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RETHINKING THE PROSECUTOR'S DISCRETION
AT THE INTERNATIONAL CRIMINAL COURT

Substantive Limitations and Judicial Control

REALIZZATA IN COTUTELA CON L'UNIVERSITÀ DI GÖTTINGEN
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INTRODUCTION

The prosecutor can probably be considered the cornerstone of any criminal law system. Her functions differentiate the structure of the criminal law procedure from that of administrative and private law procedures. In her original vest the prosecutor represented the State power in punishing those individuals who violated the law. The constitutions of the 20th Century and the culture of human rights enhanced the role of the prosecutor as minister of justice rather than as a mere party in trial. At the same time, principles as the equality of arms and fair trial have balanced the original disproportion between prosecution and defence. It is therefore not surprising the rising attention of this figure at the supranational level as well.

Supranational instruments provide for shared definitions of 'prosecutor' and identify the principles that must drive her action. At the United Nations level, there are two significant instruments, namely the *Guidelines on the Role of Prosecutors adopted by the Eight United Nation Congress on the Prevention of Crime and the Treatment of Offenders*, Havana, Cuba, 27 August to 7 September 1990; and the UN handbook entitled *The Status and Role of Prosecutors* prepared by the United Nations Office on Drugs and Crime and the International Association of Prosecutors in 2014. At the European level, on 6 October 2000, the Committee of Ministers of the Council of Europe adopted the Recommendation Rec (2000) 19 on the Role of Public Prosecution in Criminal Justice System. This recommendation defines the public prosecutor as the public authority who, on behalf of society and in the public interest, ensures the application of the law where the breach of the law carries a criminal sanction, taking into account both the rights of the individual and the necessary effectiveness of the criminal justice system. It also states that 'in all criminal justice systems' the public prosecutor: (i) decides whether to initiate or continue prosecutions; (ii) conducts prosecutions before the court; and (iii) may appeal or conduct appeals concerning all or some court decisions. The 'Rome Charter', i.e. the Opinion no. 9 (2014) of the Consultative Council of European Prosecutors to the Committee of Ministers of the Council of Europe, further highlights that prosecutors contribute to ensuring that the rule of law and public order are guaranteed by the fair, impartial and effective administration of justice.

The independency of the prosecutor is the first principle enshrined in all these legal instruments also when the prosecutor represents the executive power. Impartiality with regards to the conduct of the investigations, respect for the rights of the defence and attention to the interests of victims and witnesses are the necessary corollary to her functions.

Other two principles emerge from a comparative study of the national legal systems and are also mentioned by some of the abovementioned supranational instruments: the principle of mandatory prosecution and the principle of discretionary prosecution (or principle of opportunity). They represent two alternative models of initiation of the prosecution. Since the systems opting for the mandatory model as well have introduced mechanisms excluding prosecution in specific circumstances, it is important to delineate the concept of 'discretion' that drives the prosecutorial activity. The abovementioned Opinion no. 9 (2014) states that '[i]n order to achieve consistency and fairness when taking discretionary decisions within the prosecution process and in court, clear published guidelines should be issued, particularly regarding decisions whether or not to prosecute' and that '[e]ven when the system does not foresee that prosecutors can take discretionary decisions, general guidelines should lead the decisions taken by them'.

In this perspective, Chapter I is entirely devoted to the role of the prosecutor in national and international criminal law. In Section I the concept of discretion will be briefly analysed. Despite being a privilege and a power, at the same time it is an onus, bringing responsibility and duties. Discretion does not mean acting as it pleases but acting within specific boundaries in order to achieve specific goals.

Section II is instead devoted to the analysis of the role of the prosecutor in some national systems, distinguishing between those systems opting for the principle of mandatory prosecution and those systems opting for the principle of opportunity.

But in addition to national criminal law and national prosecutors, there is international criminal justice. International prosecutors were established in history in order investigate and prosecute international crimes. Their choices have shaped and still shape the object of the international criminal justice. The same applies to the Office of the Prosecutor attached to the first permanent international criminal court in history, the International Criminal Court. In the light of the role of the Prosecutor and the consequences of her choices and activities, it is undeniable that the efficiency of her Office is subject to close scrutiny by the public and that its mismanaging can seriously affect the credibility of the entire system. Moreover, the identification of the Office of the Prosecutor with a single individual, often appearing in public and releasing statements, probably increases the perception of the Prosecutor as the main responsible for the efficiency or inefficiency of the Court. The permanent nature of this Office and the importance of her activity for future developments induce to focus the attention on its action. For this reason, if Section III analyses the prosecutors in International Criminal Law in general, distinguishing between the International Military Tribunal, the *ad hoc* Tribunals and

the International Criminal Court, Section IV is entirely devoted to the Prosecutor of the International Criminal Court. The elaborate functioning of the Court necessarily affecting the activity of the Prosecutor requires an introduction to some aspects that will be relevant in the subsequent Chapters.

Chapter II is exclusively focused on the Prosecutor of the International Criminal Court and on the substantive limitations affecting her decision-making powers in opening an investigation or prosecuting individuals. After an overview of the required standard for both the opening of an investigation and commencing of a prosecution in Section I, the criteria leading the prosecutor's determination will be taken into account. These parameters are jurisdiction, admissibility and the so called 'interests of justice clause'.

Jurisdiction is tendentially quite a strict parameter, which therefore does not pose great problems in terms of discretionary assessment. For this reason, it will not be analysed in detail. Admissibility is instead a more challenging parameter. After an introduction on the principle of complementarity driving the action of the whole Court, it will be necessary to distinguish between the admissibility of an investigation and the admissibility of a case and the different criteria leading the Prosecutor's assessment. Since the admissibility assessment is twofold, including a complementarity and a gravity test, in light of the 'objective' nature of the first one, only the gravity test will be analysed in depth, in order to try to reach a conclusion as to the functions that the concept of gravity plays in the statutory framework. In this regard it is possible to anticipate that the proposal is to limit the role of gravity to an objective criterion, a threshold which should allow to determine whether a situation deserves or not the Court's intervention. Once that this threshold is met, the Prosecutor will have the duty to open an investigation. As to the prosecution, gravity would instead inevitably play a selective function as well, at least indirectly through the prioritisation of the cases.

Chapter II is closed by an analysis of the interests of justice clause, that allows the Prosecutor to maintain a margin of discretion. Nevertheless, the proposal is to reduce the factors which could be considered within the concept of interests of justice. An excessively broad concept of interests of justice risks indeed to transform the discretion of the Prosecutor in arbitrariness, or at least calls for accusation of arbitrariness, with negative consequences over the Court in its entirety.

Chapter III is entirely devoted to the control over the activity of the Prosecutor. Section I will take into account the control exercised by 'external subjects', namely the Assembly of the States Parties, the United Nations Security Council and the States. The

non-legal nature of this control is the reason for a less detailed deepening of the topic. The only exception concerns the role of the Security Council, whose powers of referral and deferral may significantly affect the Prosecutor's activity. Moreover, the role of the referral of both the States and the Council will be analysed in order to compare the extent of an investigation initiated upon referral with the extent of a *proprio motu* investigation.

Sections II, III, IV and V analyse instead the judicial control over the activity of the Prosecutor, respectively in case of submission of a request for investigation *proprio motu* under Article 15 of the Statute and in case of decision not to investigate or prosecute; in case of submission of a warrant of arrest under Article 58 of the Statute; during the procedure of the confirmation of the charges; and possibly during the trial. With the exception of this last case, which clearly falls within the competence of the Trial Chamber, in the other cases it is the Pre-Trial Chamber the subject in charge of overseeing the action of the Prosecutor.

With regards to the control under Article 15 of the Statute, the careful reading of the requests and of the respective decisions will show the different perspectives that, despite an apparent continuity, characterise the Court's jurisprudence. The activity of the Prosecutor seems not having profited from a certain laxity of the Pre-Trial Chamber's supervisory role. Therefore, Section II will try to determine whether a stricter approach is consistent with the Statute and whether it can assist the Prosecutor in performing her functions. Further the section analyses which kind of review the Pre-Trial Chamber is allowed to conduct in case of adoption of a decision not to investigate or prosecute also in the light of the recent case-law of the Court.

Since Article 58 does not raise significant problems as to the relationship between the Prosecutor and the Pre-Trial Chamber, greater attention will be given to the confirmation of the charges procedure. In particular, Section IV will try to determine the role of these two subjects in the construction of the case. A stricter control should lead to more focused and solid cases, avoiding subsequent amendments jeopardising both the credibility of the Prosecutor and the rights of the Defence.

Ultimately, the judicial control exercised by the Trial Chamber during the trial closes the chapter. The reason for introducing this Section V is due to the recent case-law of the Court, where the Chambers, facing some weak cases in trial, felt compelled to stop them. Even if the objective interpretation of the gravity threshold, a strict interpretation of the interests of justice clause, the recognition of the judicial control also over the interests of justice determination, a strict judicial control in both the procedures under Article 15 and 61 of the

Statute should reduce the number of weak cases reaching the trial stage, it is important to identify the applicable law should it be the case.

As to the methodology, it is preliminarly worth mentioning that International Criminal Law is a relatively recent branch of the law, mainly developed by the criminal law and international law scholarship, but with crucial sociological and historical implications. Consequently, it is vital to choose a perspective when dealing with International Criminal Law. The perspective chosen in this work is the legal one. Although the discretion of the prosecutor involves interesting sociological and policy considerations, the choice of the legal point of view enables to narrow down and circumscribe the research to certain key points that need to be analysed in depth from a legal perspective.

The topic of this thesis, the discretion of the Prosecutor of the International Criminal Court, combines theoretical and practical legal issues. Without excluding the relevance of the former, particular attention will be given to an extensive research on the case-law regarding the practice of the International Criminal Court. Therefore, after a preliminary study on the foundations in legal scholarship of the concept of discretion – a concept with significant theoretical and philosophical implications – most of the work will be devoted to the analysis of the concrete exercise of discretion in the legal field. Moreover, the criminal law scholarly contributions to the topic are the object of a more in-depth analysis and study.

Furthermore, International Criminal Law does not have an autonomous legal tradition comparable to that of the domestic systems. Therefore, comparative law is the starting point for every research. Even if this is not a thesis in comparative law, it is grounded on the comparative approach, taking into account both civil law and common law systems, in the attempt to elaborate coherent solutions to the main procedural problems faced by the international prosecutor. Only with a clear picture of the solutions applied in different national legal systems it is possible to build a credible and reliable research in International Criminal Law.

In addition to the comparative approach, International Criminal Law cannot forget the historical one. International Criminal Law developed through the practice of different experiences, from the International Military Tribunal to the *ad hoc* Tribunals, from the hybrid Courts to the International Criminal Court. Each of them is autonomous, ruled by different legal instruments, but together they form a body of law that, despite sometimes significant differences, can be considered in its entirety. Therefore, even if the object of the analysis is the

discretion of the Prosecutor of the International Criminal Court, it has been often necessary to recall the jurisprudence of other international tribunals.

Ultimately, the chapters devoted to the analysis of the International Criminal Court system are guided by two main principles. On the one hand, the analysis of valuable scholarly contributions to the topic, having regard to scholars from different legal systems and with different backgrounds (pure academics and practitioners). The analysis of the scholarly opinions is built on previous considerations regarding general principles in International Criminal Law. On the other hand, the research mainly aims at offering an (hopefully) new contribution in terms of case-law analysis. Even though prosecutorial discretion has been thoroughly analysed in scholarship, there is still the need for an updated reading in light of the practice of the International Criminal Court. Therefore, the work is rich in the analysis of the case-law, always trying to follow the file rouge that (possibly) links the numerous approaches applied and to place them into a coherent system.

ABSTRACT

The Prosecutor of the International Criminal Court is the first prosecutor attached to a permanent international criminal court and is responsible for investigating situations where international crimes appear having been committed (genocide, crimes against humanity, war crimes and crime of aggression). She is in charge of prosecuting the alleged perpetrators of these crimes before the Court. The traditional contrast between those national systems applying the principle of mandatory prosecution and those applying the discretionary principle, raised the question on the applicable model in the international criminal justice system. The traditional selectivity characterising International Criminal Law, the limited resources, the tendential use of procedural mechanisms familiar to common law systems before international criminal tribunals are some of the reasons leading scholars to attribute discretion to the Prosecutor of the International Criminal Court as well.

The purpose of this work is understanding the concept of discretion, determining whether the Prosecutor effectively enjoys this kind of discretion and possibly to what extent. The statutory framework does not necessarily point towards a strong discretionary power of the Prosecutor, and the practice reveals that the discretion granted to the Prosecutor in the last years seems sometimes having jeopardised the effectiveness of her activity. In the first place, the substantive limits to the Prosecutor's activity are the object of analysis, in particular the concept of gravity and interests of justice. An objective definition of gravity and a restrictive interpretation of the parameters possibly leading to a decision not to investigate or prosecute in the interests of justice are the first instrument to verify the correctness of the Prosecutor's action and to ensure a more stable and foreseeable basis to it. The rights of the defence may take advantage from it as well. In the second place, a more pervasive judicial control especially at the pre-trial stage should be considered a safeguard and an aid rather than an obstacle to the Prosecutor's activity.

ABSTRACT

Il Procuratore della Corte Penale Internazionale è il primo procuratore di una corte penale internazionale permanente responsabile delle indagini in situazioni nelle quali sono stati commessi crimini internazionali (genocidio, crimini contro l'umanità, crimini di guerra e crimine di aggressione). È inoltre l'organo cui spetta perseguire i presunti autori di tali crimini dinnanzi alla Corte. La tradizionale contrapposizione tra sistemi nazionali che adottano il principio di obbligatorietà dell'azione penale e sistemi che prediligono invece un modello discrezionale, ha portato a domandarsi quale di tali modelli sia applicabile al sistema internazionale penale. La selettività connaturata al diritto penale internazionale, le risorse limitate, l'uso prioritario di istituti di sistemi di *common law* nel diritto processuale davanti ai tribunali internazionali sono alcune delle ragioni che hanno spesso portato a riconoscere un potere discrezionale anche al Procuratore della Corte Penale Internazionale.

Lo scopo di questa indagine è verificare se il Procuratore della Corte goda effettivamente di tale discrezionalità ed eventualmente in che misura. Le norme statutarie non sembrano necessariamente confermare un elevato grado di discrezionalità, e la prassi dimostra che la discrezionalità di cui il Procuratore ha fatto uso in questi anni sembra talvolta aver pregiudicato la sua stessa attività. In primo luogo, oggetto di indagine sono i limiti sostanziali della discrezionalità del Procuratore, in particolare il concetto di gravità e di interesse della giustizia. Una definizione oggettiva di gravità ed una interpretazione restrittiva dei parametri che possono portare ad una decisione di non investigare o procedere in giudizio nell'interesse della giustizia sono il primo passo per verificare la correttezza dell'azione del Procuratore e garantire una maggiore fondatezza e prevedibilità anche a vantaggio dei diritti della difesa. In secondo luogo, un controllo giudiziario più accentuato soprattutto nella fase pregiudiziale dovrebbe essere considerato una garanzia e un supporto piuttosto che un ostacolo all'attività del Procuratore.

ABSTRACT

Der Ankläger des Internationalen Strafgerichtshofes ist der erste Ankläger eines ständigen internationalen Strafgerichtshofes, der für die Ermittlung von Situationen verantwortlich ist, in denen Kernverbrechen des Völkerstrafrechts (Völkermord, Verbrechen gegen die Menschlichkeit, Kriegsverbrechen und Verbrechen der Aggression) begangen wurden. Der Ankläger ist auch für die Verfolgung der Verdächtigen dieser Verbrechen vor dem Gerichtshof zuständig. Das Rechtssystem, in dem der Internationale Strafgerichtshof wirkt, setzt sich aus Elementen zusammen, die aus verschiedenen Rechtstraditionen abgeleitet sind. Der traditionelle Gegensatz zwischen den Rechtssystemen, in denen das Legalitätsprinzip gilt, und jenen, die sich nach dem Opportunitätsprinzip richten, hat darum die Frage aufgeworfen, welches Modell in Verfahren vor dem Internationalen Strafgerichtshof anzuwenden sei. Die Selektivität des Völkerstrafrechts, die begrenzten Ressourcen, die vorrangige Verwendung von Rechtsinstituten der *Common-Law*-Länder im Strafverfahrensrecht der internationalen Gerichtshöfe sind einige Gründe, die oft dazu geführt haben, auch dem Ankläger des Internationalen Strafgerichtshofes einen Ermessensspielraum bei der Eröffnung eines Verfahrens zuzuschreiben.

Das Ziel dieser Arbeit ist es zu überprüfen, inwiefern der Ankläger des Internationalen Strafgerichtshofes über ein tatsächliches Ermessen verfügt. Es ist nämlich zu bedenken, dass die Vorschriften des Römischen Statuts nicht auf ein hohes Maß an Ermessen hinweisen. Zudem deutet die Praxis darauf hin, dass der Ermessensspielraum, über den der Ankläger im Laufe der Jahre verfügt hat, seine Tätigkeit manchmal untergräbt. Zum einen werden die substanziellen Grenzen des Ermessens des Anklägers und insbesondere der Begriff von "Schwere des Verbrechens" und "Interesse der Gerechtigkeit" untersucht. Eine objektive Definition des Begriffs "Schwere" und eine enge Auslegung der Maßstäbe, die zu einer Entscheidung führen können, keine Ermittlungen einzuleiten oder zu keiner Strafverfolgung fortzuschreiten, weil dies dem Interesse der Gerechtigkeit zuwiderlaufen würde, sind der erste Schritt, um die Korrektheit des Vorgehens des Anklägers zu überprüfen und eine größere Begründbarkeit und Vorhersehbarkeit auch im Interesse der Rechte der Verteidigung zu gewährleisten. Zum anderen wird hervorgehoben, dass eine verstärkte richterliche Kontrolle, besonders im Vorverfahren, als Garantie und Hilfe anstatt als Hindernis für die Arbeit des Anklägers angesehen werden sollte.

CHAPTER I

PROSECUTORIAL DISCRETION IN NATIONAL AND INTERNATIONAL CRIMINAL LAW

Prosecutorial discretion allows to distinguish between national systems adopting a mandatory model of criminal prosecution and those adopting a discretionary one on the basis of the principle of opportunity. The objective of Section I is to provide with a brief overview of the concept of discretion. For this purpose, the philosophical concept developed within the field of philosophy of law (and limited to criminal law) will be taken into account.

Section II is devoted to a comparative analysis of five legal systems, namely the Italian, the German, the English, the U.S. and the French ones. While the first two apply the principle of mandatory prosecution, the last three opt for a discretionary model.

Section III provides an overview of the role of the Prosecutor in International Criminal Law with particular attention to the International Military Tribunal, the *ad hoc* Tribunals and the International Criminal Court. The subsequent section VI is exclusively devoted to the latter in order to provide information on her activity which may be of assistance for a better understanding of the problems analysed in Chapters II and III.

CHAPTER I

SECTION I

THE CONCEPT OF DISCRETION

In the field of criminal law,[1] discretion has been predominantly treated as a problem affecting judges. While in private law a certain margin for judicial discretion is usually accepted and the interests at stake admit the use of principles such as the principle of equity to solve litigations,[2] in criminal law the consequence of a judicial decision may affect the liberty and rights of the individual or sometimes even the life.[3] Therefore, tracing the boundaries of the discretion of the judge and limiting it through the law have always been the main topic for discussion. Since possible abuses may be solved by 'a court in Berlin',[4] it is comprehensible that the main concern is to ensure that 'the court in Berlin' does not adopt arbitrary decisions. But regardless of the role of the subject whose discretion is at stake, it is possible to refer to the

[1] Discretion is predominantly relevant in administrative law. For example, in the Italian system, the public authority is usually recognised two different types of administrative discretion: the technical one and the pure one (*See* GIANNINI M.S., *Il potere discrezionale della Pubblica Amministrazione. Concetto e Problemi*, Giuffrè, 1939, pp. 54-56; SCOCA F.G., *Diritto Amministrativo*, Giappichelli, 2019, pp. 32 ff.; CASETTA E., *Manuale di Diritto Amministrativo*, Giuffrè, 2018, pp. 390 ff. Nevertheless, some authors considered them under the same perspective, *see* RANELLETTI O., *Principi di diritto amministrativo*, Napoli, 1912, 365 ss.; RASELLI A., *Studi sul potere discrezionale del giudice civile*, Milano, 1975, pp. 54-55). While the former is the mere power of choice granted to the public authority when it is called to make a choice on the basis of a scientific or technical assessment, the latter is the residual margin of choice left to the public authority by the law, when the law does not determine its due behaviours. Pure discretion is a quality of the office concerning the creation of the administrative act, but it exists irrespective of the power and the act: it precedes the creation of the act, which in turn is the concretisation of the power. (CASETTA E., *Manuale di Diritto Amministrativo*, Giuffrè, 2018, p. 391. Differently, MORTATI C., *Note sul potere discrezionale, in Studi dell'Istituto di diritto pubblico e legislazione sociale dell'Università di Roma, Roma*, 1936, reprinted in: *Scritti Giuridici*, vol. III, Milano, 1972, p. 997, who argues that discretion is the power of the authority to choose to apply the non-legal criteria for a good administration). The margins for administrative discretion are not easily identifiable (GIANNINI M.S., *Il potere discrezionale della Pubblica Amministrazione. Concetto e Problemi*, Giuffrè, 1939, pp. 54-56; CASETTA E., *Manuale di Diritto Amministrativo*, Giuffrè, 2018, p. 390). Usually they can be determined ascertaining their violation for abuse of power or establishing the violation of the principles of rationality and appropriateness. Within these limits, the public authority is free to conduct its assessment, driven by the public interest but without forgetting the other secondary interests whose sacrifice is admitted as far as tolerable. Therefore, the choice shall be made on a case-by-case basis after careful consideration (*see* GIANNINI M.S., *Il potere discrezionale della Pubblica Amministrazione. Concetto e Problemi*, Giuffrè, 1939, p. 74). Nevertheless, for the decision to be incontrovertible, it is enough that the result of the exercise of pure discretion is *a* reasonable choice among other reasonable solutions.

[2] *See* for example Article 1374 of the Italian Civil Code. Equity is not the only principle that may be used by the judge deciding on private law. For example, Article 116 of the Italian Code of Civil Procedure on the assessment of the evidence introduces the principle of prudent evaluation of the evidence (*prudente apprezzamento*), unless otherwise provided.

[3] Judicial discretion in criminal law primarily emerges at the sentencing stage.

[4] The reference is to the well-known affair of the Mill of Sanssouci (*see* LAVEAUX J.-C., *Vie de Frédéric II, roi de Prusse, accompagnée de remarques, pièces justificatives, et d'un grand nombre d'anecdotes dont la plupart n'ont point encore été publiées*, Vol. II, Truettel, Strasbourg, 1787; ANDRIEUX F., *Le Meunier de Sans Souci* in *Contes et Opuscules, en vers et en prose, suivis de poésies fugitives*, Renouard, 1800, reprinted in *id.*, *Récits et Anecdotes*, Collection XIX, 2016).

concept of discretion traced in the literature with regards to the judge and identify the features of a general concept of discretion. For this purpose, the works of the following Authors will be mainly taken into account: A. Barak,[5] F., Bricola,[6] R. Dworkin,[7] K. Greenawalt,[8] H.L.H. Hart[9] and J. Raz.[10]

The root of the word 'discretion' is the Latin verb *discernere*, which does not only mean 'to divide', 'to distinguish', but also 'to decide accomplishing the functions of a judge or arbiter'.[11] It is therefore apparent that exercising discretion always includes an analysis of the situation and an element of judgment. In addition to the objective element there is therefore also a subjective one which explains why, in the same circumstances, different subjects may adopt different decisions.

