Chapter 2  The International Criminal Court in motion

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Four years ago, I was appointed to be the first Prosecutor of the International Criminal Court ("Court"). It was an honour and an immense responsibility. I had one goal then, and I have one goal today: to build an institution to bring justice to the victims of atrocities.

I have to implement a new law: the Rome Statute ("Statute"). This law has been in the making for over a century. In Rome in 1998, 120 states committed to end impunity for genocide, crimes against the humanity and war crimes, and to contribute to the prevention of such crimes. My challenge, as Prosecutor of the International Criminal Court, was to make the body of law adopted in Rome operational, to transform ideas and concepts into a working system. We made decisions. We chose our standards. In order to facilitate interaction with all actors within and outside the Court, the Office of the Prosecutor ("Office") published its prosecutorial strategy. Policy papers have also been disseminated including on case selection and more recently, on the interests of justice. The prosecutorial strategy and supporting policy papers can inform external actors.

In the emerging practice of the Office, two areas deserve particular attention as they shape and will continue to shape the activities of the Court: firstly, the selection of situations, and secondly, the policy of focused investigations.

1. Selection of situations

Few commentators of the Statute have noted that the most distinctive feature of the Court, as compared to the other international tribunals, is the power given to the Court to independently select the situations to investigate. In other international tribunals, situations were selected by political authorities; international prosecutors could only select cases within these situations. By establishing the *proprio motu* power-
ers of the Prosecutor to open an investigation, subject to judicial review and without an additional trigger from States or the United Nations Security Council (“UNSC”), the Statute ensures that the requirements of justice can prevail over any political decision. States or the UNSC can choose to refer situations to the Court, but if they do not, we have the possibility to select situations independently through the provisions of Article 15. This is a new and entirely different approach.

For centuries, international conflicts were resolved through wars and negotiations without legal constraints. By establishing the *propio motu* powers of the Prosecutor to open an investigation, the treaty creates a new autonomous actor on the international scene. It is a new concept: the law will rule. International justice was neither a moment in time, nor an *ad hoc* post-conflict solution: it became a permanent institution to enforce the law. States established two key provisions in order to enhance the impartiality and independence of the new Court: they made it a permanent body, and they decided that the selection of situations would be a judicial decision. From the beginning, the Office defined a process to implement those defining provisions. We set up two different analysis units to assess all communications received on alleged crimes and to routinely review all open source documents describing such crimes. Assessments of jurisdiction, admissibility and gravity are systematically conducted. This is where and when situations are selected.

The process can be illustrated through the Democratic Republic of the Congo (“DRC”) case. As soon as I took office on 16 July 2003, I announced that my Office was monitoring the gravest situation on the territory of States Parties: crimes allegedly committed in Ituri, in the East of the DRC. In September 2003, in my report to the Assembly of States Parties (ASP), I informed that the crimes allegedly committed in Ituri appeared to fall into the jurisdiction of the Court. The DRC government recognized its inability to control the region, there were no judicial proceedings underway and almost 5,000 persons were allegedly killed after 1 July 2002. I told the ASP that I was ready to use my *propio motu* powers to initiate an investigation in the DRC, but I publicly invited its Government to proceed with a referral. The question was never whether we would open an investigation, but how it would be triggered. On 3 March 2004, the President of the DRC referred the situation to my Office. After analysis of the Statute requirements, the first investigation of the International Criminal Court was opened on 21 June 2004.

Concerning admissibility, in the DRC and Uganda, there was no real issue since there were no national proceedings regarding the alleged crimes we were looking into before we took the decision to initiate the investigations. In the case of the Central African Republic (“CAR”), there had been a national investigation; however, the Cour de Cassation found that the national judiciary was unable to carry out proceedings efficiently. For my Office, even in cases referred by the Security Council, the admissibility test must be performed. For two months we conducted an analysis of the judicial activities concerning Darfur and established that there were no national proceedings underway which were focused on the most serious crimes or upon those bearing the greatest responsibility. Based on this analysis, on 1 June 2005, we opened an investigation on Darfur.

The situations in the DRC and Northern Uganda were the gravest admissible situations under the jurisdiction of the Court, and the situation in Darfur, the Sudan and