of the Prosecutor) (Office of the Prosecutor, 2009).

In addition, the distinction between the selection processes carried out by the Office of the Prosecutor (OTP) and referrals by the United Nations Security Council (SC) is of fundamental importance. Security Council referrals—which have recently been the subject of substantial criticism—have thus far only been applied to non-States Parties, such as Darfur (Sudan) and Libya. Under normal circumstances, the ICC has jurisdiction only when the alleged crime occurred on the territory of a State Party or when the accused is a national of a State Party. Otherwise, only the Security Council, acting under Chapter VII of the UN Charter, may refer a situation to the Court. These decisions are often political in nature and fall outside the ICC's control; the Court obtains jurisdiction only *after* such a referral and then determines, based on its legal framework, whether to initiate an investigation (Kaye, 2011).

This article focuses primarily on the issue of case selection, as the coherence of prosecutorial performance depends directly on the quality of these decisions. The authors do not claim to address all possible questions and challenges inherent in the selection process, as it is highly complex in practice. Various approaches may be considered: selection based on chronological order, availability of evidence, or formalized and structured criteria. The third option represents the ICC's notable innovation, whereby the OTP uses a set of legal and policy-based criteria to rank and coherently select cases (Stegmiller, 2011).

The difficulty of selecting situations and cases was far more limited in earlier international criminal tribunals, such as the ICTY and ICTR, whose jurisdictions were predefined by their statutes; thus, there was no need for situation selection, and they proceeded directly to choosing suspects. In contrast, the ICC is theoretically capable of operating on a global scale, dramatically increasing the complexity and sensitivity of selection. The Court's performance and legitimacy depend heavily on the quality of these decisions (Stahn, 2011).

Accordingly, this article concentrates on examining prosecutorial selection policy at the ICC. The authors note that the OTP has recently initiated a new process of public consultations to develop selection criteria—a significant innovation compared to prior tribunals, which never approached such matters transparently or publicly. Nevertheless, discussions on these criteria at the ICC remain in early stages. Many questions, including their binding nature and precise formulation, remain unanswered and require further study and debate (Stegmiller, 2011).

2. The Prosecution Strategy of the Office of the Prosecutor

This article focuses on the approach of the Office of the Prosecutor, as explained within the framework of its prosecutorial strategy, which is grounded in four foundational principles: focused investigations, positive complementarity, consideration of victims' interests, and maximizing the impact of the Office's work. To enable the OTP to achieve maximum effectiveness, certain reforms and improvements are necessary. The first essential step is ensuring continuous transparency. Publishing periodic reports and consolidating all policy and strategic documents into a single, coherent prosecutorial strategy can serve as a lasting model for case selection across the international criminal justice system (Office of the Prosecutor, 2010a).

2.1. Selection Strategy in the Office of the Prosecutor

Over past years, the OTP has repeatedly referred to important elements of its selection strategy in several documents, although it has not succeeded in formulating a comprehensive approach. The Office has addressed emerging challenges by issuing relevant policy and strategy papers, which are described below (Office of the Prosecutor, 2006).

2.2. Identifying the Sources

According to Regulation 14 of the Office of the Prosecutor (see OTP Regulations, 2009) (Office of the Prosecutor, 2009), the OTP may use policy papers reflecting core principles and criteria. Four foundational principles form the core of this strategy:

(i) positive complementarity,

(ii) focused investigations and prosecutions,

(iii) addressing victims' interests, and

(iv) maximizing the Office's impact (Office of the Prosecutor, 2010a).

In line with Regulation 14, the OTP has made several documents publicly available. First, key strategic issues are set out in two strategy papers:

(i) the 2006–2009 Strategy (Report on Prosecutorial Strategy, 2006) (Office of the Prosecutor, 2006), and

(ii) the 2009–2012 Strategy (Prosecutorial Strategy, 2010) (Office of the Prosecutor, 2010a).

Second, several OTP policy documents clarify additional matters such as the "interests of justice," victim participation, and preliminary examinations. The most recent draft of the Policy Paper on Preliminary Examinations will be examined further below. Additional policy papers on topics such as positive complementarity and case selection are under consultation and will be published in the future (Pampalk & Knust, 2010).

2.3. The Lack of a Comprehensive and Overarching Strategy

The OTP uses the terms "policy" and "strategy" interchangeably. Strategic documents cover specific time periods (2006–2009 and 2009–2012) and set forth the OTP's strategic objectives, whereas policy papers address particular foundational matters requiring clarity and transparency. However, under Regulation 14(1), the OTP appears obliged to formulate a single prosecutorial strategy as an overarching guide. In our view, Regulation 14(1) implies a coherent and unified strategy (Stegmiller, 2011).