It is not possible to talk about discretion without preliminarily introducing the concept of 'hard cases'. Most of the philosophical literature on discretion turns on this expression successfully used by Dworkin in the title of one of his essays in order to describe those cases 'that are in one way or another unlike textbook cases'[12] where no rule is immediately and

[5] Aharon Barak, Professor of Law at the Interdisciplinary Center in Herzliya and former President of the Supreme Court of Israel, is the author of: BARAK A., *Judicial Discretion*, Yale University Press, 1989 (originally published as *Shikul Daat Shiprety*, 1987, translated from the Hebrew by KAUFMANN Y.). In this section references are to the Italian translation, *La Discrezionalità del Giudice*, edited by MATTEI I., Giuffré, 1995.

[6] Franco Bricola was a Professor of Criminal Law at the University of Bologna. One of his main works is a rare analysis of the concept of discretion in the Italian criminal law which aims at distinguish it from a mere absence of legal certainty (*tassatività*): BRICOLA F., *La discrezionalità nel diritto penale*, Giuffrè, 1965.

[7] Ronald Dworkin was a philosopher and jurist, Professor of Law and Philosophy at the New York University and Professor of Jurisprudence at the University College London. He devoted many works and essays to judicial discretion, including DWORKIN R., *Hard Cases*, in *Harvard Law Review*, 88, 6, 1957; DWORKIN R., *Judicial Discretion*, in *The Journal of Philosophy*, 60, 21, 1963; DWORKIN R., *The Model of Rules*, in *The University of Chicago Law Review*, 35, 1967; DWORKIN R., *Taking Rights Seriously*, Duckworth, 1977.

[8] R. Kent Greenawalt, Professor of Philosophy of Law at the Columbia University, analyses judicial discretion in variuous essays, including GREENAWALT K., *Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges*, in *Columbia Law Review*, 75, 1975, p. 359; GREENAWALT K., *Policy, Rights and Judicial Decision*, in *Georgia Law Review*, 11, 5, 1977, p. 991.

[9] Harbert L.A. Hart was a philosopher and Professor of Jurisprudence at the Oxford University. He discussed discretion in his work: HART H.L.A., *The Concept of Law*, Oxford University Press, 1997 (first ed. 1961).

[10] Joseph Raz, philosopher and Professor of Philosophy of Law at the Univesrity of Oxford, at the Coumbia University and at the King's College London, criticises Dworkin's approiach to discretion in RAZ J., *Legal Principles and the Limits of Law*, in *Yale Law Journal*, 81, 1972, p. 823.

[11] CASTIGLIONI L., MARIOTTI S., *Il vocabolario della lingua latina*, Loescher, 2019.

[12] DWORKIN R., *Hard Cases*, in *Harvard Law Review*, 88, 6, 1957, p. 1057. The Author identifies five categories of 'hard cases': '(i) In many cases a court is pressed to, and in some cases does, overrule a textbook rule, and substitute a new one. (ii) Even when, as is more often the case, a court is determined to follow a particular textbook rule if it applies, that rule may be so ambiguous that it is not clear whether it applies, and the court cannot decide simply by studying the language in which the rule has been expressed, (iii) Sometimes two textbook rules by their terms apply, and the judges must choose

mechanically applicable.[13] Hard cases are therefore cases that cannot be easily decided, where it is not easily possible to identify the 'right answer'.[14]

In the light of the importance of Dworkin's thought it is worth starting from his concept of 'discretion'. He argues that 'discretion' is a relative concept, whose meaning depends on the context.[15] He distinguishes between three types of discretion: (i) the discretion allowing to interpret the standards concerning a duty in a reasonable but not univocal manner; (ii) the discretion preventing a higher authority to review the decision adopted; and (iii) the discretion of acting in context where the standards do not impose any duty as to a *particular* decision.[16] He labels the first and the second types of discretion as 'weak discretion'; in these cases the standards cannot be applied mechanically but 'require some judgment'[17] in order to prevent that the decision adopted is challenged. Conversely, he calls the third type of discretion 'strong discretion', used for commenting on 'range [of the standards] and the decisions they purport to control'.[18] According to Dworkin, the decision adopted exercising

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between them. In some such cases the need for choice may be disguised, in that only one rule is mentioned, but research (or imagination) would disclose another rule that the court could have adopted as easily, (iv) Sometimes a court itself will state that no textbook rule applies to the facts. Often the gap may be cured by what is called "expansion" of an existing rule, but sometimes a wholly new rule must be invented, (v) A large, and increasing, number of cases are decided by citing rules so vague that it is often unhelpful even to call them ambiguous: the critical words in such rules are "reasonable", "ordinary and necessary", "material", "significant", and the like. It does no good to say that questions as to the application of these terms are questions of fact, because disputes will remain, and decisions be required, even after agreement on what has happened.' DWORKIN R., *Judicial Discretion*, in *The Journal of Philosophy*, 60, 21, 1963, p. 624 at 627.

[13] *See* DWORKIN R., *Taking Rights Seriously*, Duckworth, 1977, p. 81 ff.

[14] DWORKIN R., *Hard Cases*, in *Harvard Law Review*, 88, 6, 1957, p. 1057.

[15] DWORKIN R., *The Model of Rules*, in *The University of Chicago Law Review*, 35, 1967, p. 32.

[16] DWORKIN R., *Judicial Discretion*, in *The Journal of Philosophy*, 60, 21, 1963, p. 624 at 627; DWORKIN R., *Taking Rights Seriously*, Duckworth, 1977, p. 69.

[17] DWORKIN R., *The Model of Rules*, in *The University of Chicago Law Review*, 35, 1967, p. 32. Barak notes that simply referring to the judgment required in the decision making rather than to the mechanical application of the law as done by Dworkin does not help finding a definition of discretion as it only describes how discretion should be exercised. BARAK A., *La Discrezionalità del Giudice*, edited by MATTEI I., Giuffré, 1995, p. 16.

[18] DWORKIN R., *The Model of Rules*, in *The University of Chicago Law Review*, 35, 1967, p. 32-33. Referring to judicial discretion, Dworkin is concerned about strong discretion, while he has no doubt that the judge must be recognised weak discretion. Similarly, Barak distinguishes between three types of judicial discretion as well. If Dworkin's language, despite being rooted in judicial discretion, can be easily applied to the discretion of any subject, Barak's language is more affected by the fact that the focus of his work is the discretion of the judge. According to Barak, the first type of discretion emerges when the judge decides upon the facts: Barak himself notes that this kind of discretion does not correspond to his wider understanding of the concept of discretion (i.e. the power of deciding among legitimate alternatives – *see* below in the text), therefore he excludes it from his analysis. The second and the third type of discretion are respectively related to the application of a provision *vis-à-vis* the facts and to the provision itself. *La Discrezionalità del Giudice*, edited by MATTEI I., Giuffré, 1995, p. 34-39. Differently, Greenawalt confutes Dworkin's distinction between weak discretion as 'judgement' and strong discretion as 'freedom to choose' both in legal and non-legal contexts (GREENAWALT K., *Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges*, in *Columbia Law*

strong discretion is not controlled by the standard imposed by an authority and possible critics to strong discretion are linked to mistakes rather than to disobedience.[19]

In the philosophical perspective, as the focus of the discussion is the discretion of the judge, the main issue turns toward Dworkin's 'strong discretion'. Dworkin criticises the positivissts' idea that rules and discretion are two alternative sources to a judicial decision[20] and that the latter emerges when the rules do not clearly establish who is right and who is wrong. Dworkin criticises positivists' – and in particular Hart's – concept of 'law' and their conferral of 'strong discretion' to the judges (*see* below).[21] In his opinion, when positivists refer to the judicial discretion, they necessarily mean 'strong discretion', because only through this type of discretion the judge may decide alone and 'legislate'.[22] But in Dworkin' s opinion, the idea of applying to hard cases a 'pre-existing right' of one of the parties is 'a fiction' because in reality the judge 'legislates new legal rights' and applies them 'retrospectively to the case at hand'. In his view, the judge always has the duty to *identify* the rights of the parties and not 'invent new rights retrospectively'.[23] Differently, Barak, who even starts from premises analogous to those of Dworkin, argues that although the judge does not always have discretion, she has it when adjudicating the hard cases.[24] He seems to find artificial the idea of

Review, 75, 1975, p. 359, 368. *See* also GREENAWALT K., *Policy, Rights and Judicial Decision*, in *Georgia Law Review*, 11, 5, 1977, p. 991).

[19] DWORKIN R., *The Model of Rules*, in *The University of Chicago Law Review*, 35, 1967, p. 34.

[20] DWORKIN R., *Judicial Discretion*, in *The Journal of Philosophy*, 60, 21, 1963, p. 624 at 624.

[21] Dworkin notes that positivists do not use the term discretion as 'weak discretion' with the second meaning, that is instead the choice of nominalists arguing that judges are the ultimate and final arbiter of the law. Moreover, since 'the proposition that when no clear rule is available discretion in the sense of judgment must be used is a tautology', he excludes that positivists refer to discretion as weak discretion with the first meaning. Therefore, they necessarily refer to strong discretion. DWORKIN R., *The Model of Rules*, in *The University of Chicago Law Review*, 35, 1967, p. 35. In addition to the criticisms of the authors in the following paragraphs, *see* also Waluchow, who criticises Dworkin's definition of strong discretion, since he distinguishes between 'having discretion' and 'exercising discretion'. WALUCHOW W.J., *Strong Discretion*, in *Philosophical Quarterly*, 33, 1983, p. 321 ff.

[22] The power of the judge to produce 'law' is clearly linked to the common law systems, but problems arise also in civil law systems since the enlightenment ideal of *juge bouche de la loi* has been progressively dismantled. While still anchored on positivist conceptions, also in civil law the mere interpretive role of the judge has been put into question, especially by those supporting the judge as a proper creator of law. *See*, among several contributions on this subject, DELMAS MARTY M., *Mondializzazione e ascesa al potere dei giudici*, in VOGLIOTTI M., (ed.), *Il tramonto della modernità giuridica. Un percorso interdisciplinare*, Giappichelli, 2008, p. 139.

[23] DWORKIN R., *The Model of Rules*, in *The University of Chicago Law Review*, 35, 1967, p. 31; DWORKIN R., *Taking Rights Seriously*, Duckworth, 1977, p. 81

[24] BARAK A., *La Discrezionalità del Giudice*, edited by MATTEI I., Giuffré, 1995, p. 40-48. In the light of the principle of legitimacy, he believes that in what he called 'easy cases' there is only one legitimate solution and therefore the absence of alternatives exclude the possibility to talk about discretion. He also identifies the category of the 'medium cases', where the judge has to consciously interpret the provision before concluding that there is only one possible solution and that therefore there is no discretion to use, because in reality the case is easy case.

identifying the 'right answer' and deems that the judge has to exercise her discretion when adopting a decision.[25]

All three Dworkin's a models of discretion are relevant in the activity of the Prosecutor of the International Criminal Court: the first one in the application of the requirements of gravity and interests of justice under Art. 53 of the Rome Statute; the second one with regards to the possible review of a decision to prosecute or not to prosecute; and the third one with regard to proceedings leading to the adoption of such a decision. As anticipated, the different role of the prosecutor vis-à-vis the judge is far less problematic. Nevertheless, in the light of the often repeated statement that the Prosecutor of the International Criminal Court benefits of discretionary powers, it is appropriate to understand what being granted a discretionary power means, especially if it entails 'strong discretion'.

The starting point for a discussion on a general concept of discretion not necessarily bound to the judicial one is the acknowledgment of the possibility to choose among various alternatives. This feature clearly emerges from Barak's work, where he describes discretion as the power to decide among at least two (lawful) alternatives.[26]

Nevertheless, the freedom of choice is not unfettered. In this sense, the famous metaphor used by Dworkin of the doughnut will be recalled for its evocative power. Dworkin compares discretion to the hole in a doughnut, that 'does not exist except as an area left open by a surrounding belt of restriction'.[27] In his first works he expressly talks about 'limited discretion' – as opposed to full discretion – referring to those situations where the standards impose limits. Acting outside the limits determines an abuse of discretion.[28] Later on, he leaves aside the difference between full and limited discretion, which is inherent in its relative nature.[29] Barak, even though distinguishing between absolute discretion – when the subject may choose the decisional method and factors to be taken into considerations – and limited discretion, reaches the conclusion that even the most absolute discretion is limited by the law which grants it.[30] According to Barak, discretion is not only limited by the lawfulness of the alternatives but also by their legitimacy. Referring to judicial discretion, (but the same may apply also to other types of discretion) he proposes to determine the legitimacy of the

[25] *Ibid.*, p. 21-26. For completeness, it is worth mentioning that Barack was a supporter of the creative rather than declaratory nature of the judicial discretion.

[26] BARAK A., *La Discrezionalità del Giudice*, edited by MATTEI I., Giuffré, 1995, p. 16.

[27] DWORKIN R., *The Model of Rules*, in *The University of Chicago Law Review*, 35, 1967, p. 32.

[28] DWORKIN R., *Judicial Discretion*, in *The Journal of Philosophy*, 60, 21, 1963, p. 624 at 631

[29] DWORKIN R., *The Model of Rules*, in *The University of Chicago Law Review*, 35, 1967, fn. 21.

[30] BARAK A., *La Discrezionalità del Giudice*, edited by MATTEI I., Giuffré, 1995, p. 26-34.

alternatives within the community of the lawyers.[31] Barak is aware of the imprecision and the abstract nature of this reference, but he deems it capable of distinguishing between personal understandings and the concept of law accepted by the society. The adoption of the decision does not require to take a poll, but shall be expression of the principles founding the society.[32]

The main concern of many authors is to distinguish discretion from arbitrariness. Even Dworkin notes that discretion can be exercised exclusively adopting standard of fairness and sense.[33] Barak identifies in the reasonableness of the decision the minimum substantive limitation – as opposed to procedural limitations such as the duty of impartiality and the reasoning of the decision – of discretion.[34] According to Raz, even in the absence of specific directions, the decision must be the best according to the beliefs of the subject (in his case the judge) adopting the decision.[35] Bricola criticises the tendency to consider discretion as an unlimited decision-making power,[36] because this concept of discretion can be traced back to arbitrariness. He strongly opposes to arbitrariness and highlights the risk for reasoning to be only a sequence of void formulas that do not really support the final decision. Bricola regrets that discretion is often left at the margin of the system and that there is no attempt of studying it and identifying the rationale behind the decision of the legislator to grant for discretion. In the attempt to systematically organise all the hypotheses of discretion provided for by the criminal law, Bricola marks the line between arbitrariness and discretion. While arbitrariness includes an unlimited decision-making power, discretion means 'limited ability' (*facoltà vincolata*) where the law previously identifies the criteria and goals that must be followed in

[31] *Ibid*., p. 18-20.
[32] *Ibid*., p. 18-20.
[33] DWORKIN R., *The Model of Rules*, in *The University of Chicago Law Review*, 35, 1967, p. 34.
[34] BARAK A., *La Discrezionalità del Giudice*, edited by MATTEI I., Giuffré, 1995, p. 26-34.
[35] RAZ J., *Legal Principles and the Limits of Law*, in *Yale Law Journal*, 81, 1972, p. 823, 847 ff.
[36] Since even Bricola focuses on the discretion of the judge and on article 133 of the Italian criminal code ruling judicial discretion as the sentencing stage, he criticises the traditional interpretation of discretion as power of indulgence limiting the effect of the sentence at the sentencing stage. In his opinion even this interpretation of discretion can be traced back to arbitrariness. Bricola points out that this concept of discretion is often linked to the retributive function of criminal law and to the tendency of the legislator to introduce provisions according to which the judge 'may' grant a benefit to the accused. But the automatic link between the recognition of a discretionary power and the possibility to grant a benefit to the accused made by case-law appears to be inappropriate. In his view, this concept overlaps with the effect of the application of a provision (the benefit) with the rationale of the provision (*aequitas* that is given the meaning of *benignitas*). But there is no reason for excluding those provisions that cause a drawback to the accused. According to him, adopting this concept of discretion means giving up considering the cases of discretion as proper instruments of criminal law with an autonomous rationale. This idea seems to be moved by a general distrust for the objectivity of the judge in identifying and applying those values that allow her to adopt a reasoned decision. Moreover, it reduces the discretionary power of the judge to a mere ability (*facoltà*) and the reasoning to an option unless there is an express request from the subject which the benefit should be granted to. BRICOLA F., *La discrezionalità nel diritto penale*, Giuffrè, 1965, p. 11-20.

order to reach the right conclusion.[37] More permissive, although not trespassing to arbitrariness is Greenawalt, who notes that in hard cases, especially when facing elusive concepts, the judge is rather expected to decide according to her reasonable and conscious understanding which theories he finds the most suitable.[38]

Barak's and Bricola's words introduce another important element distinguishing arbitrariness from discretion: the reasoning. A discretionary choice must be driven by logic. The chosen solution can be explained and reasoned recurring to existing criteria which stem discretion and distinguish it from whim. A choice driven by arbitrariness may be random or driven by personal whim rather than by reason. An arbitrary decision is therefore unpredictable and possibly illogic. As highlighted by Bricola, the reasoning itself does not ensure the discretionary rather than arbitrary nature of the decision. Only accepting that the discretionary choice is not only limited by the lawfulness of the alternatives, but it is also driven by criteria provided for by the law the reasoning can eventually perform its function.[39] Conferring the power to decide among various solutions and accepting any of the lawful and legitimate alternatives deprives the reasoning of its function and reduces it to a mere demonstration of internal coherence.[40] Similarly, Barak, who, as seen above, refers to reasonableness as the limit of discretion, notes that reasonableness does not concern the result – also the result deriving from flipping a coin may be reasonable – rather concerns the proceedings leading to the decision.[41] Therefore, the choice between different reasonable alternatives must be objective, and discretion must be exercised consciously and within the sphere of reasonable. Only in this way it is possible to find the best solution not to be driven by arbitrariness or fate.[42]

[37] BRICOLA F., *La discrezionalità nel diritto penale*, Giuffrè, 1965, p. 20. In his analysis of article 133 c.p., Bricola refers to the thought of Massa and his concept of discretion. Massa highlighted that the list of criteria under article 133 c.p. does not limit the judge because it includes all the possible areas of interest for the judge at the sentencing stage. Within this exhaustive list of areas, the judge must identify the relevant elements affecting sentencing. Article 133 c.p. obliges the judge to do everything she can in order to adapt the sentence to the concrete case. Since the law cannot previously foresee all the elements that can affect the sentencing, discretion is the *aequitas* of the judgment in the concrete case. *Aequitas* does not equate to arbitrariness because it is possible to objectively verify the values founding the judge's decision in the concrete case (*ibid.*, p. 67-69.).

[38] GREENAWALT K., *Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges*, in *Columbia Law Review*, 75, 1975, p. 359, 377.

[39] BRICOLA F., *La discrezionalità nel diritto penale*, Giuffrè, 1965, p. 20.

[40] *Ibid.*, p. 1-10.

[41] BARAK A., *La Discrezionalità del Giudice*, edited by MATTEI I., Giuffré, 1995, p. 26-34.

[42] *Ibid.*, p. 115 ff. Barak start from the assumption that the best solution cannot be made outside the field of reasonableness. BARAK A., *La Discrezionalità del Giudice*, edited by MATTEI I., Giuffré, 1995, p. 26-34.

Greenawalt seems to refer to the importance of the reasoning as well when he uses it as a counter-argument to Dworkin's denial of discretion.[43]

Once the line between discretion and arbitrariness has been traced, it remains to identify the criteria that shall lead to the solution of the hard cases. Always referring to judicial discretion, and therefore opposing to the positivists' limited concept of 'law', Dworkin tries to explain why the judge does not need 'strong discretion' and which elements should drive him in adopting the decision (law, principles, and, under certain circumstances policies). Conversely, the positivists, that tendentially do not exclude the relevance of the instruments identified by Dworkin, oppose that these instruments do not replace discretion. For example, Greenawalt argues that the constraints identified by Dworkin in affirming the 'no discretion' thesis have to be distinguished from the discretion debate, as they are rather issues of judicial law-making.[44] Without entering into the details of this discussion it is interesting to better define these instruments that may assist anybody who has to decide among various alternatives. In addition to the 'law' Dworkin identifies the 'principles', that differently from rules are not mechanically applied by the judge.[45] Further he distinguishes between principles

[43] Greenawalt refers to the discretion of the judge when writing her judicial opinion, especially in the fulfilment of her legislative tasks and sentencing duties. GREENAWALT K., *Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges*, in *Columbia Law Review*, 75, 1975, p. 359, 380.

[44] *Ibid*., p. 359, 388.

[45] In his view, the absence of a rule imposing to adopt a specific decision does not equate to the recognition of discretion, because principles still apply. Even if Dworkin is not the first scholar who distinguishes between rule and principle (*see*, for example, ESSER J., *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts*, Mohr, 1956, p. 300) the publishing of his article *The Model of Rules* in 1967 stimulated the debate. According to Dworkin, while rules can be 'unjust', principles are always right and represent the legal and moral foundations of a judicial system. Contrary to rules, which must be applied in their entirety by the judge, principles may be balanced with other principles and sometimes may yield to other principles prevailing in a specific case. Principles are standards that can be potentially derogated in an infinite number of cases carrying what Dworkin calls counter-instances since cannot be considered as 'exceptions'. In conclusion principles contain 'a reason that argues in one direction, but does not necessitate a particular decision'. DWORKIN R., *The Model of Rules*, in *The University of Chicago Law Review*, 35, 1967, pp. 25, 26, 36. According to Alexy, principles are 'optimization commands' that should be complied with in the highest degree possible and that differentiate from rules since they are subject to balance with other principles and rules. R. ALEXY, *On the Structure of Legal Principles*, in *Ratio Juris*, 13, 2000, p. 295 ff. Principles are usually included in or derived from constitutions and documents on fundamental rights. According to Bin, these documents (he refers to European Constitution but the same seems to apply to other documents on fundamental rights as well) are 'intimately contradictory', since each principle accompany its opposite and each freedom is accompanied by its limits. BIN R., *A discrezione del giudice*, FrancoAngeli, 2013, p. 28. Coming back to Dworkin's theory, Raz rejects the possibility to draw the limits of what is law from what is not. RAZ J., *Legal Principles and the Limits of Law*, in *Yale Law Journal*, 81, 1972, p. 823 ff., 843. Raz's argument are not of primary importance for understanding the concept of discretion and are strictly bound to judicial discretion and to the concept of law. Essentially he argues that, if the judge will be always bound by at least one principle, the possibility to draw the limits of the law (rules and principles) is immaterial, and in any event the existence of principles and rules does not prevent the judge from exercising judicial discretion. Raz further notes that sometimes judges have discretion as

and policies.[46] While policies 'justify a political decision by showing that the decision advances or protects some collective goal of the community as a whole', '[a]rguments of principle justify a political decision by showing that the decision respects or secures some individual or group right'.[47] He further summarises the difference by stating that '[p]rinciples are propositions that describe rights; policies are propositions that describe goals'.[48] Nevertheless, both rights and goals may be absolute or relative, and rights may cease in front of an urgent concurring policy under the caveat that they cannot be outweighed by *all* social goals but only those of 'special urgency'.[49]

In Dworkin's opinion, with rules, principles and policies at her disposal, it would be possible to adjudicate all the hard cases, without recurring to strong discretion. Dworkin

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they decide according to non-legal principles, whose existence, differently from Dworkin, he does not deny. In Raz's view, only an ideal legal system could exempt the judges from deciding any time the law does not provide a correct solution (RAZ J., *Legal Principles and the Limits of Law*, in *Yale Law Journal*, 81, 1972, p. 823 ff., 844 ff.). He identifies three sources of judicial discretion: (i) vagueness: although rule and principles can contribute to avoid vagueness, they are vague themselves, thus enabling judicial discretion; (ii) weight: judicial discretion always arises when it is necessary to weight principles. Since the law provides only for rules with relative weight, it is up to the judges to determine the relative weight of principles and whether to deviate or follow them in particular occasions; (iii) laws of discretion: the laws enabling the judge to decide discretionally according to non-legally binding considerations are another source of judicial discretion (RAZ J., *Legal Principles and the Limits of Law*, in *Yale Law Journal*, 81, 1972, p. 823 ff., 846). Similarly, Greenewalt finds that Dworkin's theory does not hinder the expansion (in particular) of constitutional rights by only referring to existing legal rules and principles, but rather enhances the expansive capacity of law (GREENAWALT K., *Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges*, in *Columbia Law Review*, 75, 1975, p. 359, 390.)

