



**Conference of Prosecutors General of Europe
5th Session**

**organised by the Council of Europe
in co-operation with
the Prosecutor General of Lower Saxony (Germany)**

Celle, 23 - 25 May 2004

*** * * ***

**The role and organisation of public prosecution
in international courts and bodies and its relations
with national prosecution services**

**Address by Mr. Serge BRAMMERTZ
Deputy Chief Prosecutor
International Criminal Court**

International Cooperation and the ICC

1. Introduction

It is with great pleasure that I stand before you today to talk about something I hold quite dear to my heart – the need for international cooperation in combating the most serious crimes of concern to the international community as a whole. The invitation to participate in this colloquium by addressing such distinguished participants as your good selves is indeed an honour, one which affords us an opportunity to have a healthy exchange of ideas of mutual importance be it at a domestic level or at an international level.

I wish to begin by giving you an overview of what I intend to cover during this presentation. It is appropriate to open with a word or two on the International Criminal Court (ICC), highlighting peculiar features of the Rome Statute (i.e. the statute establishing the court and which provides for its jurisdiction and functioning) and touching on issues such as the court's all-important mandate and jurisdiction. In the second part of the presentation, I will try to demonstrate why international cooperation is particularly crucial in the peculiar context in which the Office of the Prosecutor (OTP) operates. At this point, I will touch upon areas of international cooperation envisaged by the Rome Statute, including areas in which the court can be of assistance to national systems.

In my previous function as a federal prosecutor of Belgium, I had the opportunity to follow your work closely. I am happy to continue the interaction with you in my new function...

2. The International Criminal Court

The Court's Mandate

The wide mandate of the ICC includes a determination to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole and to contribute to the prevention of such crimes. The court is meant to guarantee lasting respect for and the enforcement of international justice. In fulfilling its mandate, the ICC is bound to be complementary to national criminal jurisdictions [Article 1 of the Rome Statute].

The court is vested with the power to exercise jurisdiction over natural persons for crimes within its jurisdiction. This jurisdiction, however, is not without its limitations.

Subject-Matter Jurisdiction

The subject-matter jurisdiction is limited to crimes set out in Article 5 of the Rome Statute – namely, the crime of genocide, crimes against humanity and war crimes. In the future, the court shall also exercise jurisdiction over the crime of aggression once a provision defining it is adopted.

Temporal, Territorial and Personal Jurisdiction

The court has jurisdiction only with respect to crimes committed after the entry into force of the Statute – that is, 1 July 2002 [Article 11(1)].

The court’s jurisdiction may only be exercised where the matter in question involves a national of a State Party or the conduct in question occurs in the territory of a State Party. Where a non-State Party is concerned, the court may be vested with jurisdiction if the non-State Party accepts the exercise of jurisdiction by the court with respect to the crime in question [Article 12].

If the UN Security Council refers a case to the ICC, there is no personal or territorial limitation to the jurisdiction of the court [Articles 12(2) and 13(b)].

Triggering Mechanisms for the Exercise of Jurisdiction

There are basically 3 ways of triggering the exercise of jurisdiction by the court:

1. A State Party may refer to the Prosecutor, a situation in which one or more of such crimes referred to in Article 5 appears to have been committed
2. The UN Security Council acting under Chapter VII of the UN Charter may refer to the Prosecutor, a situation in which one or more of such crimes appears to have been committed
3. The Prosecutor in the exercise of his *proprio motu* powers may initiate an investigation in respect of such a crime [Articles 13-15].

Thus far, 139 countries have signed the Rome Statute, out of which 94 have gone on to ratify the Statute.

There have been 2 referrals of situations to the court – by Uganda and the Democratic Republic of the Congo.

3. Interaction between the ICC and National Systems

Article 1 of the Statute provides that in the exercise of its jurisdiction, the court “shall be complementary to national criminal jurisdictions”. Hence, unlike the *ad hoc* tribunals, the ICC does not have primacy over national judicial systems. The responsibility to investigate and prosecute crimes remains with states. As such, the idea is for the court to serve as a court of last resort in exceptional cases where there is no other means of bringing perpetrators of the most serious crimes to justice. Such cases include situations in which there is a failed state or a state which is unwilling or unable genuinely to carry out an investigation or prosecution.