The current practice of issuing strategy papers with approximately three-year timelines does not align with the Regulation. This is not merely a formal concern. A single principal document articulating general or specific prosecutorial strategy objectives would guide not only external stakeholders but also the Office's internal staff. Moreover, a unified strategy is more practical than multiple documents issued at different times and focusing on different subjects. Only a principal document can provide a "guiding motif" from which more focused strategies may be developed and periodically reviewed (Stahn, 2012).

Three-year plans serve as valid operational plans, establishing objectives for a defined period. Likewise, policy papers reflect strategic goals and form the basis of the overall strategy. These papers, due to their policy-oriented nature, are subject to unlimited revision and create no enforceable rights (Schabas, 2008). Based on these documents and the Court's practice to date, the Prosecutor should draw upon lessons learned and draft a clearer strategy. The OTP has initiated transparent dialogue with external stakeholders, which should continue. Indeed, it is strongly recommended that the Prosecutor further expand this reciprocal process to strengthen the ICC's credibility and avoid perceptions of inconsistency in selection decisions. For example, the Prosecutor should—as envisioned in the 2009–2012 Prosecutorial Strategy—publish interim reports concluding preliminary examinations of specific country situations or allowing the OTP to maintain ongoing monitoring (Office of the Prosecutor, 2010a).

Transparency through interim reporting enhances the ICC's legitimacy. It also contributes to the Court's institutional development and strengthens the mandate of the new Prosecutor elected at the end of 2011 (Robinson, 2011). This learning process requires a dual approach:

first, drafting a new strategy document consistent with Regulation 14(1); and

second, continuing consultation with external stakeholders to develop prosecutorial guidelines covering the situation- and case-selection processes and their criteria (Stegmiller, 2011).

Such guidelines should integrate existing (draft) policy papers on the interests of justice, preliminary examinations, case selection, and related topics, thereby harmonizing the documents and establishing selection criteria within policy-based guidelines.

3. Focused Investigations

One of the guiding principles of the Office of the Prosecutor is focused investigations and prosecutions. The Office has decided to concentrate on the most serious crimes and on "those who bear the greatest responsibility." While this latter term allows for a certain degree of flexibility, the ICC Prosecutor has primarily selected individuals from the top of the (state) hierarchy for prosecution. Others are left to national criminal justice systems, thereby encouraging territorial and third States

to act against such offenders and to close the impunity gap (see the section on positive complementarity). In line with this focused approach, the OTP initially adopted a sequential model, investigating cases within a situation one after another and selecting them according to their gravity. More recently, the OTP has become more flexible in its approach and, for example, in the Kenya proceedings, has moved toward simultaneous investigations and brought forward two cases at the same time for prosecution (Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang; and Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali). Thus, while the OTP still refers to "focused investigations," the sequential approach is no longer explicitly mentioned in the 2009–2012 Strategy (Stahn, 2011). This shows that a certain degree of flexibility is useful and that the Prosecutor must be able to adjust the strategy from time to time. In addition, the Office's aim of shortening investigations and expediting trials is reflected in the selection of a limited number of the most serious incidents that are representative of the main types of victimization.

The focused approach is consistent with practical realities and the experience of earlier international criminal proceedings. It is evident that it is impossible for the ICC to prosecute all potential perpetrators of core international crimes. The resulting impunity gap can only be closed through prosecutions at the national level. The success of the OTP's approach, aimed at combating impunity, therefore depends on the strength of national systems and their integration into the international criminal justice system as a whole. At the same time, the OTP's policy choice to limit prosecutions to high-level cases should not be confused with the admissibility threshold as a legal barrier to bringing particular cases (Rastan, 2010; Stegmiller, 2011). If the Prosecutor considers it necessary to adopt a broader approach, prosecutorial policy may be adjusted accordingly, always taking into account the need for coherence.

3.1. Preliminary Examination by the Office of the Prosecutor

As stated at the beginning of this article, the OTP's selection process can roughly be divided into two stages: (i) the identification of situations and (ii) the selection of cases. "Situations" refer to broader areas of conflict in which the OTP conducts investigations and develops several case hypotheses. Situation selection is guided by the criteria in Article 53(1) of the Rome Statute, namely jurisdiction, admissibility, and the "interests of justice" (Rules 48 and 104 of the Rules of Procedure and Evidence), as further discussed by Stegmiller (Stegmiller, 2011). Cases are selected on the basis of similar legal criteria, either under Article 53(2) of the Statute or by applying, *mutatis mutandis*, the factors listed in Article 53(1) of the Statute.