[46] Principles and policies are therefore both standards for lawyers to deal with rights and obligations. In addition, Dworkin also identifies 'other standards' that do not belong neither to the first nor to the second sub-category. DWORKIN R., *The Model of Rules*, in *The University of Chicago Law Review*, 35, 1967, p. 22 ff. Greenawalt identify some constraints in Dworkin's attitude towards policies, including the controversial possibility for the judge to privilege a small number of legal values contradicting existing legal rules while adjudicating; the possibility to base her assessment on what she finds socially more desirable, i.e. on social policies; the possibility to give effects to moral or social standards to a degree not reflected in existing legal materials; the possibility to give effect to her particular or to a minority's values (GREENAWALT K., *Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges*, in *Columbia Law Review*, 75, 1975, p. 359, 391 ff.).

[47] DWORKIN R., *Taking Rights Seriously*, Duckworth, 1977, p. 82.

[48] *Ibid*., p. 90. For completeness, it is worth recalling that, according to Dworkin, *judicial* decisions (and his example are here limited to the field of private law) should be founded on principles rather than policies and he notes that referring to abstract and fundamental interests in deciding hard cases is inappropriate (with the partial exception of constitutional law). DWORKIN R., *Judicial Discretion*, in *The Journal of Philosophy*, 60, 21, 1963, p. 624 at 632; DWORKIN R., *Taking Rights Seriously*, Duckworth, 1977, p. 97.

[49] DWORKIN R., *Taking Rights Seriously*, Duckworth, 1977, p. 92. With regards to the relationship between rights and goals, Dworkin notes that it often follows a causal relationship: a society pursuing specific goals may find persuasive specific rights. Nevertheless, sometimes the relationship is the other way around: the strength of a specific right may be utilitaristic, i.e. it may be used in order to promote collective goals. None of these two approaches is in contrast with the distinction between principles and policies and even if it is basically always possible to substitute an argument of principle with an argument of policy, it does not mean that they both have the same strengths. *Ibid.*, p. 94-96.

himself extends his arguments beyond judicial discretion: 'Yet it seems strange to say that [the judges] never have discretion; we might end by saying that no one *ever* had discretion. Perhaps, after all, discretion means merely that the actor has a decision to make, a decision not already made by another, and has nothing to do with the presence or absence of standards against which the decision must be made'.[50] He eventually refers to Hercules as hypothetical judge (or, maintaining the analysis more neutral, 'actor'), possessing 'superhuman skills, learning, patience and acumen' required for performing his duties and adjudicating the case.[51] Thanks to these abilities Hercules should be able to elaborate the best theory for deciding the case, to find 'the right answer', without providing him a 'quasi-legislative power' as suggested by the positivists. His job is rather a matter of interpretation.

Many authors trace the source of discretion back to the vagueness of the language. This is apparent in Raz,[52] but even in Dworkin, not only when talking about weak discretion, but also when he eventually refers to the interpretative activity of his Hercules in order to find 'the right answer'. But it is in Hart's works that the very concept of discretion emerges entirely in connection with the vagueness of the language. He illustrates his theory on the open texture of law, criticises formalism and rule scepticism and analyses the relationship between the indeterminacy of language and legal rules. Hart does not provide for a definition of discretion and his analysis is limited to the profiles of discretion relevant for demonstrating the open texture of law.[53] Hart criticises the model of law as the sovereign's coercive order, which does not reproduce some crucial features of contemporary legal systems. In particular, Hart highlights that the authoritative general language of rules is indeterminate. Therefore, discretion is unavoidable, as in indeterminate cases where the rule shall be applied, the

[50] DWORKIN R., *Judicial Discretion*, in *The Journal of Philosophy*, 60, 21, 1963, p. 624 at 633. For a complete overview of Dworkin's thought on judicial discretion, he states that the 'judge is never entitled to offer private prejudice rather than public standards as justification' (*ibid*., at 638). In selecting rules and cases the judge may possibly exercise only weak discretion in the first meaning. Moreover, there are cases where discretion is granted to the judge, but those cases are not related to the 'solution' of the case (for example at the sentencing stage and in remedial procedural matters) (*ibid*., at 634). But since the judge never exercises strong discretion, Dworkin excludes that even in *very* hard cases, where even the judge finds it difficult to state her reasoning, the judge never abandons the attempt to reach the right decision: '[i]n very hard cases, as in very easy ones, "judicial discretion" misdescribes "judicial obligations"'. *Ibid*., at 637.

[51] DWORKIN R., *Taking Rights Seriously*, Duckworth, 1977, p. 105 ff.

[52] RAZ J., *Legal Principles and the Limits of Law*, in *Yale Law Journal*, 81, 1972, p. 823 ff., 846. *See* above fn. 45.

[53] HART H.L.A., *The Concept of Law*, Oxford University Press, 1997, p. 124 ff. The theory of the open texture is a consequence of Hart's distinction between primary and secondary rules. Primary rules are 'rules of obligation', i.e. rules which impose a certain duty on the citizen and imply a movement or change; secondary rules are rules of recognition and refer to the 'creation or variation of duties and obligations', i.e. the rules attributing private or public powers. *Ibid.*, p. 81.

interpreter has to assess whether the resemblance between the case and the rule is sufficient.[54] The indeterminate structure of language leaves space to discretion: therefore, the application of rules is in its essence a choice. In this regard Hart affirms the open texture of law, which is a direct consequence of the written legislation, suffering from the indeterminacy of language.[55] Hart criticises formalist and conceptualist positions that reject the idea of choice (i.e. discretion) and minimise the need for discretion descending from the use of general rules.[56] On the other hand, Hart sees precedent as the exercise of a sort of delegated power by courts, as well as administrative bodies, that do not require a new judgement from case to case.[57] Discretion is crucial in every legal field, because initially vague standards must be clarified. Nevertheless, Hart admits that general rules exist as well and that citizens can apply these general rules for themselves even in the absence of judicial or official discretion.[58]

Differently, Bricola opens his work criticising some authors, including Messina, and the positivist concept of discretion, according to which discretion emerges from the vagueness of the provision.[59] Bricola analyses the concept of interpretation and the distinction between discretion and interpretation.[60] He refers to the so called 'elastic concepts' (*concetti indeterminati*; *unbestimmten Rechtsbegriffe*). The elastic concepts are used by the legislator in order to include an abstract concept that cannot be translated into a concrete situation. Therefore, their use presupposes an assessment of their content that is similar to the discretionary assessment.[61] When interpreting an elastic concept there is a margin of appreciation (*Beurteilungsspielraum*) that is often considered as expression of discretion,

[54] *Ibid*., p. 127 ff.

[55] *Ibid*., p. 128 f. Hart underlines that written rules, fixed in advance and entailing unambiguous regulation are an ideal that stumbles into two obstacles: i) the relative ignorance of fact and ii) the indeterminacy of aim.

[56] *Ibid*., p. 129 f.

[57] *Ibid*., p. 135. Hart further criticises rule scepticism. According to this theory law is only as a prediction of what the courts will do. Hart argues that at least secondary rules (i.e. rules giving the courts authoritative power) have to exist; otherwise, the courts would not be empowered by an authoritative source to issue authoritative judgements. (*Ibid*., p. 136).

[58] *Ibid*., p. 135.

[59] BRICOLA F., *La discrezionalità nel diritto penale*, Giuffrè, 1965, p. 33-43. Bricola also criticises the concept of discretion developed by Cordero. He points out that the former adopted a formal concept of discretion that would emerge when the judge has the duty to adopt a decision, but the provision specifies only some of the criteria to be used in the assessment while leaving to the judge the identification of the other criteria thanks to a reference to the result of the assessment. The provision is therefore incomplete and must be integrated by the subject whose discretion is granted; it is nothing but a legislative technique that does not affect the mandatory nature of the decision to be adopted (*ibid*., p. 43-45).

[60] *See*, in particular, *ibid*., p. 203 ff. He further completes his analysis clarifying the distinction between discretion and analogy.

[61] Bricola notes that while in Italian word '*discrezionalità*' recalls the Latin verb '*discernere*' and therefore offers the idea of identifying and applying an abstract rule to a concrete case, the German word '*Ermessen*' also means 'assessment' bringing the discretionary assessment close to the assessment of the elastic concepts. *Ibid*., p. 160.

which is limited by the clear boundaries of the concept (*gebundes Ermessen*). Nevertheless, the two kinds of assessment must be kept separate.[62] The elastic concepts are often used in the administrative law where the judge cannot replace the assessment of the administrative authority, but only verify whether this assessment respects the limits of the given margin of appreciation.[63]

Finally, it is worth recalling another consideration made by Bricola concerning the language. In his opinion the use of a peremptory wording does not necessarily exclude discretion;[64] and *vice-versa* the use of the verb 'may' does not exclude the mandatory nature of the assessment.[65] From these two premises Bricola offers what he calls 'the essence of discretion'.[66] When there is discretion the legislator always believes that the concrete case is the only source for identifying the necessary values that allow to reach the objective provided by the law. The use of the verb 'may' rather than 'shall' usually only flags the broader discretion available in the assessment of the concrete case but does not affect the mandatory nature of the incumbent duty. The identification of the *function* of the provision including a discretionary power is crucial. Sometimes the criteria driving the assessment may be useful in the identification of the function (these are the cases of limited discretion in technical sense); sometimes the identification of the function may be useful in order to discover the criteria driving the assessment that are not enshrined in the provision (these are the cases of limited discretion in broad sense). When the criteria are clearly established by the provision the departure from the criteria integrate a violation of the law; in the opposite situation the

[62] Bricola refers to German scholars excluding the relationship between discretion and elastic concepts in order to build his own criteria to distinguish them: BENDER B., *Zur Methode der Rechtsfindung bei der Auslegung und Fortbildungsgesetzten Rechts*, in *Juristen Zeitung*, 1957, p. 600, JESCH D., *Unbestimmter Rechtsbegriff und Ermessen in rechtstheoretischer und verfassungsrechtlicher Sicht*, in *Archiv des öffentlichen Rechts*, 1957, p. 163. On the distinction between elastic concepts and discretion *see* SCHINDLER G., *Unbestimmter Rechtsbegriff oder Ermessen?*, in *Monatszeitschrift des Deutschen Rechts*, 1954, p. 331, 333. In particular, the possibility to choose among several possible meanings of an elastic concept is different from judicial discretion, as administrative law scholars highlighted: ULE C.H., *Zur Anwendung unbestimmter Rechtsbegriffe im Verwaltungsrecht*, in BACHOF O. (ed.), *Forschungen und Berichte aus dem öffentlichen Recht. Gedächtnisschrift für W. Jellinek*, 1955, p. 309 ff., WOLFF H.J., *Verwaltungsrecht: ein Studienbuch*, Beck, 1961, p. 139. Bricola believes that the erroneous identification of the elastic concepts with discretion is particularly deceptive in administrative law, due to the wording of the norms (often including the term 'may'). BRICOLA F., *La discrezionalità nel diritto penale*, Giuffrè, 1965, p. 165 f.

[63] *Ibid*., p. 159-161.

[64] *Ibid*., p. 117-118.

[65] *Ibid*., p. 128-129.

[66] Bricola's work concerns discretion in 'criminal law'. Nevertheless, since he distinguishes discretion in criminal law and in administrative law on the basis of the factors that can be taken into account, his considerations can be applied to the general concept of discretion. In fact, according to Bricola, adapting the general rule to the concrete case requires in administrative law to take into account also external factors not related to the nature of the decision, but to the political convenience and opportunities. In his view, even if these aspects are not directly linked to the nature of the decision, they belong to administrative law which aims at pursuing the public interest. *Ibid*., p. 215-219.

departure from the criteria suggested by the function of the provision poses a problem of adequacy of the of the criteria *vis-à-vis* the objective.[67] In his view, the use of discretionary power in the assessment of the concrete case always includes the mandatory nature of the assessment, because if it were optional, discretionary would be associated with arbitrariness. Each case of discretion is founded on the mandatory nature of the assessment as it emerges also by the necessity to reason the decision irrespective of its outcome. The reasoning is indeed the mean to control the respect of the duty imposed to the subject adopting the decision.[68]

In conclusion, the concept of discretion is essentially rooted in the power of a subject to decide among different alternatives. In the absence of alternative courses of action, discretion cannot emerge. Various authors identify in legality, legitimacy and reasonableness the limit of the admissible alternatives. Moreover, the decision ultimately adopted by the subject in charge of deciding must be driven by logic. The reasoning of one choice among the various alternatives allows to distinguis discretion from arbitrariness and ensures the transparency of the exercise of the discretionary power. The existence of limits to discretion and the possibility to verify its exercise are therefore its main features. Further, discretion is often placed on the same level as interpretation. Thus, the elastic nature of a concept is often considered a source of discretion. Other authors mark instead a line between interpretative activity and discretion. This alternative seems preferable, especially in the light of the application of the concept of discretion to the activity of the Prosecutor, where the exercise of discretion occurs in the decision on whether to investigate or not and in whether to prosecute or not. Since interpretation is an activity performed in order to give content and substance to a word, opting for an interpretation rather than for another does not confer discretion to the Prosecutor. As it will be seen in the opening of Chapter II, the expression 'interpretative discretion' seems an unnecessary duplication of the concept 'margin of appreciation' (*margine di apprezzamento*, *Beurteilungsspielraum*) that characterises each subject in charge of interpreting.

[67] *Ibid*., p. 143-144.
[68] *Ibid*., p. 150-151.

SECTION II

THE PROSECUTOR IN NATIONAL LEGAL SYSTEMS

This section will provide a brief overview of the role of the prosecutor in some national systems (Italy, German, England and Wales, U.S. and France). Even if it is not an in depth comparative study of these systems, it should suffice for identifying the main features of the role of the prosecutor in each legal system in order to better understand why scholars and jurisprudence are often divided as to the role of the Prosecutor of the International Criminal Court.[69] Moreover, a brief understanding of the check and balances mechanisms included in each system will provide some fundamental knowledge for a better understanding of the mechanisms of control on the action of the Prosecutor included in the Rome Statute and further discussed in Chapter III.

The officially different approaches of the abovementioned systems suggest to divide the section between those systems which adopt the principle of mandatory prosecution (Italy and Germany) and those which adopt the principle of opportunity (Britain and Wales, U.S.A. and France). From this preliminary distinction it emerges that it does not correspond to the classical opposition between civil law and common law systems. Most of the criminal systems opt for the principle of opportunity, recognising to the prosecutor a certain margin for discretion in deciding whether to proceed or not. Generally, the principle of opportunity is deemed granting more efficiency and avoiding unnecessary trials and wasting of resources. But systems adopting a 'pure' principle of mandatory prosecution do not exist as they always include some mechanisms aiming at obtaining these results.

1. The mandatory model

The rationale of the principle of mandatory prosecution is granting the even application of the law. The principle of equality is therefore at the heart of this approach.[70] There is no pure mandatory model as each system introduces some remedies in order to circumvent the burden

[69] On the importance of adopting a comparative approach in the study of international criminal law, *see* DELMAS-MARTY M., *The Contribution of Comparative Law to a Pluralist Conception of International Criminal Law*, in *Journal of International Criminal Justice*, 1, 2003, p. 13. She notes that 'on one hand comparative law is *necessary* in order to accompany the ascending process of hybridization, through the incorporation of national law into international criminal law (I) and, on the other hand, that it fosters, in a *subsidiary* manner, the descending process of harmonization through the integration of international law into national law (II)'.

[70] SAFFERLING C., *Towards an International Criminal Procedure*, Oxford University Press, 2003, p. 121.

resulting from a too strict application of the principle.[71] Mandatory models are therefore sometimes accused of hiding discretionary decisions.[72]

1.1. The Italian system

Contrary to all other Countries taken into account in the following paragraphs, where the prosecutor is in some way expression of the executive power, in Italy the prosecutor is part of the judicial system. Prosecutors and judges are both *magistrati*, come from the same recruiting process and only differ for their functions. Art. 101 of the Italian Constitution (Cost.) states that judges are subject only to the law. Since this Article falls under Title IV of the Constitution devoted to the *magistratura*, a term includeing both judges and prosecutors, it is possible to assume that this provision is applicable not only to the judges but also to the prosecutors.[73] This principle is a consequence of Montesquieu's theory on the separation of powers[74] and is aimed at avoiding *magistrati*'s arbitrariness through their obligation to comply with the law and exercise their powers within the margins allowed by the law. This principle is directly linked to the independence granted at Art. 104 Cost., according to which the Judiciary is a branch that is autonomous and independent from all the other powers.[75] In order to preserve this independence, a constitutional organ, the *Consiglio Superiore della Magistratura*, composed by *magistrati* and presided by the President of the Republic, is responsible for deciding on the appointment and the removal of *magistrati*.[76] It is also responsible for the adoption of disciplinary measures, although the Minister of Justice may submit some

[71] *See* AMBOS K., *Comparative Summary of the National Reports*, in ARBOUR L., ESER A., AMBOS K., SANDERS A. (eds.), *The Prosecutor of a Permanent International Criminal Court, International Workshop in co-operation with the Office of the Prosecutor of the International Criminal Tribunals (ICTY and ICTR)*, Freiburg im Breisgau, May 1998, Edition Iuscrim, 2000, p. 495 at 525.

[72] PERRODET A., *The Public Prosecutor*, in DELMAS-MARTY M., SPENCER J.R., *European Criminal Procedure*, Cambridge University Press, 2002, p. 415; WEBB P., *The ICC Prosecutor's Discretion Not to Proceed in the 'Interests of Justice'*, in *Criminal Law Quarterly*, 50, 2005, p. 305 at 312.

[73] *See* SCACCIANOCE C., *L'inazione del pubblico ministero*, Giuffrè, 2009, p. 71; CAIANIELLO M., *The Italian Public Prosecutor: An Inquisitorial Figure in Adversarial Proceedings?*, in LUNA E., WADE M. (eds.), *Transnational Perspectives on Prosecutorial* Power, Oxford University Press, 2012, p. 250 at 250.

[74] *See* DI FEDERICO G., *Obbligatorietà dell'azione penale, coordinamento delle attività del pubblico ministero e loro rispondenza alle aspettative della comunità*, in GAITO A. (ed.), *Accusa penale e ruolo del pubblico ministero*, Jovene, 1991, p.169 at 171.

[75] It has been pointed out that the recognition of the utmost independence of the prosecutor is not necessarily the only safeguard to her impartiality because in many systems dependence is considered as an added value enabling the control of the political community over the prosecutor's action. *See* DE LUCA G., *Controlli extra-processuali ed endo-processuali nell'attività inquirente del pubblico ministero*, in GAITO A. (ed.), *Accusa penale e ruolo del pubblico ministero*, Jovene, 1991, p. 217 at 219-220.

[76] Article 105 Cost. *See* CAIANIELLO M., *The Italian Public Prosecutor: An Inquisitorial Figure in Adversarial Proceedings?*, in LUNA E., WADE M. (eds.), *Transnational Perspectives on Prosecutorial* Power, Oxford University Press, 2012, p. 250 at 254.

requests.[77] In light of its particular functions, Art. 107(4) Cost. grants the prosecutor additional safeguards enumerated in the Law on the Judicial Organisation (*norme sull'ordinamento giudiziario*). This law (decree R.D. 30 January 1941 no. 12) provides for the organisation of the judiciary. With regards to the organisation of the prosecution, Art. 2 states that an Office of the Prosecutor is attached to the *Corte di Cassazione*, each appeals court, each tribunal and each juvenile court. There is no hierarchy among these offices as Art. 70 of the law on the judicial organisation clarifies that the head of each office is responsible for the activity of her office.

A provision with a broad scope of application that may represent the legal basis for the activity of the prosecutor is Art. 111 Cost., amended in 1999. It introduces the principle of fair trial (*giusto processo*) and the principle of *contraddittorio*, i.e. a 'mitigated' adversary principle. In particular Art. 111(2) Cost. states that the principle of equality of arms applies to the parties which appear in trial *in contraddittorio* and that the case must be adjudicated by an impartial judge. According to para. (3), the principle of *contraddittorio* rules the submission of evidence. The participation of both the prosecutor and the accused to the proceedings leading to the submission of evidence grants the rights of the defence to the point that the accused cannot be judged guilty only on the basis of declarations rendered by a person who refuses to appear in Court. In light of the constitutional nature of this right, it is the Constitution itself which authorises the law to provide with exceptions to the principle of *contraddittorio*, when the accused agrees to the submission of evidence or it is objectively impossible to submit it in *contraddittorio* or the impossibility is a consequence of an illicit conduct (Art. 111(5) Cost.).

1.1.1. Historical background

In the first Code for Criminal Procedure of the *Regno d'Italia* of 1865, the judicial system was predominantly inquisitorial, and the role of the prosecutor was heavily influenced by the French tradition: she was a representative of the Executive and had the power of instituting the proceedings. Nevertheless, most of the investigative activities in preparation of the trial were conducted by an investigating judge (*giudice istruttore* or *jude d'instruction* in French). The subsequent code of 1913 already authorised the prosecutor to assist the investigating judge, but it was the Code for Criminal Procedure of 1930 which gave the prosecutor full investigative powers. In this code the principle of mandatory prosecution was

[77] Article 107 Cost. For the sometimes problematic relationship between prosecutor and Minister of Justice *sse* CAIANIELLO M., *The Italian Public Prosecutor: An Inquisitorial Figure in Adversarial Proceedings?*, in LUNA E., WADE M. (eds.), *Transnational Perspectives on Prosecutorial* Power, Oxford University Press, 2012, p. 250 at 255.

contained at Art. 74, and since the prosecutor was hierarchically subject to the Executive, its purpose was to 'mechanically' ensure the exercise of the State power in the administration of justice.[78] In 1944, the Constitution moved the prosecutor within the judiciary.[79] Further amendments to the criminal procedure ultimately led to the abolition of the investigative judge and to redefine some of the characteristics of the prosecutor within the new code of 1988.[80]

The principle of mandatory prosecution was introduced in the Constitution as safeguard to the principle of equality.[81] In 1979, the Italian Constitutional Court expressly linked the rationale of Art. 112 Cost. to the principle of equality under Art. 3 Cost., highlighting that the Prosecutor has no margin for discretion in performing her duty.[82] Moreover, in 1991, the Court clarified that the punishment in case of the violations of the law is required by the principle of *nullum crimen sine lege* under Art. 25 Cost. and that the mandatory prosecution pursue this objective.[83]

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[78] DOMINIONI O., *Azione Penale*, in *Digesto Discipline Penalistiche*, Vol. I, Utet, 1987, p. 397. For a detailed reconstruction of the evolution of the role of the prosecutor in the codes of 1865, 1913, 1930 and further amendments of 1944 *see* SCACCIANOCE C., *L'inazione del pubblico ministero*, Giuffrè, 2009, p. 107 ff.