Generally speaking therefore, a case is inadmissible before the ICC where it is being investigated or prosecuted by a state which has jurisdiction over it or where it has been investigated by a state which has jurisdiction and the state has decided not to prosecute the person concerned or where the person concerned has already been tried for conduct which is the subject of the complaint [Article 17].

National investigations and prosecutions, where they can properly be undertaken, will normally be the most effective and efficient means of bringing offenders to justice. State authorities will normally have the best understanding of the dynamics of conflicts within the boundaries of their respective states, coupled with potentially easy access to evidence and witnesses. As such, national authorities are usually best-placed to deal with investigatory and prosecutorial issues relating to crimes within the jurisdiction of the court. To the extent possible the Prosecutor will encourage states to initiate their own proceedings, and as a general rule, the policy of the OTP will be to undertake investigations only where there is a clear case of failure to act by the State or States concerned.

4. International Cooperation

Chapter 9 of the Rome Statute

This chapter deals with matters relating to international cooperation and judicial assistance. State parties have a general obligation to cooperate fully with the court in its investigation and prosecution of crimes within its jurisdiction [Article 86]. Due to time constraints, I can only enumerate some of the most important areas of cooperation envisaged by the Statute. Broadly speaking, these provisions may be divided into the following sub-categories:

- (1) Arrest and surrender of persons being prosecuted and of persons convicted by the court;
- (2) Legal assistance or assistance with investigations and prosecutions. The assistance may relate to any of the following:
 - (a) Identification and whereabouts of persons or the location of items of interest to the court;
 - (b) The taking of evidence, including testimony under oath, and the production of evidence, including expert opinion and reports necessary to the court;
 - (c) The service of documents, including judicial documents;
 - (d) The execution of searches and seizures;
 - (e) The protection of victims and witnesses and the preservation of evidence.

[The list goes on and on]

- (3) Information sharing and intelligence cooperation [see also Article 54].

In spite of its global mandate, the court has limited resources at its disposal for the realisation of its objectives. Even though it is an international court, it has no international army or police force. For this reason, a coordinated framework for international cooperation is essential to ensure the efficient use of its limited resources.

Short-Term and Long-Term Cooperation

Accepting therefore that cooperation is crucial, it is then useful to develop forms of international cooperation that can be envisaged from both short-term and long-term perspectives. From a **short-term perspective**, the following should be considered:

Information Exchange

During pre-investigation analysis and investigation, the exchange of information will allow us to develop a proper understanding of situations or possible cases to be taken up by the OTP. The information will normally focus on: (a) Crimes and perpetrators; (b) Admissibility; and (c) General assessment of the context and interests of justice concerns. This third aspect is necessary because we realise we do not work in a vacuum. While the judicial approach will always prevail, we are nonetheless bound to consider all contextual information you might provide. On our part, we can provide information that may be of use in national proceedings in respect of conduct which constitutes a crime within the jurisdiction of the court. Of course in both scenarios, measures to protect the information, sources and all the legal possibilities for ensuring confidentiality will be applied.

Recently, the idea of the different war crimes units around the world sharing resources, especially information, was launched by Interpol, the Dutch War Crimes Unit and the ICC. We hope this initiative can in turn be taken up by national Prosecutors of war crimes and crimes against humanity.

Expert Support

This includes support with forensics, dealings with traumatized victims, development of cutting edge investigative and analytical tools and so on.

Witness Protection

The court has no state it can call its own because it is a creation of several states. As such, it needs to work with different states in implementing its witness protection programs.

Field Support

This includes logistical and security support on the field.

It is very encouraging to see that there are initiatives being developed from a **long-term perspective** to create structural support for the ICC. An example of this is the Rapid Response Team...

Conclusion

In closing, I wish to say that as prosecutors, you are best-placed to know the procedures available under your respective national laws for the application of the forms of cooperation highlighted in this presentation. We are indeed hopeful that these mechanisms shall be applied for our mutual benefit when the need arises.

Once again, I thank you for this opportunity to share some of my ideas and thought with you.