[3] According to Regulation 33 of the OTP, the Prosecutor refers, for case selection, to the criteria in Article 53(1) of the Rome Statute, which would appear to mean that Article 53(2) of the Statute does not apply to case selection. However, Regulation 29(5) of the OTP refers to Article 53(2) in the context of prosecutions. Since cases constitute the basis of a prosecution and, at a later stage, derive from a specific selected situation, there is an argument that Article 53(2) also covers case selection. Moreover, limiting Article 53(2) to situations in which the OTP decides not to pursue any prosecution in relation to an entire situation is not supported by a literal or systemic interpretation. Article 53(2) speaks of "sufficient basis for a prosecution," which is a higher standard than the threshold for situation selection ("reasonable basis") in Article 53(1), and therefore refers to a different stage. From a systemic perspective, both paragraphs 1 and 2 of Article 53 are drafted in negative terms ("shall not"), but this does not indicate that they cover only negative decisions not to proceed. However, the review mechanism under Article 53(3) covers only negative decisions ("not to proceed"), and intervention by the Chamber depends on such a specific decision by the Prosecutor. Otherwise, the carefully crafted review mechanism in Article 53(3) would be undermined. In other words, as long as no decision under Article 53(2) regarding a specific suspect has been issued by the OTP, such a decision does not exist and is therefore not subject to review (Stahn, 2009).

Before addressing the issue of case selection, the OTP must first pass through the pre-investigation stage, during which situations are examined and selected for further investigation. This preliminary examination phase is a significant and necessary innovation compared to the pre-trial practice of earlier international criminal bodies (the International Military Tribunals at Nuremberg and Tokyo, the ICTY and ICTR, the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, and the Special Tribunal for Lebanon). Unlike those special international courts, all of which had jurisdiction over a specific situation limited in time and place, the ICC does not have such pre-defined jurisdictional limits. Instead, it must preliminarily examine and select its situations. Even in the case of pre-defined situations referred by the Security Council or a

State, the final decision on whether to open a formal investigation rests with the Prosecutor and the judges, on the basis of the criteria in Article 53(1) of the Statute (Kaye, 2011).

3.2. Overview of the Process

During the preliminary examination process, the OTP assesses whether to initiate a formal investigation into a situation. The analysis of a situation may be triggered through three mechanisms: (i) a State referral under Articles 13(a) and 14 of the Statute, (ii) a Security Council referral under Article 13(b) of the Statute, or (iii) *proprio motu* action by the Prosecutor based on information received under Articles 13(c) and 15 of the Statute (Schabas, 2010).

In principle, all three triggers are subject to the same analysis and the application of similar criteria. *Proprio motu* initiation differs only in two respects: first, under Article 15(3) of the Statute, the Prosecutor must submit a request for authorization to the competent Pre-Trial Chamber, whereas in the case of referrals the Prosecutor may simply proceed with an investigation unless she determines that there is no reasonable basis to do so (Article 53(1) of the Statute); second, the evaluation of information received under Article 15 required the introduction of a pre-filtering mechanism. "Information received" (also referred to as "communications") must be analyzed in accordance with Article 15(2) of the Statute. This means that the "seriousness" of the information is assessed, and alleged crimes that are manifestly outside the Court's jurisdiction are discarded even before they become formally recognized "situations under analysis" (a stage referred to as Phase 1 of the analysis) (Stegmiller, 2011).

Under Regulation 27(a) of the OTP, a "pre-preliminary" examination is conducted to filter out communications that are manifestly unfounded. According to the Court's website, by the end of May 2011, out of a total of 9,214 communications received, 4,316 had been considered "manifestly outside the Court's jurisdiction" (Schabas, 2010). In any event, the "seriousness" filter is also applied to referrals (by States or the Security Council) (see Rule 104(1) of the Rules of Procedure and Evidence). In effect, this is a procedural filtering mechanism developed by the OTP to manage the large volume of information it receives regarding potential crimes.

In the subsequent preliminary analysis, the OTP assesses the criteria in Article 53(1) of the Statute, namely jurisdiction, admissibility, and the interests of justice (Office of the Prosecutor, 2010a).

In the ICC's early years, the OTP distinguished three analytical phases: (i) Phase 1 – initial assessment; (ii) Phase 2 – evaluation of jurisdiction and admissibility; and (iii) Phase 3 – advanced analysis and planning (Annex to the 2003 Policy Paper (Office of the Prosecutor, 2003); see also Stegmiller (Stegmiller, 2011)). The OTP's working method has recently been revised, reorganizing the components of the former second phase into new Phases 2 (jurisdiction), 3 (admissibility), and 4 (interests of justice), while the former phase of advanced analysis and planning has been discontinued (Draft Policy Paper on Preliminary Examinations, 2010) (Office of the Prosecutor, 2010b).