[79] *See* also Corte Cost., S. 190/1070, Cost. '*Magistrato appartenente all'ordine giudiziario, collocato come tale in posizione di istituzionale indipendenza rispetto ad ogni altro potere, egli non fa valere interessi particolari, ma agisce esclusivamente a tutela dell'interesse generale all'osservanza della legge: persegue, come si usa dire, fini di giustizia*.' As recalled by Scaccianoce, the discussion on the content of Article 112 Cost. saw the opposition of supporters of a prosecutor dependent from the Minister of Justice like Bettiol and Leone, and those highlighting the need for an independent prosecutor that fit well with the principle of mandatory prosecution, like Calamandrei. SCACCIANOCE C., *L'inazione del pubblico ministero*, Giuffrè, 2009, p. 68.

[80] RUGGIERI F., *Pubblico Ministero (Diritto Processuale Penale)*, in *Enciclopedia del Diritto*, Annali II, tomo I, Giuffrè, 2008, p. 998 at 1000-1001; CAIANIELLO M., *The Italian Public Prosecutor: An Inquisitorial Figure in Adversarial Proceedings?*, in LUNA E., WADE M. (eds.), *Transnational Perspectives on Prosecutorial* Power, Oxford University Press, 2012, p. 250 at 251-2.

[81] The importance of mandatory prosecution with regards to the principle of equality and the independence of the prosecutor is highlighted also by authors that recognise the impracticability of the principle of mandatory prosecution and its negative consequences. *See* DE LUCA G., *Controlli extra-processuali ed endo-processuali nell'attività inquirente del pubblico ministero*, in GAITO A. (ed.), *Accusa penale e ruolo del pubblico ministero*, Jovene, 1991, p. 217 ff.

[82] '[*L*]*'art. 112 Cost., che attribuisce al Pubblico Ministero (salve le eccezioni costituzionalmente previste) l'esercizio dell'azione penale,* [*non gli consente*] *alcun margine di discrezionalità nell'adempimento di tale doveroso ufficio. L'obbligatorietà dell'esercizio dell'azione penale ad opera del Pubblico Ministero, già reintrodotta nell'ordinamento con il d.l.l. 14 novembre 1944 n. 288 (art. 6), è stata costituzionalmente affermata come elemento che concorre a garantire, da un lato, l'indipendenza del Pubblico Ministero nell'esercizio della propria funzione e, dall'altro, l'uguaglianza dei cittadini di fronte alla legge penale*.' Corte Cost. S. 84/1979.

[83] '*Più compiutamente: il principio di legalità (art. 25, secondo comma), che rende doverosa la repressione delle condotte violatrici della legge penale, abbisogna, per la sua concretizzazione, della legalità nel procedere; e questa, in un sistema come il nostro, fondato sul principio di eguaglianza di tutti i cittadini di fronte alla legge (in particolare, alla legge penale), non può essere salvaguardata che attraverso l'obbligatorietà dell'azione penale*'. Corte Cost. S. 88/1991. *See* also DOMINIONI O., *Azione Penale*, in *Digesto Discipline Penalistiche*, Vol. I, Utet, 1987, p. 397.

1.1.2. The initiation of the prosecution. Introductory remarks

As mentioned, the principle ensuring mandatory prosecution in the Italian system is enshrined in Art. 112 Cost.[84] The official translation of the Italian Constitution states that 'the Public Prosecutor (*Pubblico Ministero*) shall institute the criminal proceedings'. The Italian expression is '*esercizio dell'azione penale*', that literally means 'exercise of the penal action'. This provision is completed by Art. 50 of the Code for Criminal Procedure (*Codice di Procedura Penale*, c.p.p.) ruling the 'institution of the proceedings'. Art. 50 c.p.p. states that the prosecutor institutes the criminal proceedings unless there is a reason for submitting a request for dispense from prosecution. Art. 405(1) c.p.p. reaffirms that, when the prosecutor shall not submit a request for dispense from prosecution, she initiates the prosecution submitting to the judge a request for prosecution.

The focus of these provisions is on the subject entitled to exercise this power,[85] namely the prosecutor, and on the moment in which she uses it (the verb at Art. 50 c.p.p. is in the present tense and the reference to the court's action suggests the possibility to clearly identify the moment in which the action takes place). For these reasons it seems more appropriate to use the expression 'institution of the proceedings' rather than simply 'prosecution'.[86] Even if in the Italian system the prosecutor exercises her function both during the investigation and in trial, the initiation of the prosecution marks the line between the investigating stage and the prosecution.

With regards to the 'request for dispense from prosecution' admitted under Art. 50 c.p.p, the technical term is '*archiviazione*' that literally means 'filing'. The rationale of this ruling is preventing useless trials. Both the jurisprudence[87] and the scholars[88] note that this rationale emerges from the judicial review of both the request for prosecution and the request for dispense from prosecution. Therefore, the mandatory nature of the prosecution does not

[84] *See* NEPPI MODONA G., *Art. 112*, in BRANCA A., PIZZORUSSO F., *Commentario della Costituzione, Artt. 11-113*, Zanichelli, 1987, p. 39 ff.; LATTANZI G., LUPO E., *Rassegna sul codice di procedura penale*, vol. I, Giuffré, 2012, p. 982. According to scholars, introducing the principle of mandatory prosecution within a section devoted to the organisation of the constitutional order rather than to the rights of the individuals enhances the function of the prosecution in the relationship with the constitutional organs rather than ruling the relationship between citizens and State. CHIAVARIO M., *L'azione penale tra diritto e politica*, Cedam, 1995, p. 32.

[85] On the nature of the institution of the criminal proceedings (power, duty or right) *see* SCACCIANOCE C., *L'inazione del pubblico ministero*, Giuffrè, 2009, 2 ff.

[86] The appropriateness of this translation also emerges from the heading of Article 405 c.p.p. 'initiation of the penal action'. On the broad meaning of the expression '*azione penale*' *see* CHIAVARIO M., *L'azione penale tra diritto e politica*, Cedam, 1995.

[87] *See*, Corte Cost., S. 88/1991.

[88] RUGGIERI F., *Pubblico Ministero (Diritto Processuale Penale)*, in *Enciclopedia del Diritto*, Annali II, tomo I, Giuffrè, 2008, p. 998 at 1008-1009.

mean prosecution at any cost, because prosecution remains subject to conditions provided for by the law.

Differently from other legal systems, in Italy the prosecutor is the only subject in charge of the prosecution.[89] Private parties cannot initiate the prosecution,[90] even if sometimes the prosecution is subject to procedural conditions[91] (such as the lawsuit of the victim[92] or the authorisation to proceed against members of the Parliament). Among the procedural conditions, Art. 342 c.p.p. includes the request for proceedings (*richiesta di procedimento*), i.e. a request to the prosecutor to proceed with regards to specific offences submitted by an administrative authority, usually the Minister of Justice. Doubts about the consistency of this provision with Art. 112 Cost. were raised on various occasions because the initiation of the prosecution appears in these cases subject to an expression of will by a public subject not belonging to the judiciary. The Constitutional Court has always rejected these criticisms by stating that some legal interests protected at the constitutional level may prevail over the legal interest protected by Art. 112 Cost. and therefore can justify the dependence of the initiation of the prosecution by the will of a political subject. This condition does not violate the principle of equality since every individual who might commit the offences requiring the request for proceedings is subject to the same ruling.[93]

[89] *See* Article 231 of the Implementing Rules of the Code for Criminal Procedure (*Disposizioni di Attuazione*).

[90] Some scholars express concern about a system 'unjustly' ignoring the interests of private parties and in particular of victims. They raise doubts about a system concentrating the power of initiating criminal proceedings only in the hands of the prosecutor. *See* LEONE G., *Azione Penale*, in *Enciclopedia del diritto*, IV, Giuffré, 1959, p. 851 ff. On this subject s*ee* CAIANIELLO M., *Poteri dei privati nell'esercizio dell'azione penale*, Giappichelli, 2003. Nevertheless, it is worth mentioning that the Constitutional Court has not excluded *a priori* the existence of ancillary or complementary subjects responsible for prosecution (Corte Cost., S. 61/1967; S. 84/1979; S. 114/1982 and Ord. 451/1990). CARAVITA B., *Obbligatorietà dell'azione penale e collocazione del pubblico ministero: profile costituzionali*, in GAITO A. (ed.), *Accusa penale e ruolo del pubblico ministero*, Jovene, 1991, p. 297 at 299.

[91] Article 336 ff. c.p.p. The code for criminal procedure of 1685 included a private initiative through the '*citazione diretta*'. *See* CHIAVARIO M., *L'azione penale tra diritto e politica*, Cedam, 1995, p. 8-9; 120 ff.

[92] In the Italian system there is no precise equivalence for 'victim' as it distinguishes between *persona offesa dal reato* on one side and *soggetto passivo del reato* on the other side. The former is the subject whose protected interest is affected by the offence, the latter is the subject suffering the criminal conduct that may not be the holder of the affected protected interest. Only the *persona offesa dal reato* may participate in the criminal procedure even if her rights are sometimes restricted. For an easier understanding *persona offesa dal reato* will be translated as 'victim'.

[93] *See* RIVELLO P.P., *Richiesta di procedimento*, in *Digesto Discipline Penalistiche*, Vol. XII, Utet, 1997, p. 203.

1.1.3. The concept of **'esercizio dell'azione penale'**

Authoritative doctrine identifies in the principle of mandatory prosecution a duty for the prosecutor to request for a judicial decision over a *notitia criminis*.[94] Since the prosecutor acts as an organ of justice, she does not necessarily aim at obtaining a conviction. This erroneous belief come from the overlap between the criminal law procedure with civil law procedure, where an individual always poses a specific request to the judge. The objective of instituting a proceedings is rather obtaining a judgment (irrespective of conviction or acquittal). Adopting this approach, also the request for dispense from prosecution is expression of the same prosecutorial power. Since the '*esercizio dell'azione penale*' does not directly refer to prosecution, it could in abstract be interpreted as including both prosecution and non-prosecution. The inclusion of a request for dispense within the prosecutorial power emerges from those situations where the judge denies the prosecutor's request for dispense and obliges her to initiate the prosecution. Since the prosecutor is the only subject responsible for the '*esercizio dell'azione penale*' she has to be considered the promoter of the *azione* even when she is compelled to act by the judge. The act starting the prosecution (the request for dispense) still remains the origin of the *azione*.[95] Ultimately, the final judgment not subject to any appeal marks the end of the prosecution.

Differently, Dominioni[96] notes that the principle of mandatory prosecution can be applied only to the act initiating the proceedings, which defines the boundaries of the trial as it contains a description of the fact, temporal and territorial coordinates, the identity of the accused and the charges. The mere receipt of the *notitia criminis* is unsuitable of producing a duty to proceed until a final decision, because it is unable to define the object of the decision. Only the investigations may delineate the object of a possible trial and the investigation is driven by the discretion of the prosecutor, which may organise the activities as she pleases. In his view, the limit to the discretion in conducting the investigation is the link to the principle of mandatory prosecution since the investigation as a whole has the objective of identifying all the necessary elements to render a decision on the initiation of the prosecution.

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[94] BORSARI L., *Della azione penale*, Utet, 1866; MANZINI V., *Trattato di procedura penale italiana, vol.I*, Utet, 1914; LEONE G., *Azione Penale*, in *Enciclopedia del diritto*, IV, Giuffré, 1959, p. 851 ff. SCACCIANOCE C., *L'inazione del pubblico ministero*, Giuffrè, 2009, pp. 23; 59 highlights that the content of the request cannot affect the nature of the '*azione*' transforming it from condition of the proceedings to condition of the judgment of guilt.

[95] It is also worth mentioning that Articles 178(b) and 179 c.p.p. state that any violation of the prerogatives of the prosecutor in instituting the proceedings is ground for a declaration of absolute nullity that can be declared at any moment and at any stage of the proceedings.

[96] DOMINIONI O., *Azione Penale*, in *Digesto Discipline Penalistiche*, Vol. I, Utet, 1987, p. 397.

Other scholars[97] highlight that the request for prosecution in the Code for Criminal Procedure of 1989, differently from the previous one, does not simply contain a request for a decision on its object, but contains a request for conviction. This development comes from the position of the request within the proceedings: being at the end of a complete investigation, if after the investigation the prosecutor deems appropriate to submit a request for prosecution rather than a request for dispense, it means that she expects her case to be adequately supported for sustaining a conviction.

1.1.4. The function of the investigations

Art. 326 c.p.p. defines the object of the investigations. The wording of the provision is influenced by the mandatory approach of the Italian system and suggests that the objective of the investigation is instituting the proceedings. Nevertheless, referring to the necessity to collect all the elements *in orer to reach a determination* on whether instituting a proceedings, this provision leads to the possible request for dispense from prosecution. The most appropriate translation seems therefore: 'the prosecutor and the judicial police conduct the necessary investigations in order to adopt a decision on the initiation of the prosecution'.

The investigative activity starts with the receipt of a *notitia criminis*. Each *notitia criminis* is filed in a register by the Judicial Police (*Polizia Giudiziaria*), which has investigative functions.[98] Even if the Judicial Police has some autonomous investigative powers,[99] it usually acts under the control and supervision of the prosecutor.[100] According to Art. 358 c.p.p., the prosecutor has the duty to investigate both incriminating and exonerating circumstances in order to comply with the principle of 'completeness of the investigations'. In this respect, in 1991, the Constitutional Court recognised that the completeness of the

[97] GREVI V., *Archiviazione per 'inidoneità probatoria' ed obbligatorietà dell'azione penale*, in *Rivista Italiana di Diritto e Procedura Penale*, 1990, p. 1287; SIRACUSANO D., *La 'polivalenza delle indagini preliminari'*, in SIRACUSANO D., GALATI A., TRINCHERA G., ZAPPALÀ E., *Diritto processuale penale*, vol. II, Giuffrè, 2006, p. 23; RUGGIERI F. *Azione penale*, in *Enciclopedia del Diritto*, Annali III, Giuffré, 2010, p.129 at 130. *See* also CAIANIELLO M., *The Italian Public Prosecutor: An Inquisitorial Figure in Adversarial Proceedings?*, in LUNA E., WADE M. (eds.), *Transnational Perspectives on Prosecutorial* Power, Oxford University Press, 2012, p. 250 referring to the inquisitorial nature of the Italian prosecutor within an adversarial proceedings.

[98] Article 55 c.p.p.

[99] Articles 326 and 327 c.p.p. On the inaction of the Judicial Police that may affect the principle of mandatory prosecution *see* SCACCIANOCE C., *L'inazione del pubblico ministero*, Giuffrè, 2009, p. 203 ff.; CAIANIELLO M., *The Italian Public Prosecutor: An Inquisitorial Figure in Adversarial Proceedings?*, in LUNA E., WADE M. (eds.), *Transnational Perspectives on Prosecutorial* Power, Oxford University Press, 2012, p. 250 at 256-257.

[100] Article 109 Cost.; Articles 56, 327 and 370 c.p.p.

investigations allows the prosecutor to decide whether to submit a request for prosecution or for dispense from it in the first place.[101]

The completeness and correctness of the investigation is ensured by the power of judicial review. From the analysis of the preparatory works of the Code for Criminal Procedure of 1988, the Constitutional Court noted that an internal hierarchical review over the activity of the prosecutor would have been more consistent with the adversary model and would have saved both time and resources.[102] Nevertheless, the drafters deemed it appropriate to introduce a *judicial* review since it ensured 'an effective control over the exercise of public powers'.[103]

Other mechanisms that will be described in this and the next paragraph (such as the request for additional investigation and the opposition of the victim to the request for dispense from prosecution) increase the level of control and ensure the completeness of the investigations. The need for complete investigations emerges especially in the special procedures, when the prosecutor seems to act more like a party rather than an impartial organ of justice.[104] In fact, not only the prosecutor is granted some form of discretion when deciding to recur to special procedures,[105] but she is further granted significant discretionary power in pursuing criminal policies when opting for some special procedures (such as the *applicazione della pena su richiesta delle parti* and the *decreto penale*).[106] Therefore, only if the investigations are complete the suspect can choose to be admitted to those special procedures that do not involve judicial review.

With regards to the pre-investigative stage, it has been noted that unless she has received a proper *notitia criminis*, the prosecutor is not subject to the reviewing power of the judiciary.[107] Art. 330 c.p.p. grants significant discretionary powers to the prosecutor in the collection of the notice of offences. This discretionary power is not in contrast with the principle of mandatory prosecution under Art. 112 Cost., which operates only when the

[101] Corte Cost., S. 88/1991. *See* SCACCIANOCE C., *L'inazione del pubblico ministero*, Giuffrè, 2009, p. 55.

[102] Corte Cost., S. 88/1991.

[103] *Ibid.*

[104] Some scholars highlight the contradiction between the concept of prosecutor as impartial organ of justice in this phase and the fact that she is subject to the control of the judge for preliminary investigation. FERRAIOLI M., *Il ruolo di 'garante' del giudice per le indagini preliminari*, Cedam, 2006, p. 93.

[105] GAITO A., *Natura, caratteristiche e funzioni del pubblico ministero. Premesse per una discussione*, in GAITO A. (ed.), *Accusa penale e ruolo del pubblico ministero*, Jovene, 1991, p.11 at 23.

[106] RUGGIERI F., *Pubblico Ministero (Diritto Processuale Penale)*, in *Enciclopedia del Diritto*, Annali II, tomo I, Giuffrè, 2008, p. 998 at 1014.

[107] FUMU G., *L'attività pre-procedimentale del pubblico ministero*, in GAITO A. (ed.), *Accusa penale e ruolo del pubblico ministero*, Jovene, 1991, p.135 at 136-137.

prosecutor has not only identified the object of the possible investigation, but also the individual allegedly responsible for the commission of the crime. Only at that point the prosecutor has the duty to register the name of the suspect in the devoted register (Art. 335 c.p.p.) and to initiate the preliminary investigations. Only when the proceedings has started the prosecutor has the duty to submit the results of her investigations to a judge, requesting for prosecution or for dispense from prosecution.[108] At this pre-investigative stage the prosecutor does not have the typical authoritative and coercive powers of the preliminary investigation stage. The prosecutor acts therefore as public organ. In light of this character, other commentators note that also the Constitutional Court has repeatedly stated that the prosecutor is bound by Art. 97(2) Cost. and therefore must assure the 'good performance' (*buon andamento*) and impartiality of the Public Administration.[109] Therefore, if the initiation of the prosecution does not admit discretion, also the previous activities do not admit it. It is only possible to have 'technical discretion' i.e. deciding which investigative activities to perform.[110]

For the notice of acts that do not possess the requirements of the *notitia criminis* there is a devoted register, the so called 'Model 45'. Despite the specific function of this register, it has been noted that this instrument allows the prosecutor to autonomously decide whether to put aside those notices that, in her opinion, do not integrate the requirement for offences.[111] The risk for abuses would be even higher because of the absence of a judiciary control over the prosecutor's choices.

When, upon investigations, the prosecutor intends to initiate the proceedings, she notifies the conclusion of the investigations to the person under investigation, her lawyer, and the victim of the offence if the investigation concerns specific crimes.[112] The notice of conclusion of the investigations contains a brief description of the fact with its temporal and spatial boundaries and the allegedly violated provisions. The person under investigation is also informed that she and her counsel have access to the documentation concerning the

[108] Even in the Italian system it was discussed whether to reintroduce an internal mechanism of review within the prosecution when the activity of the prosecutor does not reach the stage of the formulation of the charges, but a unique investigative opportunity requires the intervention of the judiciary (*incidente probatorio*). CHIAVARIO M., *L'azione penale tra diritto e politica*, Cedam, 1995, p. 67 ff.

[109] CARAVITA B., *Obbligatorietà dell'azione penale e collocazione del pubblico ministero: profile costituzionali*, in GAITO A. (ed.), *Accusa penale e ruolo del pubblico ministero*, Jovene, 1991, p. 297 at 305-306.

[110] CHIAVARIO M., *L'azione penale tra diritto e politica*, Cedam, 1995, p. 135. *See* above fn. 1.

[111] SCACCIANOCE C., *L'inazione del pubblico ministero*, Giuffrè, 2009, p. 103-104; 212 ff.; 295 ff.

[112] Article 415(1) c.p.p.

investigations and contained in the file of the prosecutor.[113] More importantly, the person under investigation may submit her observations and documents obtained by conducting defensive investigative activities[114] and requesting the prosecutor to conduct additional investigations.[115] If the prosecutor grants the request, these activities must be conducted within thirty days, but the time limit can be extended by the judge for preliminary investigations (*giudice per le indagini preliminari*) to no more than sixty days.[116]

The prosecution starts when the prosecutor submits the request for prosecution (*richiesta di rinvio a giudizio*) to the judge for the preliminary hearing (*giudice per l'udienza preliminare*) (or with the *citazione diretta a giudizio* pursuand to Art. 552 c.p.p. that will be not analysed here). The request is accompanied by the file containing the *notitia criminis*, the documentation related to the investigation, and the record of the activities performed under the supervision of the judge for the preliminary investigations and possibly the body of evidence.[117] The request shall contain the identity of the accused and possibly of the victim; a precise description of the facts, of the aggravating circumstances and of those which may determine the applicability of a security measure;[118] the list of the source of evidence obtained;[119] the request for prosecution; date and signature of the prosecutor.[120] It has been argued that the principle of mandatory prosecution incumbent on her is transferred to the judge once the prosecutor has adopted her decision.[121]

1.1.5. The request for dispense from prosecution

As anticipated, the mandatory nature of the initiation of the investigation is mitigated by the express recognition of the possible submission of a request for dispense from

[113] Article 415(2) c.p.p.

[114] Article 391*bis* c.p.p. Scholars point out that the introduction of the right to investigations of the defence was not accompanied by a mitigation of the duty of the prosecutor to investigate both incriminating and exonerating circumstances, therefore enhancing, contrary to the ruling of the special proceedings, the role of the prosecutor as organ of justice. RUGGIERI F., *Pubblico Ministero (Diritto Processuale Penale)*, in *Enciclopedia del Diritto*, Annali II, tomo I, Giuffrè, 2008, p. 998 at 1014.

[115] Article 415(3) c.p.p.

[116] Article 415(4) c.p.p.

[117] Article 416 (1) and (2) c.p.p.

[118] Article 199 ff. of the Italian Criminal Code.

[119] It is technically inappropriate to refer to 'evidence' at this stage of the proceedings. The code uses the expression 'sources of evidence' (*fonti di prova*) until the submission of evidence in trial *in contraddittorio* at the presence of both the prosecutor and the accused in front of an impartial judge. Therefore, with the exception of the unique investigative opportunities, the evidence collected by the prosecutor cannot be directly used in trial. In case of unique investigative opportunities, the material collected can be used in trial since the collection is subject to the control of an impartial judge, and possibly at the presence of the defence counsel.

[120] Article 417 c.p.p.

