The discretionary power of the Prosecutor of the ICC and its limits
(working title)

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The purpose of this project is to analyse the discretionary powers of the Prosecutor of the International Criminal Court and the limits of her discretion. These limits come first of all from the reviewing powers of the Chambers, but also from the control exercised by other subjects, such as States, the UN Security Council and the Assembly of the States Parties to the Rome Statute. Even if the Prosecutor seems to act like a national prosecutor, her features differ from her national colleagues', because of the context in which she operates, the consequences of her activity at the international level, and the means she has (or does not have) at her disposal in order to reach her objectives.

The history of international criminal law dates back to the end of World War I, when article 227 of the Treaty of Versailles aimed at establishing a special tribunal for trying the German Kaiser 'for a supreme offence against international morality and the sanctity of treaties'. The Kaiser was never tried, but after the end of World War II, the Allies established two international military tribunals (respectively in Nuremberg and in Tokyo) in order to try the major perpetrators of the crimes committed by the members of the Axis. With regards to the organ in charge of investigating and prosecuting at the IMT, each Signatory appointed a Chief Prosecutor. The IMT did not experience the problem of the prosecutorial discretion in *whether* to investigate and prosecute or not. A residual margin for discretion was left with regards to the selection of the individuals to be tried, but since its creation it was clear the prosecutorial activity was strictly linked to the will of the States who appointed the Chief Prosecutors.

The Statutes of the ICTY and ICTR vested the Prosecutor with the responsibility for investigating and prosecuting the persons responsible for the crimes committed under the jurisdiction of the tribunals and urged the Prosecutor to 'act independently as a separate organ' prohibiting her to 'receive instruction from Government or from any other source'. The case-law of the *ad hoc* Tribunals is rich in case-law on the prosecutorial discretion. It emerges that this discretion is subject to judicial scrutiny and is not absolute as it is subject to limitations, such as the principle of equality. Nevertheless this principle has been applied narrowly as there was a presumption in favour of the Prosecutor and discretion appeared to be violated when a prosecutor selected a defendant purely based on the defendant's ethnicity or other individual grounds.

With the entry into force of the Rome Statute, the organ in charge of investigating and prosecuting international crimes, namely genocide, crimes against humanity, war crimes and the crime of aggression, is the Prosecutor. The Prosecutor is elected (and possibly removed) by the Assembly of the States Parties to the Rome Statute, and must assure independency in her action, even when the jurisdiction of the Court is triggered by a State referral or by a referral of the Security Council.

The relevance of the Prosecutor's discretion emerges in particular when she adopts a decision to investigate or prosecute, or when she declines to investigate or prosecute into a referred situation. Article 53 of the Statute rules the initiation of the investigation and the decision to prosecute irrespective of the mechanism triggering the jurisdiction of the Court. According to paragraph (1), the Prosecutor shall, having evaluated the information made available to her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether: (a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed; (b) The case is or would be admissible under article 17; and (c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

Paragraph (2) has a similar content and rules the Prosecutor's decision to start with a prosecution, while paragraph (3) limits the Prosecutor's discretion describing the reviewing powers of the Pre-Trial Chamber in case the Prosecutor declines to investigare or prosecute into a referred situation.

Chapter I analyses prosecutorial discretion both at national and international level. The first section is entirely dedicated to the concept of discretion. The focus is on the main theories developed at national level (with particular attention to the Italian and the German systems) with regards to the concept of discretion, its main features and the limits to the discretionary power. Particular attention is dedicated to the prosecutorial rather than judicial discretion.

The following section provides with an overview over the difference between those judicial systems adopting the mandatory model for the investigation and prosecution of the crimes, and those which adopt the discretionary model. The Italian and German prosecutors are both driven by the principle of legality (*Legalitätsprinzip*), even if in some circumstances this principle is subject to exceptions. The number and extent of some exceptions raises sometimes doubts on the real existence of the mandatory principle. Other systems, like France or those belonging to the common law family, adopt the so-called discretionary model, giving the prosecutor the power to decide whether to investigate and prosecute (*Opportunintätsprinzip*). This discretionary power is ruled and may be subject to some forms of control or review. The comparison between the most important national legal systems aims at understanding the features of a supranational organ such as the Prosecutor of the International Criminal Court whose creation (as the creation of the Court) is the result of the compromise reached in Rome between different legal cultures.

The last sections are dedicated to the role of the Prosecutor at international level: after a brief overview over the powers of the investigating and prosecutorial authorities in other international experiences (in particular the IMT and the *ad hoc* Tribunals), great attention is given to the Prosecutor of the International Criminal Court. The need to clearly frame her investigative and prosecutorial discretionary powers is particularly relevant because of the permanent nature of the Court. Moreover the International Criminal Court is not an *ex post facto* Tribunal, therefore the need for clear established criteria is crucial.

Consequently, Chapter II is dedicated to the object of the Prosecutor's assessment when initiating an investigation and a prosecution. A preliminary section on the applicable standard for initiating an investigation and a prosecution opens the chapter. The following sections aim at introducing the main constitutive elements governing the three stages of the Prosecutor's assessment while deciding on the initiation of an investigation or a prosecution under article 53(1) and (2) of the Statute. These three elements are: jurisdiction, admissibility, and interest of justice. Greater attention will be reserved to to gravity within the admissibility assessment, and to the interests of justice, because these two elements particularly affect the Prosecutor's discretion.

Chapter III is dedicated to the reviewing powers of the Pre-Trial Chamber, in particular when dealing with the Prosecutor's decision not to open an investigation or not to prosecute. The case-law of the Court still has to clearly establish the extent of the reviewing powers of the Judiciary on the discretion of the Prosecutor, but recent practice seems to demonstrate that the Prosecutor's discretion is subject to more limts than initially apparent from the wording of article 53 of the Statute. The intervention of the referring entities in this control is taken into account.