The distinction between phases in the preliminary examination process is not prescribed by the Statute; it merely describes the OTP's internal working process. As a matter of law, two stages can be distinguished, which the OTP now clearly identifies: first, Article 15(2) of the Statute allows for an assessment of the "seriousness" of the information received in order to identify communications that clearly provide no basis for further action. Second, the "reasonable basis" standard and the assessment criteria must then be examined. Given the three triggers mentioned above, it is important to note that the "reasonable basis" test is applied in the same way to all triggers under Articles 15(3) and (4), and Article 53 of the Statute, in conjunction with Rules 48 and 104 of the Rules of Procedure and Evidence (Robinson, 2011). Thus, jurisdiction, admissibility, and the interests of justice are the core criteria for the analysis and selection of situations.

3.3. Critical Assessment of the Draft Policy Paper on Preliminary Examinations

The issue of selecting situations and cases was evident from the very beginning of the Court's work. However, at this early stage, practical constraints and administrative matters took precedence over the development of a clear selection strategy. In addition, the situations in Uganda and the Democratic Republic of the Congo (DRC), the first situations referred to the Court by the respective States in 2004, were so serious that a finely calibrated weighting exercise was not yet necessary. Only when the number of communications concerning potential situations increased did a policy on preliminary examinations become an

urgent matter. At present, seven situations are under preliminary analysis (Colombia, Afghanistan, Georgia, Guinea, Honduras, Korea, and Nigeria), and the OTP has recently requested authorization to investigate Côte d'Ivoire (Situation in the Republic of Côte d'Ivoire, Request for authorization of an investigation under Article 15, June 23, 2011), which makes it the second *proprio motu* request in addition to the Kenya situation (Office of the Prosecutor, 2010b).

In October 2010, the OTP issued a draft Policy Paper on Preliminary Examinations, which was widely circulated and attracted critical comment. This policy paper is largely based on an earlier (internal) draft from 2006 on situation and case selection, which had also been circulated—though not widely—for comment among (external) experts. Other papers addressing key issues, such as case selection and positive complementarity, are still in an internal consultation process and have not yet been made public (Stegmiller, 2011).

In comparison with the ad hoc tribunals, where the Prosecutor's Office has engaged with NGOs and external experts, the question arises as to why the process of finalizing policy documents is taking so long. Since early 2006, the OTP has worked on strategic questions and has repeatedly postponed publication of those documents. From an outside observer's perspective, one can only speculate about the reasons why the remaining documents have not been finalized. Given the increase in the Office's workload—not least due to (unexpected) Security Council referrals in the Sudan (Darfur) and Libya situations—it is quite plausible that there are serious capacity constraints. Since there is no unit devoted exclusively to policy or strategic documents, most OTP staff are engaged in ongoing situations and cases, which raise complex and often novel procedural questions that require priority attention. Numerous legal challenges emerge during trial proceedings, and tight deadlines put pressure on the OTP to provide swift responses.

However, this raises the question of why policy and strategy documents cannot be produced by the Prosecutor and his close team, which has recently been significantly strengthened through the appointment of additional advisers.[4] These advisers are not involved in the Office's daily case work; their task, if anything, is to assist the Prosecutor in developing a coherent strategy and policy. In any event, a transparent selection process is vital for the ICC's future and can also save resources. It is equally crucial for public acceptance of the Court. Strategic questions should be prioritized and resolved as soon as possible. The election of a new Prosecutor in December of last year and the assumption of office by mid-2012 provide an opportunity for a fresh start, learning the necessary lessons from the numerous mistakes and failures of the predecessor (Kaye, 2011). The new Prosecutor should, as one of his first steps, clarify the overall strategy. Working groups should be established to address this key matter with the involvement of external experts. The selection strategy affects the Court as a whole and shapes its future (Stahn, 2012).

In relation to the Preliminary Examinations Paper, a number of clarifications offered by the OTP require further precision. One example is the absence of any defined time frame for completing a preliminary examination (Draft Policy Paper on Preliminary Examinations, 2010) (Office of the Prosecutor, 2010b). While fixed time limits might be overly rigid given the complexity of investigations into mass atrocities, a complete absence of temporal rules and external control over preliminary examinations creates legal uncertainty and generates tensions between the State concerned, the OTP, and victims. In any event, international human rights law requires prompt proceedings, and this applies equally to the investigative phase. Thus, in relation to the situation in the Central African Republic (CAR), a disagreement arose between the OTP and the Pre-Trial Chamber concerning the status of that situation because the OTP had not provided any information for more than two years. To avoid such disputes in the future, the Chambers should be entitled to request information on a situation after a specified period of inactivity, carefully balancing prosecutorial independence against the need for judicial oversight (for a proposed new rule suggesting an 18-month time frame, see Stegmiller, 2011) (Stegmiller, 2011).