[121] SCACCIANOCE C., *L'inazione del pubblico ministero*, Giuffrè, 2009, p. 57.

prosecution. As highlighted by scholars, the main reason for introducing this ruling is the magnitude of the criminality.[122] In order to limit the adoption of different approaches by the various offices, the adoption of national policies has often been one of the main reasons for concern.[123]

Differently from the indictment in the request for prosecution, which corresponds to the institution of the criminal proceedings, the request for dispense belongs to a previous phase and represents the opposite alternative to prosecution.[124]

The extent of the power of the prosecutor to request for dispense from prosecution has induced some authors to state that the Italian system includes a *de facto* discretionary prosecution.[125] Other scholars instead rejects any reference to the opportunity principle and prefer a reading of the dispense from prosecution consistent with the principle of mandatory prosecution;[126] or exclude the possiblity to refer to discretion when the prosecutor has to decide between request for prosecution and request for dispense from prosecution, because it is

[122] DI FEDERICO G., *Prosecutorial independence and the democratic requirement of accountability in Italy: analysis of a deviant case in comparative perspective*, in DE FIGUEIREDO DIAS J., DI FEDERICO G., OTTENHOF R., RENUCCI J.F., HENRY L.C., SHIKITA M., *The Role of the public prosecutor in criminal justice, according to the different constitutionals systems, Reports presented to the ancillary meeting held at the United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, Cairo, May 4, 1995, Lo Scarabeo, 1996, p. 18

[123] For this purpose, the Ministry of Justice may publish non-binding directives (*circolari*) containing policies to follow. *See* GAITO A., *Natura, caratteristiche e funzioni del pubblico ministero. Premesse per una discussione*, in GAITO A. (ed.), *Accusa penale e ruolo del pubblico ministero*, Jovene, 1991, p.11 at 19, who also notes the need for decriminalisation as means for granting effectiveness to the principle of mandatory prosecution (at p. 25). *See* also FUMU G., *L'attività pre-procedimentale del pubblico ministero,* in GAITO A. (ed.), *Accusa penale e ruolo del pubblico ministero*, Jovene, 1991, p. 135 at 138; CARAVITA B., *Obbligatorietà dell'azione penale e collocazione del pubblico ministero: profile costituzionali*, in GAITO A. (ed.), *Accusa penale e ruolo del pubblico ministero*, Jovene, 1991, p. 297 at 303; SCACCIANOCE C., *L'inazione del pubblico ministero*, Giuffrè, 2009, p. 338. Some scholars even suggest introducing the dependency of the prosecutor to the Executive like in other countries in order to facilitate the application of national policies. MAZZUCCA T., *Ambiguità del pubblico minister e riforma accusatorial*, in GAITO A. (ed.), *Accusa penale e ruolo del pubblico ministero*, Jovene, 1991, p. 213 ff. Against the need for policies and opposing to the control over the activity of the prosecutor when deciding whether to proceed *see* CONSO G., in GAITO A. (ed.), *Accusa penale e ruolo del pubblico ministero*, Jovene, 1991, p. 29 ff.; CAIANIELLO M., *The Italian Public Prosecutor: An Inquisitorial Figure in Adversarial Proceedings?*, in LUNA E., WADE M. (eds.), *Transnational Perspectives on Prosecutorial* Power, Oxford University Press, 2012, p. 250 at 259.

[124] *See* SCACCIANOCE C., *L'inazione del pubblico ministero*, Giuffrè, 2009, p. 172-173.

[125] DI FEDERICO G., *Obbligatorietà dell'azione penale, coordinamento delle attività del pubblico ministero e loro rispondenza alle aspettative della comunità*, in GAITO A. (ed.), *Accusa penale e ruolo del pubblico ministero*, Jovene, 1991, p.169 at 175, who argues that the need for coordination would reveal the discretionary nature of the prosecutorial activity, which would not be required if mandatory prosecution were strictly applied. *See* p. 185 ff.; VITALONE C., *La funzione d'accusa tra obbligatorietà e discrezionalità*, in GAITO A. (ed.), *Accusa penale e ruolo del pubblico ministero*, Jovene, 1991, p. 291 at 294; CAIANIELLO M., *The Italian Public Prosecutor: An Inquisitorial Figure in Adversarial Proceedings?*, in LUNA E., WADE M. (eds.), *Transnational Perspectives on Prosecutorial* Power, Oxford University Press, 2012, p. 250 at 255, 256.

[126] CHIAVARIO M., *L'azione penale tra diritto e politica*, Cedam, 1995, p. 116.

rather a determination based on the evidence at her disposal: the prosecutor has no discretion to choose among different legitimate solutions, because there is only one correct choice.[127] Other authors oppose to the discretionary model but suggest to introduce the principle of 'controlled opportunity'.[128] This principle would be applied evenly by all the offices when statutory limitations make it clear that the prosecution would be pointless or in the light of the 'irrelevance' of the offence or its petty nature.[129]

The Italian legislator rules the temporal limitations to the investigative activities in detail.[130] If within these time limits the prosecutor reaches the conclusion that the *notitia criminis* is manifestly ill-founded (*manifestamente infondata*) she submits to the judge for the preliminary investigations a request for dispense from prosecution.[131] The inconsistency of the *notitia criminis* shall not be self-evident, but rather emerge from the results of investigative activities. This conclusion can be drawn from two elements: first of all the request for dispense from prosecution for ill-foundness of the *notitia criminis follows* the investigation.[132] In second place, the code authorises the prosecutor to conduct relatively long investigations during which she can perform many activities.[133] If the *notitia criminins* is manifestly ill-founded since the beginning, the prosecutor can register it in the abovementioned 'Model 45' and avoid investigations.

The Constitutional Court highlighted that the wording '*manifestly* ill-founded' leads to reject the opportunity principle because in case of doubt the prosecutor has to opt in favour of the prosecution.[134] The favour for the prosecution does not mean that each *notitia criminis* shall automatically be followed by a proceedings: the dispense from prosecution shall be requested when it appears to be 'objectively superfluous' to go to trial. However, this favour for the prosecution was significantly reduced by the amendment of Art. 425 c.p.p. in 1999, introducing a ground for non-continuation of the proceedings when the evidence collected during the investigation is insufficient, contradictory or unsuitable of supporting the case in

[127] CARAVITA B., *Obbligatorietà dell'azione penale e collocazione del pubblico ministero: profile costituzionali*, in GAITO A. (ed.), *Accusa penale e ruolo del pubblico ministero*, Jovene, 1991, p. 297 at 301.

[128] SCACCIANOCE C., *L'inazione del pubblico ministero*, Giuffrè, 2009, p. 88 ff.

[129] *Ibid.*, p. 322 ff.

[130] Article 405(2), (3) and (4); Article 406 ff. c.p.p.

[131] Article 408 c.p.p.; *see* CAIANIELLO M., *The Italian Public Prosecutor: An Inquisitorial Figure in Adversarial Proceedings?*, in LUNA E., WADE M. (eds.), *Transnational Perspectives on Prosecutorial* Power, Oxford University Press, 2012, p. 250 at 260.

[132] CHIAVARIO M., *L'azione penale tra diritto e politica*, Cedam, 1995, p. 114.

[133] RUGGIERI F., *Pubblico Ministero (Diritto Processuale Penale)*, in *Enciclopedia del Diritto*, Annali II, tomo I, Giuffrè, 2008, p. 998 at 1008.

[134] Corte Cost., S. 88/1991 Cost.

trial.[135] This approach seems consistent with Art. 125 of the Implementing Rules of the Code for Criminal Procedure (*Disposizioni di Attuazione*) as well, which further clarifies that for the *notitia criminis* to be unfounded the prosecutor must conclude that the evidence collected during the investigation is not suitable of supporting the charge in trial.[136]

Scholars note that the ruling of the dispense from prosecution is basically founded on the conclusion that the trial is superfluous. Nevertheless, they also note that the line between 'superfluous' and 'inappropriate', as in the systems opting for the opportunity principle, may be difficult to trace.[137]

The request for dispense from prosecution also applies[138] if a procedural condition is missing (for example the crime cannot be prosecuted *ex officio*, but the law requires a lawsuit by the victim which has not been filed); if the suspect cannot be punished because of the exceptional minor gravity of the offence (*particolare tenuità del fatto*); if there is what in the Italian system is called 'ground extinguishing the offence' (*causa di estinzione del reato*), i.e. the death of the accused, an amnesty, the withdrawal of the lawsuit, the statute of limitation and others;[139] or because the fact is not provided by the law as a criminal offence.[140] When the prosecutor submits a request for dispense from prosecution, she submits to the judge for the preliminary investigation a file containing the *notitia criminis*, the documentation related to the investigation, and the record of the activities performed under the supervision of the judge for the preliminary investigations.[141]

When the judge receives the request for dispense from prosecution she can grant the request issuing a reasoned order (*decreto motivato*). She also sends back the file to the prosecutor and the order is notified to the possible persons under investigation and subject to

[135] *See* below 1.1.6. The judicial review on the request for initiation of the prosecution.

[136] It has been told that this provision reversed the previous approach and codified a hidden practice. GAITO A., *Natura, caratteristiche e funzioni del pubblico ministero. Premesse per una discussione*, in GAITO A. (ed.), *Accusa penale e ruolo del pubblico ministero*, Jovene, 1991, p.11 at 22.

[137] CHIAVARIO M., *L'azione penale tra diritto e politica*, Cedam, 1995, p. 52 ff.; SCACCIANOCE C., *L'inazione del pubblico ministero*, Giuffrè, 2009, p. 88 ff. noting that in order to avoid arbitrariness the prosecutor's assessment must be based on the available evidence; and p. 178. *See* also GREVI V., *Archiviazione per 'inidoneità probatoria' ed obbligatorietà dell'azione penale*, in *Rivista Italiana di Diritto e Procedura Penale*, 1990, p.1281 which includes the assessment under article 125 of the Implementing Rules of the Code for Criminal Procedure within the 'technical discretion'.

[138] Article 411 c.p.p.

[139] Articles 150 ff. of the Italian Criminal Code.

[140] The Italian system distinguishes between 'the fact is not provided by the law as an offence' (*il fatto non è previsto dalla legge come reato*) and 'the fact is not an offence' (*il fatto non costituisce reato*). While in the first case no provision sanctions the specific behaviour, in the second case the objective elements of the crimes can be attributed to an individual, but the requirements of the subjective element are missing.

[141] Article 408(1) c.p.p.

restrictions of the personal liberty. If the judge does not grant the request, she schedules a hearing within three months and informs the prosecutor, the person under investigation and the victim.[142] If after the hearing the judge deems it necessary to continue the investigations, she issues an order to the prosecution fixing a time limit to complete them.[143] But the judge can also believe that the evidence collected by the prosecutor during the investigation is enough for the prosecution. In this case she rejects the prosecutor's request for dispense from prosecution and orders to the prosecutor to charge the person under investigation.[144] One may wonder whether these cases may be considered a derogation to the principle of *ne procedeat judex ex officio*. Since the Constitution and the law reserve this responsibility to the prosecutor, it has been noted that both under the code of 1930 after the amendments of 1944 and under the Code of 1989 the judge is prevented from acting without a previous request from the prosecutor.[145]

When the prosecutor submits a request for dispense, the request is notified also to the victim under Art. 408(2) c.p.p. Through the notification the victim is informed about her right of analysing the content of the file sent to the judge and of opposing to the request for dispense within twenty days. A time limit of thirty days is granted for victims of sexual offences. Opposing to the request, the victim requires the prosecutor to further investigate and has to provide guidance on the object of the additional investigations and the evidence supporting the request. If the victim does not provide for this information the opposition is inadmissible and the judge grants the prosecutor's request for dispense.[146]

Art. 409(3) also states that when the judge does not immediately grant the prosecutor's request for dispense and schedules a hearing, she informs the General Prosecutor attached to the appeals court of the district. In this way, if the prosecutor does not submit a request for initiating the prosecution or does not submit a second request for dispense from prosecution within the time limit fixed by the judge, the General Prosecutor issues a reasoned order and takes the lead of the investigation. After the necessary additional investigations, the General Prosecutor submits her requests (for initiation of or dispense from the prosecution) within thirty days.[147]

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[142] Article 409(2) c.p.p.

[143] Article 409(4) c.p.p.

[144] Article 409(5) c.p.p.. The same principles apply when the prosecutor was not able to identify any suspect, but the judge believes that it is possible to charge an individual already involved in the investigation. *See* Article 415 c.p.p. On the problematic extent of the judge's powers under Article 409 c.p.p. *see* SCACCIANOCE C., *L'inazione del pubblico ministero*, Giuffrè, 2009, p. 289 ff.

[145] CHIAVARIO M., *L'azione penale tra diritto e politica*, Cedam, 1995, p. 57.

[146] Article 410 c.p.p.

[147] Article 412 c.p.p. This procedure is called '*avocazione*'. It is a measure of last resort that aims at avoiding that the inactivity of the prosecutor could paralyse the proceedings.

The principle of mandatory prosecution also includes the duty to re-open the investigations if necessary. The decision of the judge for the preliminary investigations granting the prosecutor's request for dispense from prosecution does not prevent the prosecutor from requesting the judge to re-open the investigations in the light of new facts that require additional investigations. The re-opening of the investigations is authorised with reasoned order.[148] Conversely, the prosecutor does not require the authorisation of the judge in order to re-open an investigation when request for dispense has been adopted because she had not identified any suspect.

The principle of mandatory prosecution is necessarily completed by the prohibition to withdraw the charges (the so called *irretrattabilità dell'azione penale*). It would be a non-sense to exclude discretion on whether to initiate the prosecution and to allow the prosecutor to decide whether to interrupt it. Once the prosecution has initiated the investigation, the trial must end with a judicial decision rendered by an impartial judge.[149]

1.1.6. The judicial review on the request for initiation of the prosecution

The Italian system does not rule only the review by the judge for the preliminary investigations of the request for dispense from prosecution, but also the review by the judge for the preliminary hearing of the request for prosecution as well.

First of all, the judge for the preliminary hearing may request for additional investigations under Art. 421*bis* c.p.p. In this case she fixes a time limit and schedules another preliminary hearing. In the light of this request the General Prosecutor may take the lead of the investigation with a reasoned order. Further, Art. 422 c.p.p. authorises the judge to order *ex officio* the submission of evidence that appears to be decisive for the conclusion of the *sentenza di non luogo a procedere*.

The *sentenza di non luogo a procedere* is a judgment preventing the continuation of the proceedings and the initiation of the trial. It is ruled by Art. 425 c.p.p. Literally it means 'judgment on the non-continuation'. First of all, it is a judgment and not a simple decision. The judge renders the judgment on the non-continuation when she detects a 'ground extinguishing

[148] Article 414 c.p.p.

[149] The prosecutor can only request for a suspension or interruption of the investigation (Article 71 c.p.p.) of the trial (Articles 3, 479, 41 and 47 c.p.p.) or both of them (Articles 343 and 344 c.p.p.). *See* DI SALVO E., *Principio d'irretrattabilità dell'azione penale, regressione del procedimento e poteri del pubblico ministero*, in *Cassazione Penale*, 2010, p. 2740; GALLUZZO F., *È ipotizzabile una rinuncia parziale all'imputazione?*, in *Cassazione Penale*, 2010, p. 2740.

the offence'[150] or a reason according to which the prosecution should not have been initiated or shall not be continued. The judge further proceeds under Art. 425 c.p.p. when: 'the fact is not provided for by the law as an offence' or 'the fact is not an offence';[151] when from the preliminary hearing it emerges that the offence has not been committed or that the accused did not commit the offence; or because there is a ground for excluding criminal responsibility (the accused is not chargeable for any reason such as minor age or mental disease). An additional and specific reason for issuing a judgment on the non-continuation is when the evidence collected during the investigation is insufficient, contradictory or unsuitable to support the case in trial. As noted among scholars, this last reason was introduced in 1999 in order to draw a parallel between the requirements for the initiation of the investigation (in particular Art. 125 of the Implementing Rules of the Code for Criminal Procedure) and the object of the review of the judge for preliminary investigations (the insufficiency contradiction or unsuitability of the evidence).[152] In this case a comparison between the judgment on the non-continuation and the decision not confirming the charges can be traced. The idea of the original text, raising doubts of conformity with the Constitution and of appropriateness, was that, in case of doubt, the public hearing could have been the most adequate safeguard to the right of the accused, whose strangeness from the offence could be demonstrated in court. Therefore, it is apparent that the judgment serves the purpose of introducing a judicial review in order to prevent possible abuses by the prosecutor. The judgment is appealable by the prosecutor, in some cases by the victim and the accused.

The premature conclusion of the proceedings and possibly of the trial are ruled also by other two provisions, Art. 129 c.p.p. and Art. 469 c.p.p.[153] Art. 129 c.p.p. states that *at any moment and at any stage of the proceedings* the judge shall close it *ex officio* when she detects that the offence has not been committed or that the accused did not commit the offence; when she detects that the fact is not provided for by the law as an offence' or that 'the fact is not an offence'[154]; when she detects a 'ground extinguishing the offence'[155] or when a procedural condition is missing. In this case as well, the measure declaring the closing of the proceedings is a judgment. Art. 129 c.p.p. further states that the judge shall use the formula most favourable to the accused: therefore, if the judge could render a judgment under Art. 129 c.p.p. both

[150] *See* above 1.1.5.The request for dispense from prosecution.
[151] *See* above fn. 140.
[152] RUGGIERI F. *Azione penale*, in *Enciclopedia del Diritto*, Annali III, Giuffré, 2010, p.129 at 132.
[153] *See* below, Chapter III, Section V, 2. The ruling of analogous situations in civil law systems.
[154] *See* above fn. 140.
[155] *See* above 1.1.5. The request for dispense from prosecution.

because there is a ground extinguishing the trial and because she deems that the accused did not commit the offence, she has to acquit the accused with the second formula.

Similarly, Art. 469 c.p.p. rules the acquittal after that the judge for the preliminary hearing has granted the prosecutor's request for prosecution but before the initiation of the trial. The subject matter of the judgment cannot be the merit of the case since the trial has not commenced yed and the provision is introduced by the formula 'without prejudice to the content of Art. 129 c.p.p.' (which can be applied at any moment and at any stage of the proceedings). Essentially, under Art. 496 c.p.p. the trial judge, after consultation with the prosecutor and the defence and if they do not oppose, renders a non-appealable judgment concluding the proceedings when: there is a reasons according to which the prosecution should not have been initiated or shall not be continued or there is a 'ground extinguishing the offence'[156] and it is not necessary to go to trial to ascertain that. An additional ground has been added if the offence is of exceptional minor nature. In this case the judge also consults with the victim and renders the judgment if she does not oppose.

1.1.7. The amendment of the charges

As seen above, one of the necessary elements of the request for prosecution is the precise description of the facts, of the aggravating circumstances and of those circumstances which may determine the applicability of a security measure. Nevertheless, during the preliminary hearing the charges may be different from those originally envisaged by the prosecutor and included in the request. Moreover, some kind of 'connection'[157] between offences or aggravating circumstances may emerge.[158] The prosecutor is allowed to note those discrepancies and amend the charges after having informed the accused or her lawyer during the hearing. If a new fact not contained in the request for prosecution emerges during the hearing and it is possible to proceed *ex officio*, the prosecutor can request the judge to introduce a new charge only if the accused agrees.[159]

A difference between the charges and the facts may also emerge during the trial. If the new offence does not fall under the jurisdiction *ratione materiae* of a higher court, the prosecutor simply amends the charges. If the different qualification implies the jurisdiction

[156] *See* above 1.1.5. The request for dispense from prosecution.
[157] The relevant cases are ruled at Article 12(1)(b) c.p.p.
[158] According to Leone this was an extension of the boundaries of the prosecution originally initiated. LEONE G., *Azione Penale*, in *Enciclopedia del diritto*, IV, Giuffré, 1959, p. 851 ff.
[159] Article 423 c.p.p.

ratione materiae of a higher court, the lack of jurisdiction must be challenged immediately, otherwise the trial can continue.[160]

1.2. The German system

The role of the prosecutor (*Staatsanwalt*) in the German system is ruled by the Law on the Constitution of the Courts (*Gerichtsverfassungsgesetz*, GVG). Under Title X of the GVG, entirely devoted to the prosecution (*Staatanwaltshaft*), §141 attaches an office of the prosecutor to each tribunal. Contrary to the Italian system the prosecutor does not belong to the judiciary,[161] but to the executive: the Federal Chief General Prosecutor (*Generalbundesanwalts*) and the Federal Prosecutors (*Bundesanwälte*) are appointed by the Minister of Justice (*Bundesminister der Justiz*) with the approval of the Federal Counsel (*Bundesrat*).[162] The organisation of the offices is therefore hierarchical and §146 GVG states that each prosecutor has to follow the directives coming from her superiors. With regards to the Federal Chief General Prosecutor and the Federal Prosecutors the power of supervision and direction belongs to the Minister of Justice; with regards to the regional public prosecutorial officials (*staatsanwaltschaftlichen Beamten des betreffenden Landes*) it belongs to the Regional Minister of Justice (*Landesjustizverwaltung*); and with regards to the officials of the office of the prosecutor (*Beamten der Staatsanwaltschaft*) it belongs to the first public prosecutor in the Higher Regional Courts and Regional Courts (*ersten Beamten der Staatsanwaltschaft bei den Oberlandesgerichten und den Landgerichte*).[163] Nevertheless, the law also includes limits to the control over the action of the prosecutor: in particular the principle of mandatory prosecution prevents the prosecutor to be subject to the political requests of not prosecuting specific offences.[164]

In the German system the prosecutor acts as an organ of justice and in trial is not treated as a party. While the initiation of the investigation and the use of coercive powers ruled at §§152 and 170(1) of the German Law on the Organisation of the Criminal Proceedings

[160] Article 516 c.p.p.

[161] §150 GVG expressly states that the prosecutor's office is independent from the Courts it is attached to and § 151 GVG prohibits the prosecutors to engage in judicial career and to exercise any control over the activity of the judges. A judge for the investigations (*Ermittlungsrichter*) oversees the stage of the investigations.

[162] §149 GVG.

[163] §147 GVG.

[164] *See* WEIGEND T., *Anklagepflisht und Ermessen*, Nomos, 1978, p. 64, who notes that the principle of mandatory prosecution is usually considered a shield against political interferences in criminal investigations. Nevertheless, he is also aware that the mere existence of a written principle may not be enough. Therefore, the possible preference for this principle over the principle of opportunity cannot be grounded exclusively on this reason.

(*Strafprozessordnung*, StPO) are expression of the principle of mandatory prosecution,[165] the attendance of the prosecutor to the proceeding is an autonomous duty.[166] The prosecutor shall continuously participate in the proceedings,[167] formulates the charges,[168] has the right to pose questions[169] and can ask for the submission of evidence.[170]

1.2.1. The initiation of the prosecution. Introductory remarks

Similarly, to the Italian system, also the German one is based on the principle of mandatory prosecution (*Legalitätsprinzip*),[171] which is nevertheless not enshrined in the German Constitution (*Grundgesetz*, GG). The constitutional foundation of this principle is Art. 3 GG, granting the principle of equality and the even applicability of the law. In this perspective, mandatory prosecution is one of the pillars of the rule of law.[172]

As expressly stated at §152 StPO, the prosecutor (*Staatanwaltschaft*) is the subject responsible for charging of the accused.[173] This provision is expression of the State monopoly in criminal law[174] and of the officiality principle (*Offizialprinzip*), i.e. the principle recognising only to the State the power/duty to prosecute and prohibiting alternative forms private justice. A partial exception to the officiality principle is represented by the *Antragsdelikte*, requiring a complaint from the victim. A distinction must be drawn between absolute and relative *Antragsdelikte*. In the former the absence of an individual complaint causes the dismissal of the proceedings; conversely, its absence in the latter can be circumvented by the prosecutor if

[165] *Ibid.*, p. 17.

[166] SCHMITT B., *§152 StPO*, in MAYER-GOßER L., SCHMITT B., *Strafprozessordnung mit GVG und Nebengesetzen*, 58th ed., C.H. Beck, 2016; BEULKE W., *Strafprozessrecht*, 13th ed., C.F. Müller, 2016, pp. 57 ff.

[167] § 226(1) StPO.

[168] § 243 StPO.

[169] § 240 StPO.

[170] § 244 StPO.

[171] For an historical analysis of the development of the principle of mandatory prosecution in the German law, *see* WEIGEND T., *Anklagepflisht und Ermessen*, Nomos, 1978, pp. 25-39.

[172] SCHNABAL R., VORDERMAYER H., *§152*, in SATZGER H., SCHLUCKEBIER W., WIDMAIER G., *Strafprozessordnung mit GVG und EMRK Kommentar*, 2nd ed., Heymanns, 2016, pp. 1063 ff. *See* also WEIGEND T., *Anklagepflisht und Ermessen*, Nomos, 1978, pp. 74 ff. In his view the possible different treatment of the accused is one of the main reasons for preferring the principle of mandatory prosecution.

[173] Exceptionally other subjects can fulfil this duty: for example, tax officials can investigate and request the competent Judiciary to issue a penal order (*See* §§ 368(1) and (2), 399(1) and 400 AO). *See* GENEUSS J., *Völkerrechtsverbrechen und Verfolgungsermessen. §153f StPO im System völkerrechtlicherStrafrechtspflege*, Nomos, 2013, p. 46 who refers to the theory of penalty, according to which the penalty is the reward for the conduct with both function of reparation and retribution.

[174] SCHMITT B., *§152 StPO*, in MAYER-GOßER L., SCHMITT B., *Strafprozessordnung mit GVG und Nebengesetzen*, 58th ed., C.H. Beck, 2016; SCHNABAL R., VORDERMAYER H., *§ 152*, in SATZGER H., SCHLUCKEBIER W., WIDMAIER G., *Strafprozessordnung mit GVG und EMRK Kommentar*, 2nd ed., Heymanns, 2016, pp. 1063 ff.

she identifies a public interest in prosecution.[175] Only under strict conditions a private citizen is allowed to initiate a private prosecution in criminal matters (*Privatklage*) as provided for by §§374 ff. StPO.[176] Private prosecution of crimes requires the absence (or irrelevance) of any public interest, but according to §376 StPO, the prosecutor can nevertheless intervene if she discovers a public interest at a later stage.[177]

1.2.2. The investigation

In the light of the principle of mandatory prosecution, when the prosecutor is informed about a possible criminal offence, she has the duty to proceed.[178] The investigative stage covers the preparatory fase, also called *Vorverfahren* or *Ermittlungsverfahren*, as opposed to the *Zwischenverfahren*, where the verification of the inquiry takes place, and the *Hauptverfahren*, i.e. the trial.

The initiation of an investigation must be justified by an initial suspect that a crime has been committed (*Anfangsverdacht*). Mere conjectures and vague supporting elements are not satisfactory, because sufficient factual basis of an offence (*zureichenden tatsächlichen Anhaltspunkte für verfolgbare Straftaten*) are required.[179] Despite her limited powers at this early stage, the prosecutor can conduct preliminary investigations (*Vorermittlungen*) in order to detect elements supporting the existence of the initial suspect. During the preliminary investigation the prosecutor records the information about the offences in the *AR-Register*. Only after the assessment of the initial suspect, the information is recorded in the *Js-Register* if the identity of the people suspected of having committed the crime is known or in the *Ujs-Register* if their identity is unknown. It has been argued that the power of conducting preliminary examinations is not fully consistent with the investigating regime, because the prosecutor's activity and the jurisdiction to investigate are only justified by the existence of the

[175] BEULKE W., *Strafprozessrecht*, 13th ed., C.F. Müller, 2016, pp. 22 ff.

[176] JOFER R., in SATZGER H., SCHLUCKEBIER W., WIDMAIER G., *Strafprozessordnung mit GVG und EMRK Kommentar*, 2nd ed., Heymanns, 2016, p.1967.

[177] BEULKE W., *Strafprozessrecht*, 13th ed., C.F. Müller, 2016, p. 22; SCHMITT B., *§152 StPO*, in MAYER-GOßER L., SCHMITT B., *Strafprozessordnung mit GVG und Nebengesetzen*, 58th ed., C.H. Beck, 2016.

[178] §160(1) StPO. *See* SCHNABAL R., VORDERMAYER H., *§152*, in SATZGER H., SCHLUCKEBIER W., WIDMAIER G., *Strafprozessordnngmit GVG un EMRK Kommentar*, 2nd ed., Heymanns, 2016, pp. 1064.

[179] SCHNABAL R., VORDERMAYER H., *§152*, in SATZGER H., SCHLUCKEBIER W., WIDMAIER G., *Strafprozessordnungmit GVG und EMRK Kommentar*, 2nd ed., Heymanns, 2016, pp. 1063 ff.; GENEUSS J., *Völkerrechtsverbrechen und Verfolgungsermessen. §153f StPO im System völkerrechtlicherStrafrechtspflege*, Nomos, 2013, p. 47.

initial suspect.[180] Despite the recognition of a certain margin of appreciation, the identification of the existence of an initial suspect is not left to the Prosecutor's discretion: according to the experience in criminal law, the suspects must tend towards the conclusion that a crime has probably been committed. Therefore, if there is absolutely no doubt that a ground for excluding criminal responsibility exists or that specific procedural conditions are missing, there is no initial suspect.

Once that the initial suspect has led the prosecutor to initiate the investigation, her action is driven by the principle of objectivity (*Verpflichtung zur Objektivität*), i.e. she has the duty to investigate incriminating and exonerating circumstances equally.[181] The objective of the investigation is collecting evidence. Although at this stage of the proceedings some measures affecting the rights of the suspects must be authorized by the judicial authority, the prosecutor still is the *dominus* of the investigation as she maintains the control over the whole investigative activities, is responsible for their carrying out and supervises the police's actions leading and controlling them (*Leitungs-* and *Kontrollbefugnis*).

At the end of the investigation the office of the prosecutor that deems appropriate to initiate the prosecution files a note of conclusion of the investigation[182] and submits a bill of indictment to the competent court.[183]

1.2.3. The charges

After the investigation, the prosecutor shall proceed against the suspect (*Verfolgungszwang*), and, if the necessary conditions apply, charge her (*Anklagezwang*).[184]

According to §151 StPO the judicial proceedings begins with the decision of the prosecutor to charge with an offence (*Erhebung einer Klage*),[185] usually through a written[186] indictment (*Einreichung einer Anklageschrift*).[187] Therefore the provision gives substance to

[180] GENEUSS J., *Völkerrechtsverbrechen und Verfolgungsermessen. §153f StPO im System völkerrechtlicher Strafrechtspflege*, Nomos, 2013, p.48.

[181] §160(2) StPO.

[182] §169a StPO.

[183] §170(1) StPO.

[184] SCHMITT B., *§152 StPO*, in MAYER-GOßER L., SCHMITT B., *Strafprozessordnung mit GVG und Nebengesetzen*, 58th ed., C.H. Beck, 2016.

[185] This is an expression of the principle *Nemo index sine actore*.

[186] Sometimes the indictment can be orally presented during the main hearing for supplementary charges. SCHNABAL R., VORDERMAYER H., *§152*, in SATZGER H., SCHLUCKEBIER W., WIDMAIER G., *Strafprozessordnung mit GVG und EMRK Kommentar*, 2nd ed., Heymanns, 2016, p. 1063.

[187] Other relevant instruments are provided for at §§374, 407, 413, 414.2, 440 StPO and §76 JGG.

the so-called adversarial principle (*Anklagegrundsatz* or *Akkusationsprinzip*). The duty to initiate the prosecution against any offence raises, unless otherwise provided, when the prosecutor has sufficient factual basis (*zureichende tatsächliche Anhaltspunkte*).[188] More specifically, §170(1) states that the decision to prosecute is taken at the end of the investigations (*Ermittlungen*) if there is sufficient reasons to sustain the charge (*genügende Anlass zur Erhebung der öffentliche Klage*), otherwise the prosecutor interrupts the proceedings.[189] The request for a warrant of arrest is tantamount to a public charge.[190] The indictment shall contain the name of the accused; the crime the person is charged of; the time and place of the alleged offence; the legal characterisation of the crime and the applicable law.[191] The detailed content of the indictment, in addition to the principle of mandatory prosecution, ensures the respect of the defence rights also enshrined in Art. 6(3)(a) and (b) of the ECHR, because it gives the accused the possibility to know what she is accused of.[192]

In order to proceed, the prosecutor must prove that the charges have been sufficiently investigated. Only after sufficient investigations it is possible to frame the subject matter of the proceeding (*verfahrensrechtliche Tatbefgriff*). Notwithstanding this, even if the indictment is necessary, the initiation of the trial does not automatically follow its submission: §203 StPO requires for a formal decision adopted by a judge authorising the prosecution (*Eröffnungsbeschluss*) and fixing the limits of the prosecution (*Fixierungsfunction*).[193] This decision puts an end to the preliminary phase (*Zwischenverfahren*) and introduces the main phase of the proceedings (*Hauptverfahren*). After the adoption of the decision authorising the prosecution, the prosecutor can no more withdraw the charges as expressly stated by §156 StPO. Nevertheless, according to §170(2) StPO, if the conduct does not correspond to a criminal offence under the German law; or there is no initial suspect against a determinate person; or there is a condition of inadmissibility or a condition of admissibility is missing, the prosecutor shall dismiss the case.

[188] §152(2) StPO
[189] §170(2) StPO.
[190] §407(2) StPO.
[191] §200 StPO.
[192] RIEDO C., FIOLKA G., NIGGLI M.A., *Strafprozessrecht sowie Rechtshilfe in Strafsachen*, Lichtenhahn, 2011, p.33.
[193] §155 StPO. *See* SCHNABAL R., VORDERMAYER H.,*§ 152*, in SATZGER H., SCHLUCKEBIER W., WIDMAIER G., *Strafprozessordnung mit GVG und EMRK Kommentar*, 2nd ed., Heymanns, 2016, p. 1063; BEULKE W., *Strafprozessrecht*, 13th ed., C.F. Müller, 2016, p. 25.

1.2.4. Some margin for discretion

As seen above, the German Code for Criminal Procedure explicitly refers to the principle of mandatory prosecution. Nevertheless, §152(2) StPO states that this principle is applicable 'unless otherwise provided', introducing the negative[194] of the principle of legality, i.e. the opportunity principle (*Opportunitätsprinzip*).[195] The applicability of the opportunity principle is limited to the cases provided for by §§153-154e, 376 StPO, §45 JGG and §31 BtMG, where the prosecutor, despite the 'initial suspect', may decide not to proceed. German scholars do not believe that the use of the word 'discretion' (*Ermessen*) and the use of the verb 'can' (*kann*) give the prosecutor a whole discretionary power (*Wahlrecht*),[196] but only allow her to balance different juridical factors leading to different outcomes.[197] In order to help the Prosecutor in these circumstances, the system includes since 1 January 1977 some Directives on the Criminal Proceedings and Fines Proceedings (*Richtlinien für das Strafverfahren und das Bußgeldverfahren, RiStVB*) mainly addressed to the prosecutor, but that are directed to the judge as well. The introduction of the Directives states that they encompass principles but it is left to the recipient the decision on whether to follow them or not. As the Directives observe, they can be useful for a standard case, but in each case it is left to the prosecutor to wisely decide which directives are applicable in each case and to decide not to apply some of them because of the particular circumstances of the case.

In principle, in the German system each offence entails a violation of a public interest and the principle of mandatory prosecution, providing for a duty to prosecute, grants adequate

[194] SCHMITT B., *§152 StPO*, in MAYER-GOßER L., SCHMITT B., *Strafprozessordnung mit GVG und Nebengesetzen*, 58th ed., C.H. Beck, 2016.

[195] Weigend tries to overcome the possible negative consequences of a strict application of the principle of mandatory prosecution and to reaffirm the importance of this principle despite the exceptions expressly provided in the law. He notes that the frustration of the police and the waste of resources in prosecuting petty offences do not eliminate the importance that the mandatory prosecution has with regard to the rule of law. The problem of the overloading of the offices of the prosecutors could be rather circumvented by increasing the resources at the disposal of the investigative authorities. WEIGEND T., *Anklagepflisht und Ermessen*, Nomos, 1978, pp. 41 ff.

[196] It is worth mentioning that according to Weigend, the concept of *Ermessen* within the opportunity principle, corresponds to the concept of 'real discretion' (*echtes Ermessen*) used in administrative law. WEIGEND T., *Anklagepflisht und Ermessen*, Nomos, 1978, p. 21.

[197] The recognition of an exceptional discretion to the prosecutor is limited to some provisions, like §153c(1)(I) no. (1) and (2), §45(1)(I) JGG, §47(1) OWiG für OWien. SCHMITT B., *§152 StPO*, in MAYER-GOßER L., SCHMITT B., *Strafprozessordnung mit GVG und Nebengesetzen*, 58th ed., C.H. Beck, 2016; SCHNABAL R., VORDERMAYER H., *§152*, in SATZGER H., SCHLUCKEBIER W., WIDMAIER G., *Strafprozessordnung mit GVG und EMRK Kommentar*, 2nd ed., Heymanns, 2016, p. 1066; GENEUSS J., V*ölkerrechtsverbrechen und Verfolgungsermessen. §153f StPO im System völkerrechtlicherStrafrechtspflege*, Nomos, 2013, p. 51 ff. According to Weigend, one of the main reasons to prefer the principle of mandatory prosecution is not jeopardising the general preventive function of criminal law. Moreover, he notes that the principle of opportunity weakens the protection of the legal goods. WEIGEND T., *Anklagepflisht und Ermessen*, Nomos, 1978, pp. 68-70.

protection to all these interests. When the opportunity principle applies, the State has no or limited interest in punishing or this interest is balanced with another conflicting and prevailing one (economy, efficiency, rationality etc.).[198] In these cases the legislator gives the prosecutor the power to decide whether to prosecute or not in the light of the concrete features of the situation.

According to §153 StPO, the German prosecutor can dispense with the prosecution in case of petty offences. The rationale of this provision is avoiding to slow down the whole judicial system because of a too strict applicability of the legality principle. This risk would be entailed in the duty of the prosecutor to investigate and prosecute each and every unlawful behaviour, even when the low threshold of gravity excludes the public interest in the prosecution. The minor gravity does not need to be proven by the prosecutor since she is only asked to make a hypothetical assessment of the offender's responsibility and to compare the behaviour of the concrete offender with other offences of the same nature. Notwithstanding this, the minor gravity of the responsibility must always be accompanied by the absence of any public interest in the prosecution.[199] The prosecutor's decision requires the approval of the court that would be competent for opening the main proceedings, unless the misdemeanour is not subject to an increased minimum penalty and the consequences ensuing from the offence are minimal.

Where §153 is not applicable but the offence still falls within the micro- and middle-criminality, §153a recognises the possibility to replace a penal measure with a different 'sanction'. Under this provision the opportunity principle is exceptionally not connected with a decision not to prosecute, but with a decision to apply a non-penal sanction, capable of satisfying a public interest.

Other exceptions to the principle of mandatory prosecution are ruled at §153d and 153e StPO in case of offences committed against the State respectively on political grounds and in national security cases. In both these cases the Chief Federal General Prosecutor can make the assessment and is allowed to withdraw the charges if the prosecutor has already initiated the prosecution as well.

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[198] GENEUSS J., *Völkerrechtsverbrechen und Verfolgungsermessen. §153f StPO im System völkerrechtlicherStrafrechtspflege*, Nomos, 2013, p. 53.

[199] SCHNABAL R., VORDERMAYER H.,*§ 153*, in SATZGER H., SCHLUCKEBIER W., WIDMAIER G., *Strafprozessordnung mit GVG und EMRK Kommentar*, 2nd ed., Heymanns, 2016, p. 1070; SCHMITT B., *§ 152 StPO*, in MAYER-GOßER L., SCHMITT B., *Strafprozessordnung mit GVG und Nebengesetzen*, 58th ed., C.H. Beck, 2016.

§§153c and 153f are both directly related to an international or supranational dimension. §153c is related to crimes committed outside Germany. It states that the prosecutor may decide not to proceed (1) if the crime has been committed out of the field of application of the German law, or when proceeding against people responsible with accessory liability who held their behaviour outside the German law's jurisdiction; (2) if the crime has been committed by a non-German person on a non-German vessel or aircraft; (3) if the alleged crime is included in §§129 or 129a StGB and the foundation or involvement in activities of the criminal or terroristic organization did not take place in Germany, or the conduct held in Germany is not particularly relevant. The provision is also applicable when a sentence has already been executed abroad against the accused and the sentence which is to be expected in Germany would be negligible after taking the foreign sentence into account or if the accused has already been acquitted abroad by a final judgment in respect of the offence; or if the conduct of proceedings poses the risk of serious detriment to the Federal Republic of Germany or if other public interests of overriding importance present an obstacle to prosecution.[200] If the prosecution has already initiated, the prosecutor can withdraw the charges, even if in some cases the subject responsible for the withdrawal is the Federal General Public Prosecutor.[201]

This provision is applicable to any offence except for the international crimes included in the German code of International Criminal Law (*Völkerstrafgesetzbuch*, VStGB), namely genocide, crimes against humanity and war crimes. For these crimes §153f provides for a special regime. [202] The rationale of the special regime for international crimes enshrined in §153f is linked to the peculiar nature of the these crimes and to the need to distinguish between the applicability of the legality principle for international crimes committed in Germany and the opportunity principle for international crimes committed abroad.[203] Even if §153f is applicable only when the German law is applicable pursuant to §§3 to 9 StGB, the discretion of the prosecutor does not seem particularly limited because she can decide in autonomy.

When §153f applies, the prosecutor may decide not to proceed when (i) one of the circumstances provided for by §153c(1) no. (1) or (2) occur (if the crime has been committed out of the field of application of the German law, or when proceeding against people responsible with accessory liability who held their behaviour outside the German law's

[200] § 153c(2) and (3) StPO.
[201] § 153c(4) and (5) StPO.
[202] SCHMITT B., *§153f StPO*, in MAYER-GOßER L., SCHMITT B., *Strafprozessordnung mit GVG und Nebengesetzen*, 58th ed., C.H. Beck, 2016.
[203] SCHNABAL R., VORDERMAYER H., *§153c*, in SATZGER H., SCHLUCKEBIER W., WIDMAIER G., *Strafprozessordnung mit GVG und EMRK Kommentar*, 2nd ed., Heymanns, 2016, p. 1084; GENEUSS J., *Völkerrechtsverbrechen und Verfolgungsermessen. §153f StPO im System völkerrechtlicherStrafrechtspflege*, Nomos, 2013, p. 221.

jurisdiction; and if the crime has been committed by a non-German person on a non-German vessel or aircraft;); and (ii) the suspect does not actually live in Germany and is not expected to be resident in Germany (i.e. the suspect is only exceptionally in Germany). The assessment of the possible link between the suspect and Germany must be done taking into consideration the working activity of the suspect and her familiar and personal relationships. A difference intercourse between the applicability of the conditions set forth in §153c(1) no. (1) rather than (2): if the suspect is German and the conditions of §153c(1) no. (1) occur, the prosecutor may decide not to proceed *only* if the crime is prosecuted by an international tribunal or by another State on whose territory the crime occurred or whose nationals suffered the consequences of the crime. Para. (2) lists four elements that the prosecutor must give particular attention to (*insbesondere*) in order to adopt a decision of non-prosecution: (1) the absence of suspects of German nationality; (2) the commission of the crime outside Germany; (3) the absence of the suspect from the territory of Germany and the absence of expectations that she will be resident in Germany; (4) the prosecution of the crime by an international tribunal or by another State on whose territory the crime occurred or whose nationals suffered the consequences of the crime.

The same decision can be taken by the prosecutor if the crime has been committed by a non-German person that is actually in Germany, but the circumstances of para. (2) no. (2) and (4) occur and the surrender of the suspect to an international court or the extradition to the State proceeding is possible. Moreover, §153f(3) extends the opportunity principle to a stage following the initiation of the proceeding before a German Court, since it allows the prosecutor to withdraw the charges in any phase of the proceeding if the circumstances of para. (1) or (2) occur. It has been excluded that this provision departs from the principle of the natural judge provided for at Art. 101 GG, because §153f does not establish the jurisdiction of a non-German judge (an international tribunal or the tribunal of another State), but simply recognises the existence of other jurisdictions, giving the German prosecutor the possibility to defer the prosecution.[204]

The importance of the opportunity principle in the prosecution of international crimes is linked to the wording of §1 VStGB. This provision applies the German universal jurisdiction (*Weltrechtspflegegrundsatz*) for international crimes, extending the tasks of the German prosecutor worldwide and potentially on a great number of crimes. The absence of any

[204] SCHMITT B., *§153f StPO*, in MAYER-GOßER L., SCHMITT B., *Strafprozessordnung mit GVG und Nebengesetzen*, 58th ed., C.H. Beck, 2016; SCHNABAL R., VORDERMAYER H., *§153f*, in SATZGER H., SCHLUCKEBIER W., WIDMAIER G., *Strafprozessordnung mit GVG und EMRK Kommentar*, 2nd ed., Heymanns, 2016, p. 1088.

relationship with Germany may nevertheless make it difficult to investigate and prosecute.[205] It has even been highlighted that §153f does not introduce an opportunity assessment, rather explains how to exercise discretion. Therefore, this provision would not be a proper exception to the principle of mandatory prosecution, since it would rather regulate the prosecutor's intervention which sometimes would be mandatory.[206] The existence of §153c StPO, which would be applicable in the absence of §153f stop, implies that the objective of the former is not only avoiding the overburdening of the activity of the prosecutor, since the former would be enough, rather ruling the prosecutor's discretion in case of investigations involving international crimes.

It has been noted that the lack of guidelines for determining in which situations the prosecutor should proceed and in which ones she could act discretionally may be problematic,[207] while according to other commentators, not only §153f StPO, but all the exceptions to the principle of mandatory prosecution may undermine this fundamental principle of German criminal procedure.[208] The attempts to discover the identity of handlers, co-perpetrators, indirect perpetrators, but also the need to protect specific goods in specific circumstances risks postponing the prosecutorial intervention or reduce its importance.

1.2.5. The proceedings to compel public charges

According to §170(2) StPO, when the prosecutor does not initiate the prosecution, she shall terminate the proceedings. She further notifies the decision to the possible suspects that have been questioned or that were the object of a warrant of arrest and to the applicant lodging the complaint indicating the reasons of the decision.[209] In fact, the person lodging the complaint has the right to challenge the prosecutor's decision and within one month from the notice of the decision may submit a request to the higher regional court (*Oberlandesgericht*, OLG). More specifically the applicant requires the court to issue an order obliging the prosecutor to initiate the prosecution. This procedure is ruled by §§172 ff. StPO and is called *Klageerzwingungsverfahren*, that means 'proceedings to compel public charges'. Even if its

[205] Scholars note that the inclusion of the principle of opportunity in these circumstances avoids the initiation of investigations that should be dismissed because of the impossibility to conduct successfully investigations in other States because the crimes do not have any connection with Germany or because their prosecution would prejudice German's foreign policies. SCHMITT B., *§153f StPO*, in MAYER-GOßER L., SCHMITT B., *Strafprozessordnung mit GVG und Nebengesetzen*, 58th ed., C.H. Beck, 2016.

[206] GENEUSS J., V*ölkerrechtsverbrechen und Verfolgungsermessen. §153f StPO im System völkerrechtlicherStrafrechtspflege*, Nomos, 2013, p. 228 ff.

[207] *Ibid.*, p. 29.

[208] SCHNABAL R., VORDERMAYER H., *§152*, in SATZGER H., SCHLUCKEBIER W., WIDMAIER G., *Strafprozessordnung mit GVG und EMRK Kommentar*, 2nd ed., Heymanns, 2016, p. 1066.

[209] §171 StPO.

applicability is subject to some restrictions,[210] this procedure overturns the prosecutor's decision imposing her to proceed.