4. The Prosecution Strategy of the Office of the Prosecutor of the International Criminal Court

The current Prosecutor has also introduced a practice of inviting so-called "self-referrals," which, according to the OTP, "were explicitly envisaged during the Rome negotiations" (Draft Policy Paper on Preliminary Examinations, 2010) (Office of the Prosecutor, 2010b). However, it is controversial whether "the idea of a State referring a situation against itself was ever actually intended" (Schabas, 2010). In any case, the text of Articles 13(a) and 14 of the Statute does not exclude this possibility (for a detailed and recent analysis, including the *travaux préparatoires*, see Robinson, 2011) (Robinson, 2011).

Moreover, the policy question of whether such referrals should be preferred over the *proprio motu* trigger—explicitly referenced by the OTP in its policy documents on the DRC, Uganda, and Kenya (Draft Policy Paper on Preliminary Examinations, 2010) (Office of the Prosecutor, 2010b)—is open to debate. The Court is currently operating at full capacity, and *proprio motu* investigations may be the better option in some situations. At the same time, the risk of the Court being perceived as biased and conducting one-sided investigations cannot be underestimated. Such allegations can easily spread in societies where knowledge of the Court is limited. A policy of self-referrals may help to fuel such perceptions, even though subsequent case selection that targets all sides to the conflict may mitigate the criticism.

The OTP can also avoid or reduce criticism through its established outreach program, by redefining referred situations, and by making greater use of the *proprio motu* power (Stahn, 2011). The shift to the *proprio motu* mechanism mentioned above may be facilitated by the ongoing Kenya and Côte d'Ivoire situations, which will necessarily require and, hopefully, resolve some of the related legal issues. Ultimately, the decision whether *proprio motu* should be used as the OTP's last resort or as an equal and powerful triggering mechanism lies in the hands of the new Prosecutor (Stahn, 2012).

4.1. Case Selection

Within the framework of selected situations, the OTP must identify cases for further investigation and prosecution. This involves the following stages: (i) selection of areas, (ii) selection of incidents, (iii) selection of groups, and (iv) selection of individual perpetrators (Stahn, 2009; Van Heeck, 2006). Human Rights Watch and Regulation 49 of the Regulations of the Court, which indicates what kind of information the OTP needs to commence an investigation, also provide guidance on this point, though the present analysis draws primarily on academic and institutional sources close to those debates (Office of the Prosecutor, 2006; Stahn, 2009).

The Prosecutor has decided to select cases within a situation on the basis of the gravity of the crime and to prosecute only those suspects who bear the greatest responsibility for the most serious crimes. The OTP applies this latter criterion in a flexible manner (Office of the Prosecutor, 2006; Stahn, 2009). If applied in this way, the two criteria—"gravity of the crime" and "those who bear the greatest responsibility"—must be linked to the legal basis that provides the Prosecutor with her mandate, namely Article 42(1) in general and Article 53(2)(c) in particular, including the broad clause on the "interests of justice" (Stahn, 2009).

4.2. Gravity as a Criterion for Case Selection

In its policy papers, the Office of the Prosecutor has stated that gravity lies at the heart of its selection practice. According to Regulation 29(2) of the OTP Regulations, the following factors must be taken into account: (i) scale, (ii) nature, (iii) manner of commission, and (iv) impact.

Before the adoption of the OTP Regulations, there was intense debate about which factors should be considered when applying the gravity criterion. The Pre-Trial Chambers endorsed the factors identified by the OTP and likewise supported a combined qualitative and quantitative approach (Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, para. 62; Prosecutor v. Bahar Idriss Abu Garda, Decision on the Confirmation of Charges, 8 February 2010, para. 31) (Stahn, 2011). Previously, a very rigid interpretation of the gravity threshold had been developed by Pre-Trial Chamber I in the Lubanga and Ntaganda cases, effectively creating a legal threshold by focusing only on senior leaders (Prosecutor v. Lubanga, Decision on the Prosecutor's Application for a Warrant of Arrest, 10 February 2006, paras. 41 et seq.), which was subsequently overturned on appeal (Situation in the Democratic Republic of the Congo, Judgment on the Prosecutor's Appeal against the Decision of Pre-Trial Chamber I, 13 July 2006, paras. 1 et seq.) (Schabas, 2010). From the perspective of the Pre-Trial Chamber, gravity was to be understood as a legal threshold that limits the admissibility of ICC cases to "senior leaders," a view that would, of course, severely restrict the scope of the Court's activities. Contrary to this, we argue that gravity encompasses both a discretionary concept and a legal filter, and that the focus on "senior leaders" belongs to the former, discretionary understanding

of gravity. In any event, the Appeals Chamber has opened the door for further legal argument about the meaning and operation of gravity (Stahn, 2009).