The victim's request shall contain a description of the facts which are intended to substantiate preferment of public charges and the evidence supporting the request. Before rendering a decision, the court shall ask the prosecutor to provide the records of the hearings and may order a judge to conduct additional investigations. The Court dismisses the application if there is no sufficient reason for preferring charges and informs the applicant and the prosecutor. The initiation of a prosecution is subject to the submission of new evidence supporting the request. On the contrary, if the Court believes that the application is well founded, it orders the prosecutor to initiate the prosecution.[211]

2. The discretionary model

The alternative to the mandatory system is the discretionary model, ruled by the opportunity principle. The rationale of this model is to avoid the overburdening of the judicial system giving the prosecutor the power to decide whether to prosecute or not after an assessment on the appropriateness of the prosecution. The recognition of prosecutorial discretion does not mean arbitrariness: prosecutors follows guidelines granting a general uniformity usually provided by the Minister of Justice. These guidelines of criminal policy are issued within the framework of the criminal laws approved by the parliaments. Irrespective of the dependence of the prosecutor from the executives, the tendency is against a strict subjection of prosecutors to the Minister of Justice, especially when the constitutions grant the parliaments the competence in criminal matters: if the prosecutor actes under the instructions of the Executive, there is the risk of circumventing the statutory reservation. The leading principle remains therefore the principle of independence of the prosecutor. The recognition of discretion rather aims at enhancing transparency of the prosecutorial choices and is always balanced by mechanisms aiming at stimulating, directing and verifying its correct use.[212] For example, the Anglo-American systems are equipped with the remedies of the abuse of process and the inherent powers of the Court in order to block oppressive or vindictive prosecutions.

[210] *See* §171(2) StPO.
[211] §175 StPO.
[212] DI FEDERICO G., *Obbligatorietà dell'azione penale, coordinamento delle attività del pubblico ministero e loro rispondenza alle aspettative della comunità*, in GAITO A. (ed.), *Accusa penale e ruolo del pubblico ministero*, Jovene, 1991, p.169 at 174, 181.

2.1. The English system (England and Wales)

In the English system the organ in charge of prosecution since 1985 is the Crown Prosecution Service headed by the Director of Public Prosecution.[213] The Director is appointed by and acts under the superintendence of the Attorney General, which is subordinate to the Secretary of State for Justice. The Attorney General is responsible for the integrity of the prosecution system and is further accountable to the Parliament for the work of the Service.[214] Nevertheless, the Prosecution Service maintains its independence both from the government and the police. Before 1985 even the police were in charge of most of the prosecutions, but now it is only responsible for instituting the prosecution. The proper prosecution is instead subject to the decision of and carried out by the Service. Private citizens cannot initiate a prosecution but can institute private prosecutions. Under certain circumstances, the Director of Public Prosecution can take the lead of these private prosecutions and possibly discontinue it.

The main sources ruling the functions of the prosecutors are the Prosecution Offences Act of 1985 and the Code for Crown Prosecutors issued by the Director of Public Prosecution under section 10 of the 1985 Act.

2.1.1. The investigation

According to the Prosecution Offences Act of 1985, the activity of the Service only starts when police investigations are concluded and the suspect has been charged. The police is entirely responsible for the investigations and can decide their scope and whether to continue them or not.[215] At this stage the prosecutor is expressly forbidden to direct the police and must only have regard for the impact of any failure to pursue 'an advised reasonable line of inquiry or to comply with a request for information'.[216] She is further allowed to advise the police in the most serious and complex cases.[217] In this advisory function, the objective of the prosecutor's intervention is limited to the identification of possible evidential weaknesses that

[213] For an overview *see* ARCHBOLD, *Criminal, Pleading, Evidence and Practice*, 2020, part X; ARCHBOLD, *Magistrates' Courts Criminal Practice*, Sweet & Maxwell, 2017, pp. 209 ff.

[214] *See* EDWARDS J., *The Attorney General, Politics and the Public Interest*, Sweet & Maxwell, 1984.

[215] *See Director's Guidance on Charging*, 5th ed., May 2013, para. 8.

[216] *Code for Crown Prosecutors, Crown Prosecution Service*, England and Wales, 2018, para. 3.3.

[217] *Director's Guidance on Charging*, 5th ed., May 2013, para. 26. *See* also para. 7 referring to the guidance and advice provided in 'serious, sensitive or complex cases and any case where the police supervisor considers it would be of assistance in helping to determine the evidence that will be required to support a prosecution or to decide is a case can be proceed to court'.

could affect the prosecution in order to rectify them.[218] The same (limited) power may be exercised in trial if the prosecutor realises that the evidence does not support a conviction. Neither in this case the prosecutor can direct the police but only warn them that she will have to drop the case if they do not provide for additional evidence.

The first subject deciding on the need for prosecution is therefore the police,[219] which prepares the charges and decide whether to continue with the investigation and to refer the case to the Crown Prosecution Service. In order to decide on whether to refer a case to the Service or not, the police must consider whether there is sufficient evidence to charge a suspect in the light of the criteria used by the prosecutor in order to determine whether to prosecute or not.[220] At the end of the investigation the police may arrest the suspect and charge her, adopt a decision of 'no further action' if it has not identified any suspect or in case of petty offences; or issue the offender with a formal caution.

Although it is responsibility of the police to prepare the charges, the Service can nevertheless decide on the appropriateness of the charges in the most serious cases.[221] In addition, the prosecutor reviews all the police charged cases prior to the first hearing. If it appears that the police charged a case not permitted by the Guidance,

> 'the reviewing prosecutor must consider whether the evidence and material available at that time fully meets the [appropriate tests] to the circumstances of the case. Where it does the prosecutor will continue with the prosecution and record the reason with the case review. Where it does not meet the appropriate Test, the prosecutor should immediately enquire if there is any other material available which has not been provided which may allow the case to continue. Where that is not the case, the prosecution should be discontinued pending the gathering of further evidence and the referral of the case to a prosecutor to make a charging decision'.[222]

On the other hand, once the police have made the charges, if the prosecutor deems that the investigations are incomplete, she may decide to give the case back to the police for further investigations.

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[218] *Director's Guidance on Charging*, 5th ed., May 2013, para. 6, adding that: 'Prosecutors will be proactive in identifying and, where possible, rectifying evidential deficiencies and in bringing to an early conclusion those cases that cannot be strengthened by further investigation or where the public interest clearly does not require a prosecution'. *See* para. 16.

[219] DELMAS-MARTY M, SPENCER J.R. (eds.), *European Criminal Procedure*, Cambridge University Press, 2002, p. 161.

[220] *Director's Guidance on Charging*, 5th ed., May 2013, para. 5.

[221] *Prosecution of Offences Act of 1985*, section 3(2)(b). Moreover, the Director's Guidance on Charging clarifies that in all cases not allocated to the police under para. 15 of the guidance, the prosecutor may make the charging decision.

[222] *Director's Guidance on Charging*, 5th ed., May 2013, para. 21.

2.1.2. The decision on whether to continue with the prosecution

Once the police have concluded the investigation and opted for charging the suspect, the prosecutor is responsible for deciding on whether to continue with the prosecution or not. If she decides to continue she is also responsible for preparing the cases and presenting them in court. The Crown Prosecutor Service was primarily created in order to grant the homogeneous exercise of discretion on the whole territory.[223] In order to perform these functions with objectivity and impartiality each prosecutor is required to follow the Code for Crown Prosecutors which illustrates how to determine the appropriateness of the prosecution.[224] In particular, the decisions must not be moved by discriminatory or political considerations and must be adopted keeping in mind that the prosecutor is requested to act in the interests of justice and not solely for the purposes of obtaining a conviction.[225]

The third section of the Code is entirely devoted to the decision on whether to continue with the prosecution. According to para. 3.1, the prosecutor decides whether a person should be charged with a criminal offence and possibly, in the most serious or complex cases, what that offence should be. Her decision must be consistent not only with the provisions of the Code, but also with the Director of Public Prosecution's Guidance on Charging and any relevant legal guidance or policy.

In addition to the information received by the police, the prosecutor may also take into account additional information provided by the suspect.[226]

The Service is required to continue a prosecution only when the case passes both the evidentiary and the public interest stages.[227] Sometimes, irrespective of the sufficiency of the evidence, it is clear since the beginning that there is no public interest in the prosecution.[228] According to the Code 'prosecutors should take the decision to prosecute only when they are satisfied that the broad extent of the criminality has been determined and that they are able to

[223] ARCHBOLD, *Magistrates' Courts Criminal Practice*, Sweet & Maxwell, 2017, p. 224 ff. *See* also DELMAS-MARTY M, SPENCER J.R. (eds.), *European Criminal Procedure*, Cambridge University Press, 2002, p. 161.

[224] *Code for Crown Prosecutors*, Crown Prosecution Service, England and Wales, 2018, para. 2.2.

[225] *Ibid.*, para. 2.7.

[226] *Ibid.*, para. 3.4.

[227] *Ibid.*, section 4. ARCHBOLD, *Magistrates' Courts Criminal Practice*, Sweet & Maxwell, 2017, pp. 225-226.

[228] In these rare cases, the police or prosecutors may make an early Public Interest decision that the case should not proceed further. *See Director's Guidance on Charging*, 5th ed., May 2013, para. 10.

make a fully informed assessment of the public interest'.[229] With regards to the evidentiary threshold, the Service must be satisfied that there is sufficient evidence to provide with a realistic prospect of conviction against each suspect on each charge after having assessed the admissibility and reliability of evidence and the existence of additional elements affecting its sufficiency; moreover, the prosecutor must consider the possible case of the defence and how it is likely to affect the prospects of conviction. As far as the public interest is concerned, the Code is adamant by stating that 'it has never been the rule that a prosecution will automatically take place once the evidential stage is met'. The prosecutor must positively assess whether there are factors tending against the prosecution in the light of the seriousness of the offence; the level of culpability and the age of the suspected person; the circumstances of the crime; the harm caused to the victim; the impact of the crime on the community; and the proportionality of prosecution as response to the offence. Sometimes the prosecutor may be satisfied that the public interest is properly served by offering the offender the opportunity to have the matter dealt with by an out-of-court disposal.[230]

The Code further provides with guidance with regards to the way as to assess the public interest and the way to balance the public interest with other outweighing factors. It identifies a non-exhausting and purely indicative list of questions that the prosecutor must answer in order to facilitate her determination. The weight to be attached to each question clearly depends on the circumstances of the case. The Director's Guidance on Charging states that '[g]enerally, Public Interest decisions should not be taken until sufficient key evidence[231] has been obtained to meet the evidential standard'.

In 'limited circumstances, where the Full Code Test is not met', when the seriousness or the circumstances of the case justify the making of an immediate charging decision, and when there are substantial grounds to object to bail, the prosecutor can apply the so called 'threshold test'.[232] In particular the Threshold Test may be used to charge a suspect who may justifiably be detained in custody to allow evidence to be gathered to meet the Full Code

[229] *Code for Crown Prosecutors*, Crown Prosecution Service, England and Wales, 2018, para. 4.5.

[230] *See Director's Guidance on Charging*, 5th ed., May 2013, para. 9; ARCHBOLD, *Magistrates' Courts Criminal Practice*, Sweet & Maxwell, 2017, p. 226.

[231] According to the Guidance a key evidence is that evidence which either alone or taken together with other evidence establishes the elements of the offence to be proved and that the person to be charged committed the offence with any necessary criminal intent.

[232] *Code for Crown Prosecutors*, Crown Prosecution Service, England and Wales, 2018, section 5.

Test.[233] This test requires a 'rigorous examination' of five conditions, which include: the existence of reasonable grounds to suspect that the person to be charged has committed the offence; the existence of reasonable grounds to believe that further investigations can provide for additional evidence establishing a realistic prospect of conviction; the need of an immediate charging decision in the light of the seriousness and the circumstances of the case; the existence of substantial grounds to object to bail; the existence of a public interest in charging the suspect. The Code also states that a decision adopted under the threshold test must be kept under review and authorises the prosecutor to be proactive to secure from the police the identified evidence. The evidence must be regularly assessed to ensure that the charge is still appropriate and that continued objection to bail is justified. As soon as the anticipated further evidence is available and in any event before the formal prosecution, the prosecutor must apply the full test.[234]

Ultimately, the decision not to proceed is adopted under section 23 of the Prosecution of Offences Act of 1985 and is communicated with a notice of discontinuance which necessarily contains the reasons for the decision only if the person has been charged with an offence after being taken into custody without a warrant. It is worth mentioning that the accused may request to continue with the proceedings because the discontinuance shall not prevent the institution of other proceedings in respect of the same offence.

2.1.3. The discontinuance of the proceedings after the initiation of the trial

The corollary to the discretionary power granted to the prosecutor with regards to the continuation of the prosecution at the pre-trial stage is the power to drop the charges *after* the starting of the trial. Under section 23F of the Prosecution of Offences Act the prosecutor shall give notice of her decision providing her reasons to the court but not necessarily to the accused. The discontinuance of the proceedings shall not prevent the institution of fresh proceedings in respect of the same offence.

Ultimately the prosecutor can also force the Court to acquit the accused by providing no evidence. In these cases the Court cannot oblige the prosecutor to continue the prosecution

[233] *Director's Guidance on Charging*, 5th ed., May 2013, para. 11. The discipline is completed by para. 12 stating that: 'Where the prosecutor is not satisfied on either part of the evidential stage, the suspect cannot be charged. The case must then be referred back to the custody officer who will determine whether the suspect may continue to be detained or released on bail or whether the case should be concluded with no further action'.

[234] *See* also *ibid.*, para. 13.

and cannot proceed *proprio motu*.[235] Since in this case the prosecutor does not need the Court's authorisation, scholars note the paradox of introducing the judicial scrutiny of the decision not to prosecute.[236]

2.1.4. The control over the decision to prosecute

The decision to prosecute or not to prosecute adopted by the Crown Prosecution Service may be subject to judicial review.

The decision not to prosecute it is usually definitive in the light of the principle that people should rely on decisions adopted by the Crown Prosecutor Service. Notwithstanding this, occasionally the prosecutor can overturn a decision not to prosecute or deal with the case by way of an out-of-court disposal or when it restarts the prosecution. The possibility to review is admitted in particular if the case is serious, for example when a review of the original decision shows that it was wrong or new evidence became available.[237] In addition to this internal review, the English system allows a judicial review of the Prosecutor's decision not to prosecute as well. The Code and the Victims' Right to Review Scheme allow victims to seek a review of the decision not to initiate a prosecution or to drop the charges. If the applicant submits a request for review and succeeds, the Court directs the Crown Prosecution Service to reconsider its decision, although the final decision remains to the Service.

The reasons that may determine the request for review belong to four different categories: law, evidence, policy and previous judicial decisions. As far as policy is concerned, the leading case *Regina v. Director of Public Prosecutions*[238] and subsequent case-law[239] clarify that a decision not to prosecute may be judicially reviewed only if made because of (i) a policy has not been properly applied and or compelled with, even when the prosecutor included irrelevant considerations in her assessment; (ii) the adopted policy is unlawful; and (iii) the decision was adopted because of corruption, fraud or bad faith of the prosecutor. Nevertheless, the case-law shows that the judiciary rarely intervenes in the prosecutor's assessment.

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[235] DELMAS-MARTY M, SPENCER J.R. (eds.), *European Criminal Procedure*, Cambridge University Press, 2002, p. 171.

[236] *Ibid.*, p. 209.

[237] *Code for Crown Prosecutors*, Crown Prosecution Service, England and Wales, 2018, section 10.

[238] *R v DPP, ex p. C* [1995] 1 Cr App R 136

[239] *R v DPP, ex p. Manning* [2001] QB 330; *R v Chief Constable of Kent, ex p. L; R v DPP, ex p. B* (1991) 93 Cr App R 416); *R v DPP, ex p. Kebilene* [2000] 2 AC 326; *R v Panel on Takeovers and Mergers, ex p. Fayed* [1992] BCC 524.

With regards to the decision to continue with the prosecution it may be subject to judicial control when the accused flags a possible abuse of process by the prosecutor in exercising her prosecutorial powers. The concept of abuse of process does not appear in statutory law but has been elaborated by the common law. One of the main leading cases on this topic is *Connelly v. DPP* of 1964.[240] Without going into details, it is enough recalling that the abuse of process can be declared when the circumstances prevent the accused to be granted a fair trial; or something happened that makes it unfair for the defendant to stand in trial at all. Only if the complainant cannot present a submission of abuse of process and requests a stay in the proceedings (or other remedies), she can submit a request for judicial review of the decision to prosecute for analogous reasons as those analysed above with regard to the decision not to prosecute. The case-law tends to limit the cases of judicial control over the decision adopted by the Crown Prosecution Service to fraud corruption, *mala fides* or failure to follow the policies adopted in the Code.[241]

The last form of judicial control over the decision of the prosecutor to continue with the prosecution takes place at the end of the presentation of the case by the prosecutor if the defence submits a request for 'no case to answer'.[242]

2.1.5. The selection of the charges

When the prosecutor decides to prosecute, she must select among the charges prepared by the police those that she intends to bring to trial. The selection must reflect the seriousness and extent of the offending and give the court adequate powers to sentence and impose appropriate post-conviction orders. Moreover, the selection of the charges must also enable the case to be presented in a clear and simple way.[243] The prosecutor is expressly prohibited from proceeding with more charges than necessary with the sole purpose of encouraging the defendant to plead guilty to some of them or from proceedings with more serious charges in order to obtain a guilty plea for less serious charges.[244]

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[240] *Connelly v. DPP*, [1964], AC 1254.

[241] *See R v Panel on Takeovers and Mergers, ex p. Fayed* [1992] BCC 524; *R v Inland Revenue Commrs, ex p. Allen* [1997] STC 1141*; R v DPP, ex p. Burke* [1997] COD 169; *R v Liverpool City JJ. and the CPS, ex p. Price* (1998) 162 JP 766; *R v DPP, ex p. Kebilene* [2000] 2 AC 326.

[242] *See* below Chapter III, Section V, 1. The ruling of the 'no case to answer' in common law systems.

[243] *Code for Crown Prosecutors*, Crown Prosecution Service, England and Wales, 2018, para. 6.1.

[244] Therefore, the selection of the charges cannot be used in order to obtain the pleas and avoid using time and resources in the prosecution. Nevertheless, it is common for the prosecutor (or the police) to engage in the so-called plea-bargaining with the defence, i.e. a negotiation where the prosecutor agrees to drop some charges in return of the guilty plea with regards to other charges.

2.2. The U.S. system

In the U.S. federal system the Prosecutor has broad discretion in deciding whether to initiate or continue the prosecution, and for this reason it has been defined as 'the single most powerful officer in the criminal justice system'.[245]

According to Art. II(3) of the Constitution, under the heading 'Executive Branch', the President 'shall take care that laws be faithfully executed'. Therefore, also in the U.S. system the prosecutor does not fall within the judicial power (ruled by Art. III of the Constitution), but within the executive. The responsibility of the prosecution's activity belongs to the Department of Justice, headed by the Attorney General. The case-law has enhanced her link with the President since long time: in 1888, the Supreme Court highlighted that despite the absence of specific statements of the general duties of the Attorney General, it was possible to infer some of them, including supervising the conduct of all suits brought against the U.S. and advising the President.[246] Moreover, in 1922 the case-law described the Attorney General as the 'hand of the President in taking care that the laws of the United States in protection of the interests of the United States in legal proceedings and in the prosecution of offences, be faithfully executed'.[247]

Under the direction and control of the Attorney General, the U.S. Attorneys operate as attorney for the executive within their respective district. Each U.S. Attorney is vested with broad discretion to protect the public from crime and such discretion derives both from statutory grant and the authority of the Attorney General at common law.[248] This discretion is essential in order to assure general public welfare[249] and to fulfil the duties of executing laws, protecting the interests of United States, and prosecuting the offences.[250] According to authoritative case-law, the prosecutor 'is charged by law with large discretion in prosecuting

[245] HADDAD J.B., MARSH E.P., ZAGEL J.B., MEYER L.R., STARKMAN G.L., BAUER W.J., *Criminal Procedure, Cases and Comments*, 7th ed., West, 2008, p. 902. *See* also WEAVER R.L., ABRAMSON L.W., BACIGAL R.J., BURKOFF J.M., HANCOCK C., HOEFFEL J.C., *Criminal Procedure, Cases, Problems and Exercises*, 4th ed., West, 2010, p. 766 referring to the 'uncontrolled discretion' of the Prosecutor, whose potential for abuse 'is now a reality'. For an overview, *see* also MILLER M.L., WIGHT R.F., *Criminal Procedures, Cases Statutes, and Executive Materials*, 4th ed., Kluwer, 2011, pp. 911-914; SALTZBURG S.A., CAPRA D.J., *American Criminal Procedure, Cases and Commentary*, 9th ed., West, 2010, p. 857 ff.

[246] *U.S. v. San Jacinto Tin Co*., 125 U.S. 273, 1888. *See* also *In Re Neagle*, 135 U.S. 1, 1890.

[247] *Ponzi v. Fessenden*, 258 U.S. 254, 1922.

[248] *Fay, U.S. Atty. v. Miller*, 183 F.2d 986, D.C. Cir., 1950.

[249] *U.S. v. Brokaw*, 60 F.Supp. 100, S.D. Ill., 1945.

[250] *Newman v. United States*, 382 F.2d 479, D.C. Cir., 1967.

offender against the law. He may commence public prosecution in his capacity by information and he may discontinue them when, in his judgment the ends of justice are satisfied'.[251]

Further, the functions of the U.S. Attorney are well described by the U.S. District Court for the Southern District of New York:

> 'the prerogative of enforcing the criminal law was vested by the Constitution […] squarely in the executive arm of the government. Congress has implemented the powers of the President by conferring the power and the duty to institute prosecution for federal offenses upon the United States Attorney for each district. In exercising his power, the United States Attorney acts in an administrative capacity as the representative of the public. […]
>
> It by all means follows, however that the duty to prosecute follows automatically from the presentation of a complaint. The United States Attorney is not a rubber stamp. His problems are not solved by the strict application of an inflexible formula. Rather, their solution calls for the exercise of judgment. Judgment reached primarily by balancing the public interest in effective law enforcement against the growing rights of the accused.'[252]

The prerogatives of prosecutorial discretion and the lack of overseeing powers of the judiciary has been highlighted by Judge Wright in *Moses v. Katzenbach*:

> 'It seems more than passing strange, to me at least, that in some parts of this country citizens exercising their First Amendment rights of assembly, petition an free speech are arrested and convicted by the hundreds, while perpetrators of innumerable church bombings and burnings, kidnappings, beatings, maimings and murders of Negroes and civil rights workers are not prosecuted – or even apprehended. Perhaps, as appellants suggest, federal laws, or their enforcement, in this area are indeed inadequate. But I agree that an investigation as to the adequacy, or the execution, of these laws is not a matter within the jurisdiction of the judicial branch of this Government'.[253]

As the prosecution activity belongs to the executive rather than to the judiciary, it is not surprising that the Federal Rules for Criminal Procedure promulgated by the U.S. Supreme Court and further amended by Acts of Congress do not include the investigative stage up to the adoption of the decision to prosecute.[254] After a short provision on the complaint, the Rules start with the issuance of the arrest warrant or summons to appear. The activity of the U.S. attorneys is instead guided by the principles enshrined in the Justice Manual, prepared under the supervision of the Attorney General and the direction of the Deputy Attorney General,

[251] *People v. Wabash, St. Louis and Pacific Railway*, 12 Ill. App. 263, 1882. *See* also *Wilson v. County of Marshall*, 257 Ill. App. 220, 1930; *Howell v. Brown*, 85 F. Supp. 537, D. Neb., 1949; *Pugach v. Klein*, 193 F. Supp. 630, S.D.N.Y., 1961; *U.S. v. Cox*, 342 F.2d 167, 5th Cir., 1965.

[252] *Pugach v. Klein*, 193 F. Supp. 630, S.D.N.Y., 1961.