At present, despite this intense debate, the overall concept of gravity remains largely unclear. In particular, it is not evident where, normatively, gravity can be anchored in the Statute. For case selection, gravity may be taken into account under Articles 53(2)(b) and 17(1)(d) of the Rome Statute and/or under Article 53(2)(c). In light of Regulation 29 of the OTP Regulations and the above-mentioned decision of Pre-Trial Chamber II in the Kenya situation, it appears that the OTP and the Pre-Trial Chamber consider gravity only as the second limb of the admissibility test under Article 17(1) of the Statute. The legal basis would then lie in Articles 53(2)(b) and 17(1)(d) of the Statute (Rastan, 2010). However, the OTP's own understanding in its policy papers is different and points toward a broader, discretionary reading of gravity, as outlined above. Consistent with this approach, it has been argued that a degree of prosecutorial discretion ("a principle of opportunity") is taken into account when the OTP determines gravity in practice (Stegmiller, 2011).

The way in which gravity is applied by the OTP requires a relative assessment that compares cases with each other and entails discretionary choices, and thus goes beyond a purely legal determination. Such a discretionary approach is different from the strictly legal (non-discretionary) determination of gravity under Article 17(1)(d) of the Statute (Schabas, 2010). In our view, the OTP is not legally barred from using gravity in this manner, but the legal basis for this discretionary understanding is to be found in Article 53(2)(c), rather than Article 17, of the Statute. Accordingly, if gravity is used by the Prosecutor as a factor for selecting and prioritizing cases, it should be labeled as such—that is, the OTP should specify whether it is using gravity as a minimum legal threshold under Article 17(1)(d) of the Statute or as a case-selection criterion that incorporates discretionary considerations. If the latter is the case, as the policy and strategy documents suggest, the determination of gravity by the OTP falls under Article 53(2)(c) of the Statute and is subject to judicial review under Article 53(3) (Stahn, 2009).

Prosecutions based on a discretionary assessment of gravity—regardless of whether the situation was triggered *proprio motu*, by State referral, or by Security Council referral—may be reviewed by the Chambers (Stegmiller, 2011). This follows clearly from the wording of Article 53(3) of the Rome Statute, even though the subsequent power of the State concerned or the Security Council to trigger such review (under Article 53(3)(a)) raises concern, as these actors usually decide on the basis of political considerations. It is therefore welcome that, under this provision, the Pre-Trial Chamber may only request the Prosecutor to "reconsider" a decision, meaning that the final decision ultimately remains with the OTP (Schabas, 2008).

4.3. Those Who Bear the Greatest Responsibility

During case selection, another crucial aspect is the OTP's policy of focusing on those suspects who bear the greatest responsibility for the most serious crimes. The question of whom to prosecute arises in the context of international crimes because the number of potential perpetrators is so large that prosecuting all of them is practically impossible. The related issue of avoiding impunity and prosecution gaps will be examined later under the heading of positive complementarity, whereas at this stage we focus on the implementation of the OTP's policy of focused investigations.

The expression used by the OTP ("those who bear the greatest responsibility") does not appear in the Rome Statute, but some guidance can be gleaned from the Preamble and Articles 5 and 17. The Prosecutor himself understands this as a matter of policy. If it were regarded as a legal requirement, an accused could argue that he was only a minor perpetrator and therefore falls outside the Court's *ratione personae* jurisdiction or that his case would be inadmissible. In a comparable context, the Special Court for Sierra Leone rejected a proposed jurisdictional barrier of this sort. In its early jurisprudence, Pre-Trial Chamber I held, contrary to the OTP's view, that a perpetrator had to be among the "most senior leaders suspected of being most responsible" in order to satisfy the admissibility requirement under the gravity threshold of Article 17(1)(d) of the Rome Statute (Decision on the Prosecutor's Application for a Warrant of Arrest under Article 58, 10 February 2006, para. 51). This interpretation significantly restricted the ICC's jurisdictional reach and was therefore rightly overturned by the Appeals Chamber. According to the Appeals Chamber, the Pre-Trial Chamber's approach undermined the Court's deterrent effect and lacked a proper legal basis (Situation in the Democratic Republic of the Congo, Judgment on the Prosecutor's Appeal, 13 July 2006, paras. 75 et seq.) (Schabas, 2010; Stahn, 2008). Consequently, the criterion has a purely policy-based character and cannot operate as a legal bar to prosecuting particular individuals (Rastan, 2010).

According to the OTP, the criterion is not a rigid or precise threshold; rather, it can be interpreted flexibly enough to encompass suspects below the rank of high officers (Mullins & Rothe, 2010). In light of this flexibility, it is evident that the criterion cannot simply be equated with the (legal) gravity threshold under Articles 53(2)(b) and 17(1)(d) of the Statute; it must instead be located elsewhere in the legal framework (Rastan, 2010).

Indeed, a leadership requirement has not been treated by the OTP as a concept pertaining solely to gravity (Schabas, 2008), although it is clearly connected to it. As Radan Rastan has argued, gravity "may have a broader function in guiding the exercise of discretion in the identification and prioritization of case selection" (Rastan, 2010).

While a certain degree of flexibility concerning the rank and role of suspects to be prosecuted is necessary—not only for the deterrence-related reasons mentioned above, but perhaps even more for very practical reasons—the Prosecutor's implicit discretion to prioritize some suspects over others requires justification and reasoned explanation so as not to appear arbitrary.

The OTP has not yet published an explicit interpretation of this policy threshold, although gravity-related factors, such as the "manner of commission," provide some indication of the underlying policy.[6] Nonetheless, the OTP has been notably reluctant to link senior leadership to any specific legal basis, apart from very general references to the Preamble and Articles 5 and 17 of the Statute. In fact, the OTP claims that, once the gravity threshold in Article 17(1)(d) has been crossed, it retains full discretion, but it should not be overlooked that Article 53(2)(c) of the Rome Statute provides an appropriate framework for its policy (Stegmiller, 2011).

Article 53(2)(c) of the Rome Statute incorporates three elements that are relevant to the adoption of a focus on those who bear the greatest responsibility: (i) discretion, (ii) gravity (as a policy matter), and (iii) the role in the alleged crime. The last two of these are even explicitly mentioned in the relevant subparagraph and capture the key features of the OTP's terminology: "those who bear the greatest responsibility" (= "role" under Article 53(2)(c)) for "the most serious crimes" (= "gravity" under Article 53(2)(c)) (Stahn, 2009). If the OTP combines these three elements, it may structure and apply its policy focus accordingly and base it on a solid legal foundation.

The only argument that might speak against such a reading of Article 53(2)(c) from the OTP's perspective is the fact that the Prosecutor cannot exercise an entirely independent discretionary policy, but is subject to the checks and balances provided in Article 53. In other words, prosecutorial choices may be reviewed by a Pre-Trial Chamber under Article 53(3) of the Rome Statute (Schabas, 2010).

4.4. Positive Complementarity

With regard to complementarity, the OTP rightly emphasizes that the primary responsibility for conducting investigations and prosecutions lies with the territorial State (Report on Prosecutorial Strategy, 2006) (Office of the Prosecutor, 2006). However, combining the principle of complementarity with the OTP's focus on those most responsible creates the risk that, if the territorial State is unable—due to capacity constraints or other difficulties—to bring to justice those responsible for international crimes at levels below the very top leadership, gaps of impunity may arise.

Complementarity comprises two conceptual approaches: (i) an admissibility principle dealing with competing jurisdictions, and (ii) a burden-sharing principle designed to allocate caseloads by mutual agreement. As to the latter, the OTP has adopted a policy of coordinated action referred to as positive complementarity (Rastan, 2010). Positive complementarity, understood as the burden-sharing approach just mentioned, rests on a partnership model (Stahn, 2008). The ICC's objective is not to "compete" with States for jurisdiction, but to be guided by principles of partnership and vigilance (Informal Expert Paper on Complementarity, 2003) (Office of the Prosecutor, 2003).

In practice, positive complementarity means that, instead of taking over a case itself, the Prosecutor will encourage national-level proceedings. In other words, even if a case is admissible under the complementarity test—that is, where the State concerned is in principle unwilling or unable to investigate and prosecute (for details, see the Introduction)—the Prosecutor may encourage that State to take action, with the OTP's support, without engaging directly in capacity-building. However, this constructive burden-sharing approach has so far been applied only in relation to a third State (Germany's prosecution of leading members of a rebel group; see the discussion of selection strategy at the ICC), and not a territorial State.

In the Libya situation, where the new national authorities claimed that the domestic judicial system was actively investigating the Saif Al-Islam Gaddafi and Abdullah Al-Senussi cases, the Court faced a dilemma. According to Libya's official position, the ICC should, in line with its positive complementarity approach, declare the cases inadmissible (Prosecutor v. Al-Islam Gaddafi and Abdullah Al-Senussi). The problem, however, is that the Court has not yet developed a clear strategy on parallel domestic proceedings, and the OTP's practice has been inconsistent. While in some instances the Prosecutor has given priority to facilitating domestic proceedings (for example, in Colombia) (Kleffner, 2008), in the Libya situation the OTP appears expected to actively challenge admissibility. This suggests significant ambiguity regarding the assessment of domestic investigations and prosecution strategies in light of the complementarity test (Rastan, 2010). It remains to be seen to what extent the OTP will apply positive complementarity in the future in light of the Libya experience. Of course, deeper conceptual questions about the precise requirements of "positive complementarity" must be clarified (Stahn, 2012).

In any case, given the ICC's caseload, there is ultimately no alternative to promoting the exercise of domestic jurisdiction through positive complementarity. Where the territorial State is unwilling or unable, the Court may also cooperate with third States.

4.5. Territorial States

A territorial State may render ICC proceedings inadmissible if it complies with the requirements set out in the principle of complementarity. Under Article 17 of the Rome Statute, a three-step test applies: first, the Court examines whether the State has taken any action at all (situations of inactivity); second, the exceptions listed in Articles 17(1)(a)–(c) and 20(3) of the Rome Statute render a case inadmissible before the ICC; and third, the "exception to the exception"—the unwillingness or inability test—may apply (Schabas, 2010).

While the OTP in principle recognizes transitional justice mechanisms implemented at the national level, it has not yet provided guidance on how such mechanisms are to be reconciled with the legal requirements of the Statute (Stegmiller, 2011). The Prosecutor cannot leave the sensitive issue of alternative mechanisms entirely to States, but must monitor any crimes that are neither investigated nor prosecuted, insofar as they relate to situations or cases under examination. Developing coherent guidelines that specify what constitutes genuine investigations and prosecutions by territorial States is therefore a crucial task.

The Prosecutor should reassess the Policy Paper on the Interests of Justice and clarify the understanding of transitional justice mechanisms under the Rome Statute framework. The narrow interpretation adopted so far, and the use of "interests of justice" only as a last resort, does not exempt the OTP from developing a comprehensive approach. Although each case is different and thus requires a situation-specific analysis, issuing guidance on transitional justice mechanisms is both feasible and necessary for the Court's future work. In our view, the complementarity principle even obliges the Prosecutor to recommend an appropriate framework that may subsequently be accepted or adjusted by the ICC judges in a specific proceeding. Otherwise, a territorial State cannot meaningfully comply with (positive) complementarity, since it can never be certain that its efforts are sufficient. All it can do is implement a mechanism in advance and then submit to the complementarity test, running a high risk of failing under the OTP's *ad hoc* standards. Positive complementarity, however, presupposes a good-faith, reciprocal process. The OTP must therefore engage in a dialogue about the kinds of measures that satisfy the complementarity regime (Stahn, 2012).

While the latter task primarily falls within the Prosecutor's domain, reform efforts in relation to national capacity-building do not. National measures to address the impunity gap certainly need to be strengthened, but little substantial progress has been made so far in reinforcing domestic judicial systems. The Court itself lacks the resources to engage directly in national capacity-building. It may potentially assist territorial States through its cooperation networks, by sharing information, certain databases, and similar tools (Office of the Prosecutor, 2007).

During the review process at the Kampala Conference, the Assembly of States Parties (ASP) committed itself to facilitating discussions on complementarity and the strengthening of national jurisdictions. In our view, the ASP and the more capable States Parties must take this responsibility more seriously and help post-conflict States to develop their criminal justice capacity. While the Court may, under the policy of positive complementarity, leave cases in the hands of the territorial State, it cannot rebuild that State's domestic judicial system.

5. Conclusion

The strategic evolution of the Office of the Prosecutor at the International Criminal Court simultaneously reflects significant progress and ongoing challenges in creating a coherent, transparent, and principled framework for the selection and prosecution of international crimes. Although the OTP has articulated key pillars such as focused investigations, positive complementarity, attention to victims' interests, and the maximization of impact, it has not yet managed to integrate them into a single comprehensive and unified prosecutorial strategy. The absence of an overarching strategic document on prosecutions remains an obstacle to internal coherence and external transparency.

Moreover, the OTP's reliance on discretionary criteria such as "gravity" and "those who bear the greatest responsibility," while practically necessary, may generate doubts about legitimacy and selective enforcement if not backed by clear legal foundations and consistently applied. External oversight, particularly under Article 53 of the Rome Statute, is an essential control mechanism; nonetheless, further clarification of institutional structures and public accountability is required to strengthen confidence in prosecutorial decision-making.

The principle of positive complementarity offers a promising avenue for narrowing the impunity gap by encouraging national judicial systems to fulfill their primary responsibilities in prosecuting international crimes. However, this approach must be clearly defined and implemented more coherently, especially in relation to territorial and third States. Likewise, the effective participation of victims and the responsiveness to their rights and expectations remain vital yet underdeveloped dimensions of the OTP's prosecutorial policy framework.

Ultimately, the future credibility and effectiveness of the ICC depend on the OTP's ability to formulate a coherent, inclusive, and adaptable strategy. This requires setting clear priorities, communicating selection decisions transparently, and revisiting legal and policy criteria in light of complex field realities. With new leadership, the Court has a critical opportunity to reassess and redefine its prosecutorial vision—a vision that balances legal rigor with principled discretion, and that mediates between global justice and institutional coherence.

Ethical Considerations

All procedures performed in this study were under the ethical standards.

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Conflict of Interest

The authors report no conflict of interest.

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