[253] *Moses v. Katzenbach*, U.S. Court of appeals, D.C. Cir., 342 F.2d 931 (D.C. Cir. 1965).

[254] *Federal Rules for Criminal Procedure*, 1 Dec. 2018.

containing publicly available Department of Justice's policies and procedures.[255] Section 9-27, entitled 'Principles of Federal Prosecution' aims at 'ensuring a fair and effective exercise of prosecutorial discretion […] and promoting confidence on the part of the public and individual defendants that important prosecutorial decisions will be made rationally and objectively on the merits of each case'.[256] These principles aim at granting uniformity in the prosecution avoiding discrimination and promoting equality.[257]

2.2.1. The decision on whether to prosecute

The core of prosecutorial discretion has been caught by Attorney General Robert Jackson in 1940:

> 'Law enforcement is not automatic. It isn't blind. One of the greatest difficulties of the position of the prosecutor is that he must pick his cases, because no prosecutor can ever investigate all the cases in which he receives complaints. [...] If the prosecutor is obliged to choose his case, it follows that he can choose his defendants. Therin is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get rather than cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of come act on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the low books, or putting investigators to work to pin some offences to him.'[258]

The courses of action available to the attorney once she concludes that there is probable cause to believe that a person has committed a federal offence within her jurisdiction is set forth in section 9-27.200 of the Justice Manual and basically consists in conducting further investigation, commencing or declining prosecution. The commentary to the abovementioned section notes that the 'probability cause-threshold' is the minimum requirement barring the initiation of a federal prosecution. Nevertheless, although it is the same standard required for the issuance of an arrest warrant and the minimum requirement for indictment by a grand jury, it does not mean that prosecution is automatically warranted as relevant considerations may induce the prosecutor to decline it or request further investigation.

[255] The Justice Manual was adopted in September 2018 and replaced the United States Attorneys' Manual.

[256] *Justice Manual*, 2018, para. 9-27.0001.

[257] M.M. DEGUZMAN, W.A. SCHABAS, *Initiation of investigations and Selection of Cases*, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV, S. ZAPPALÀ (eds), *International Criminal Procedure*, Oxford University Press, 2013, p. 160.

[258] JACKSON R., *The Federal Prosecutor, Addressed delivered at the Second Annual Conference of the United States Attorneys*, 1 Apr. 1940.

Section 9-27.220 entitled 'grounds for commencing or declining prosecution' states that the attorney for the government should commence or recommend federal prosecution if she believes that the person's conduct constitutes a federal offence, and that the admissible evidence will probably be sufficient to obtain and sustain a conviction. This provision includes three exceptions: when the prosecution would serve no substantial federal interest; when the person is subject to effective prosecution in another jurisdiction; or when there exists an adequate non-criminal alternative to prosecution.[259]

The first obvious requirement is the suspect that a federal criminal offence has been committed; followed, as in the English and Welsh system, by the belief that the evidence will be probably sufficient for a conviction.[260] The evidence upon which the attorney has to rely is limited to the admissible one, otherwise the prosecution could not adequately serve its purpose. The commentary points out that the attorney does not need to have in hand all the evidence upon which she intends to rely, if she has a reasonably good faith belief that such evidence will be available and admissible in trial. This clarification is useful since the attorney is not prevented from initiating the prosecution when the investigation and collection of evidence has not been concluded yet, differentiating this system from the English one. It has been highlighted that, in conclusion, in order to charge the offenders, the prosecutor must be sure of her guilt.[261] If she has doubts on the responsibility of the person to charge and no alternatives are available, the prosecutor should therefore refrain from prosecution.

As far as the factors possibly leading to declining prosecution, in first place the attorney has to positively identify the substantial federal interest served by the prosecution. The wording does not militate in favour of a presumption but seems to require a positive determination. Section 9-27.230 provides a non-exclusive list of relevant considerations the attorney should weight in her assessment, including: federal investigative and prosecutorial priorities, identified by the Attorney General among those deserving federal attention and most likely to be handled effectively at the federal level, in order to better allocating the resources

[259] This category includes also administrative sanctions that may be imposed by national agencies. *See* HADDAD J.B., MARSH E.P., ZAGEL J.B., MEYER L.R., STARKMAN G.L., BAUER W.J., *Criminal Procedure, Cases and Comments*, 7th ed., West, 2008, p. 906.

[260] The analysis of the praxis testifies that the decision on whether to prosecute or not is significantly affected by the uncertainty of the prosecutorial merit of the case, namely the probability of conviction. *See* ALBONETTI C.A., *Prosecutorial discretion: the effects of uncertainty*, in LAW AND SOCIETY REVIEW, 21, P. 291; EMERSON R.M., PALEY B., *Organisational Horizons and Complaint-Filing*, in HAWKINS K., (ed.), *The Uses of Discretion*, Clarendon Press, 1992, p. 231 who distinguishes between 'good' and 'bad' cases and, also referring to other authors, links the 'seriousness' of the case to the high chance of sentence.

[261] GERSHAM B.L., *The Prosecutor's Duty to Truth*, in *Georgetown Journal of Legal Ethics*, 14, 2001, p. 309.

and to 'achieve an effective nationwide law enforcement program'; the nature and seriousness of the offence, avoiding wasting resources prosecuting inconsequential cases or cases in which the violation is only technical; the deterrent effect of the prosecution in particular on the community; the person's culpability to be assessed both in the abstract and in comparison with other possible individuals involved in the offence; the person's criminal history and her willingness to cooperate; the person's personal circumstances; the interests of any victims; and the probable sentence if the person is convicted in order to assess whether the time and effort of prosecution are justified or not. From many of these elements it is possible to infer the broad discretion of the Prosecutor and it is possible to understand why selective enforcement or non-enforcement are frequent.[262]

In second instance, the Attorney may decline prosecution as the person is subject to effective prosecution in another jurisdiction (section 9-27.240). This decision may be adopted after an assessment of the strength of the other jurisdiction's interest in prosecution; the other jurisdiction's ability and willingness to prosecute effectively and the probable sentence if the person is convicted in the other jurisdiction.

Ultimately the attorney must take into consideration whether adequate non-criminal alternatives to prosecution are available (section 9-27.250). Case-law has further developed the elements to be assessed by the Attorney, in particular that the prosecution promotes the 'ends of justice' and advances the cause of ordered liberty.[263] Other considerations include the likelihood of conviction, the degree of criminality, the weight of the evidence, the credibility of witnesses, precedent, policy, the climate of public opinion, timing, the relative gravity of the offense, the relative importance of the offence compared with the competing demands of other cases on the time and resources of investigation prosecution and trial.[264]

Irrespective of the grounds leading to a decision not to prosecute, the attorney has the duty to communicate the outcome of the decision and the reasoning behind that to the relevant investigative agency.[265] The need for reasoning allows the control over the Attorney's discretion and prevents from abuses.

[262] Authoritative scholars also refer to 'the personal predilection of the prosecutor, the tolerance of the local community, or the antiquity or irrationality of the statute' as 'general factors of discretion'. HADDAD J.B., MARSH E.P., ZAGEL J.B., MEYER L.R., STARKMAN G.L., BAUER W.J., *Criminal Procedure, Cases and Comments*, 7th ed., West, 2008, p. 905.

[263] *Pugach v. Klein*, 193 F. Supp. 630, S.D.N.Y., 1961.

[264] *Ibid*.

[265] *Justice Manual*, 2018, Section 9-27.270.

2.2.2. The limits to discretion

The Manual explicitly forbids (section 9-27.260) the Attorney from prosecuting because of personal feelings or because of the possible consequences on her professional and private life and on the grounds of discriminatory factors, such as race, religion, gender, ethnicity, sexual orientation, political association, activity or beliefs. The official Commentary clarifies that this section has the sole purpose of making clear that 'federal prosecution will not be influenced by such improper considerations'. The consequence of abuse of prosecutorial discretion may be the removal for misfeasance (which is rare) or the non-reappointment.[266]

In addition, the breadth of the prosecution's discretion is the subject matter of many cases on the alleged violation of the equality principle deriving from discretionary decisions. In *Newman v. U.S.*,[267] whose subject matter was the violation of due process, equal standing and equal protection as the Prosecutor had refused to consent the appellant to a guilty plea while had granted the same request from his co-defendant, the Court of Appeals for the D.C. Circuit clearly explained the extension of prosecutorial discretion. The Court highlighted that the decision when and whether to institute criminal proceedings, the selection of the charges and the decision to dismiss a proceedings fall within the discretionary power of the executive grounded in the Constitution. In *Oyler v. Boles*,[268] the petitioners challenged the prosecution because, among others, nine hundred-four men who were known as offender for the same crime had not been sentenced, and although the habitual criminal statute imposed mandatory duty on the prosecuting authorities to seek more severe penalty against all persons coming within statutory standards, the prosecution had been chosen only in a minor number of cases. Thus, they argued that they had not been granted equal protection. The U.S. Supreme Court not only rejected the claim on the basis of the lack of information as to the reasons driving the decision not to prosecute adopted in other cases, but also stated that 'the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation', but only if 'deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification'.[269]

[266] HADDAD J.B., MARSH E.P., ZAGEL J.B., MEYER L.R., STARKMAN G.L., BAUER W.J., *Criminal Procedure, Cases and Comments*, 7th ed., West, 2008, p. 903.

[267] *Newman v. U.S.*, 382 F.2d 479, D.C. Cir., 1967.

[268] *Oyler v. Boles*, 368 U.S. 448, 1962.

[269] Some States have further developed 'no-drop policies' with regards to specific crimes, such as domestic violence and have sometimes developed principles analogous to those of mandatory prosecution that is compared by scholars to that provided by the Italian and the German constitutions. *See* MILLER M.L., WIGHT R.F., *Criminal Procedures, Cases Statutes, and Executive Materials*, 4th ed., Wolters Kluwer, 2011, p. 901.

2.2.3. The control over the Attorney's decision

In exercising her discretion, the Attorney is neither subject to the control of interested individuals or groups aiming at using the trial for redressing the wrong suffered nor to that of the court.[270]

The traditional exclusion of the courts' jurisdiction over the discretion of the Attorney in performing her duties is unquestioned as it is a Constitutional prerogative of the executive.[271] In addition to the separation of the powers, the impossibility for the judiciary to oversight on the allocation of the resources of the prosecution and the necessary selection required by the large amount of provisions in criminal codes are other arguments opposed by courts to justify their reluctance in interfering with prosecutorial discretion.[272]

Nevertheless, even if whether and when prosecution is to be instituted is within the discretion of the Attorney General, and courts are powerless to interfere with the Attorney's discretionary power compelling her to prosecute a complaint or an indictment irrespective of her reasons for not acting,[273] a court may exceptionally be empowered to force prosecution in some circumstances where the Congress has withdrawn all discretion from the prosecutor by special legislation.[274] In *Marbury v. Madison* it was originally set forth the principle according to which, when the executive is 'directed by law to do a certain act, affecting the absolute rights of individuals', courts are no more 'excused from the duty of giving judgment that right be done to an injured individual'.[275] This principle was further reaffirmed in *Goldberg v. Hoffman* precising that, while a request for judicial control of reviewing administrative discretion overruling the decision of the executive and directing the course the discretion must take is beyond its powers, courts may compel the Attorney to perform an express duty imposed by constitutional statute.[276] Moreover any court may even be allowed to decide on an alleged abuse of discretion as, although discretion is always subject to abuse, the court found that the drafters of the Constitution believed that 'the danger of abuse by the executive is a lesser evil than to render the acts left to executive control subject to judicial encroachment'; therefore it

[270] *U.S. v. Brokaw*, 60 F. Supp. 100, S.D. Ill., 1945.
[271] *Marbury v. Madison*, 5 U.S. 137, 1803.
[272] MILLER M.L., WIGHT R.F., *Criminal Procedures, Cases Statutes, and Executive Materials*, Wolters Kluwer, 2011, 4th ed., p. 895.
[273] *Pugach v. Klein*, 193 F.Supp. 630, S.D.N.Y., 1961; *Moses v. Kennedy*, 219 F.Supp.762, D.D.C., 1963.
[274] *Powell v. Katzenbach*, 359 F.2d 234, D.C. Cir., 1965.
[275] *Marbury v. Madison*, 5 U.S. 137, 1803.
[276] *Goldberg v. Hoffman*, 225 F.2d 463, 7thCir., 1955.

concludes that *mandamus* against attorneys shall be issued 'only to protect vested legal rights and to enforce fixed legal duties' but no other questions of morality.[277]

2.2.4. The selection of the charges

Another important aspect of prosecutorial discretion is the selection of the charges in case the accused committed more than one offence.[278] Differently from systems adopting the mandatory model, the attorney deciding to prosecute does not charge all the offences, but only the most serious and ready provable ones.[279] The Justice Manual defines the 'most serious offences' as 'those that carry the most substantial guidelines sentences, including mandatory minimum sentences'. The attorney assessment is therefore grounded on the penalty foreseen by the legislator, ensuring that each defendant is equally charged for the most serious offences.

From an opposite perspective, as a strict scheme would affect prosecutorial discretion, if the attorney believes that a charging policy is still not warranted, she is required to carefully assess 'whether an exception may be justified'. The decision on the exception shall be approved by a U.S. Attorney or Assistant Attorney General and the decision shall be reasoned.

The 'most serious offences' requirement does not preclude the attorney from charging also other criminal conducts when 1) they are necessary to ensure that the information or indictment adequately reflects the nature and extent of the criminal conduct and provides the basis for an appropriate sentence under all of the facts and circumstances of the case; 2) they provide the basis for an appropriate sentence under all of the facts and circumstances of the case; or 3) they will significantly enhance the strength of the government's case against the defendant.[280]

The selection of the charges is influenced by the evidence available as the attorney must submit in trial admissible evidence sufficient to sustain a conviction. The selection is further complicated by the applicability of different evidentiary standards to different offences.

2.2.5. Additional remarks

The entire ruling of the plea agreements is influenced by the discretionary power of the attorney as well. According to Section 9-27.420 of the Justice Manual, relevant factors

[277] *Ibid.*

[278] For an overview *see* MILLER M.L., WIGHT R.F., *Criminal Procedures, Cases Statutes, and Executive Materials*, 4th ed., Kluwer, 2011, p. 933 ff.

[279] *Justice Manual*, 2018, Section 9-27.300.

[280] *Ibid.*, Section 9-27.320.

assisting the attorney in exercising her prosecutorial discretion as to whether a plea agreement is appropriate in a given case include: the defendant's willingness to cooperate in the investigation and prosecution of others; the defendant's criminal history and her remorse or contrition; the nature and seriousness of the offence; the likelihood of obtaining a conviction at trial; the probable effect on the witnesses; the probable sentence; the public interest in having the case tried; the expense of trial and appeal; the need to avoid delay in the disposition of other pending cases; and the interests of victims. Leaving aside the details, it is enough to recall some revealing factors: the timing of the plea is essential as a plea offered by the defendant on the eve of the trial does not offer the advantage of reducing investigative expenses and may cause scheduling disruption. Therefore, the attorney may be reluctant in reaching the agreement. The prosecutorial assessment of the existence of an interest in trying the case rather than going down the road of the plea agreement is another emblematic factor of discretion as the agreement should be avoided when 'to the detriment of public confidence in the criminal justice system'.[281] Conversely the attorney may deem useful a plea agreement when facilitating prompt disposition of other cases (including cases in which the prosecution might otherwise be declined[282]) for example because leading to pleas of other defendants or because allowing a reallocation of the resources. As to the prosecution, after the decision to proceed with a plea agreement, it is necessary to select the charges.[283]

But the most unusual concept for civil law systems adopting the mandatory model is probably the non-prosecution agreement in return for cooperation ruled in section 9-27.600 of the Justice Manual.[284]As the agreement avoids the offender any liability for her conduct, the attorney must not only believe that the person's timely cooperation is necessary to the public interest but also that other means of obtaining the desired cooperation are unavailable or would be ineffective. It is the last resort for obtaining cooperation from a person that appears to be potentially prosecuted because the attorney herself has interest in reaching her objectives with other means (for example because a witness who signed this kind of agreements is considered less credible than others).

The Manual does not provide for a definition of public interest, but only for a non-exhaustive list of factors that the attorney should take into consideration in its assessment, including: the importance of the investigation or prosecution to an effective program of law

[281] *Ibid.*, Section 9-27.420, Commentary.
[282] *Ibid.*, Section 9-27.420, Commentary.
[283] *Ibid.*, Section 9-27.430.
[284] The agreement does not usually grant blanket immunity, as the attorney should, if practicable, explicitly limit the scope of the commitment according to section 9-27.630 of the Justice Manual.

enforcement, or consideration of other national security governmental interests;[285] the value of the person's cooperation to the investigation or prosecution; the person's relative culpability in connection with the offense or offences being investigated or prosecuted and her history with respect to criminal activity; and the interests of the victim. The assessment of the value of the cooperation is probably the factor that more than the others mirrors the prosecutorial discretion behind the proposal of the agreement, since only the attorney may know the potential benefits of the cooperation and whether this cooperation may be useful in achieving primary objectives, even at the expense of prosecuting a single individual.

The Attorney's discretion is not exercised autonomously as it is subject to the control of their supervisor, i.e. the U.S. Attorney or the Assistant Attorney General, whose approval is sometimes a precondition for the agreement.[286]

The discretionary power of the Attorney also occurs in the decision to stop the case through issuing an order of *nolle prosequi* expressing the unwillingness of the Attorney to continue with the prosecution. It is therefore an act terminating the proceeding. Even in this case, courts cannot enter this order or direct the prosecution to enter it as this power falls within the discretion and the exclusive responsibility of the Attorney. It is an act of the prosecutor and not of the court that has no power to deny it[287] unless upon the failure to exercise discretion because of corruption or malfeasance.[288] The attorney's assessment cannot be overturned by the court, whose only tool is the removal of the prosecutor from her office.[289]

The case-law has also pointed out that from a temporal perspective, the attorney has an 'absolute and uncontrolled power' to enter a *nolle prosequi* before the initiation of the trial. Between the constitution of the jury and its verdict the power to enter it is instead subject to the control of the court in order to avoid a misuse in detriment of the defendant. Following the verdict, the attorney is again empowered of uncontrolled power of the prosecutor to enter a *nolle* revives'.[290]

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[285] The commentary clarifies that the agreements should be used only when the attorney needs cooperation for investigating *serious* criminal offences or is important in achieving effective enforcement of criminal law or pursuing national security issues.

[286] *See Justice Manual*, 2018, Section 9-27.640.

[287] *Orabona v. Linscott*, 49 R.I. 433, R.i., 1928.

[288] *U.S. v. Brokaw*, 60 F. Supp. 100, S.D. Ill., 1945.

[289] *Ibid*.

[290] *U.S. v. Brokaw*, 60 F. Supp. 100, S.D. Ill., 1945; *Commonwealth v. Tuck*, 20 Pick. 356; *State v. Valent*, 3 W.W.Harr.399, 138 A. 640; *State v. Smith*, 49 N.H. 155, 6 Am.Rep. 480; Anonymous, 31 Me. 590, 592; *State v. Whittier*, 21 Me. 341, 38 Am.Dec.272; *Baker v. State*, 12 Ohio St. 214, 215; *Commonwealth v. Gillespie*, 7 Serg. R., Pa., 469, 10 Am.Dec. 475; *State v. Smith*, 67 Me. 328; *Regina v. Leatham*, 8 Cox Cr. Cas. 498; *Rex v. Moss et al*., 1 Russell Ryan 620; *Orabona v. Linscott*, 49 R.I. 443,

The private individual cannot request for a review of the prosecutor's decision to prosecute, unless she opposes an abuse of discretion. Limits to the discretion of the prosecution are the so called selective and vindictive prosecution. Selective prosecution means that the prosecutor adopts a discriminatory approach in deciding to prosecute some individuals rather than others. It is therefore a violation of the principle of equality and it is not focused on the merit of the case. In this case the claimant has the burden of proving the discriminatory intent of the prosecutor.[291] The vindictive prosecution is instead related to the principle of fair trial and prevents the prosecutor from including more charges than necessary or making the charges heavier as form of retaliation of the defensive choices made by the accused.[292] The tendency is to refer to the prosecutorial intent rather than to the prosecutor's behaviour.

2.3. The French system

As anticipated, the distinction between mandatory prosecution and opportunity principle does not correspond to the distinction between civil law and common law systems. For example, France belongs to those civil law countries[293] which opted for the opportunity principle.

During the *Ancien Régime* the tribunals were independent from the executive power. For this reason, the monarchy used the *prise à partie* and the *procureur du roi* as means to control the activity of the judges. The *procureurs du roi* were in charge of informing the courts of the king's orders, overseeing the activity of the judges and the correct application of the

144 A. 52; *Rogers v. Hill*, 22 R.I. 496, 48 A. 670; Ex parte McGrane, 47 R.I. 106, 130 A. 804; *Commonwealth v. McMonagle*, 1 Mass. 517; *Commonwealth v. Briggs*, 7 Pick. 177; *Commonwealth v. Jenks*, 1 Gray 490; *Jennings v. Commonwealth*, 105 Mass. 586; *Commonwealth v. Scott*, 121 Mass. 33; *State v. Pillsbury*, 47 Me. 449; *State ex rel. Bier v. Klock*, 48 La.Ann. 140, 18 So.942.

[291] *U.S. v. Berrios*, 501 F. 2d, 1207, 2d Cir., 1974; *U.S. v. Eklund*, 733 F. 2d 1287, 8th Cir., 1984; *U.S. v. Greene*, 697 F 2d 1229, 5th Cir., 1983; *U.S. v. Hazel*, 696 F. 2d 473, 6th Cir., 1983. *U.S. YickWo v Hopkins* 118 US 356, 373, 1886; and *U.S. v. Armstrong*, 517 U.S. 456, 462, 1996 codify the principle to the effect that in order to ensure the constitutional principle of equal protection, the Court may intervene if the accused demonstrates that the administration of criminal law is exclusively directed against a specific class of persons with oppressive purposes which lead in practice to a denial of the equal protection. In this regard *see* HELLER R., *Selective Prosecution and the Federalization of Criminal Law: The Need for Meaningful Judicial Review of Prosecutorial Discretion*, in *University of Pennsylvania Law Review*, 145, 1997, p. 1309; DAVIS A.J., *Prosecution and Race: the power and privilege of Discretion*, in *Fordham Law Review*, 67, 1998, p. 13; HADDAD J.B., MARSH E.P., ZAGEL J.B., MEYER L.R., STARKMAN G.L., BAUER W.J., *Criminal Procedure, Cases and Comments*, 7th ed., West, 2008, p. 926 937; MILLER M.L., WIGHT R.F., *Criminal Procedures, Cases Statutes, and Executive Materials*, 4th ed., Kluwer, 2011, pp. 955-963; SALTZBURG S.A., CAPRA D.J., *American Criminal Procedure, Cases and Commentary*, 9th ed., West, 2010, pp. 874-879; DAVIS A.J., *Prosecution and Race: The Power and Privilege of Discretion*, in *Fordham Law Review*, 67, 1998, p. 13; WEAVER R.L., ABRAMSON L.W., BACIGAL R.J., BURKOFF J.M., HANCOCK C., HOEFFEL J.C., *Criminal Procedure, Cases, Problems and Exercises*, 4th ed., West, 2010, p.787-796.

[292] *U.S. v. Goodwin*, 457 U.S. 368, 1982.

[293] *See* Belgium, Finland, Brazil, Chile and Costa Rica.

ordonnances. They could not proceed against private citizens and had no judicial powers, but their political influence was remarkable. In particular, they could urge the constitutional review of the law strengthening the idea of a *procureur du roi* in charge as guardian of the fundamental law.[294] The French revolution led to the introduction of a jury responsible of filtering the unfounded accusations. The verdict of the jury was the '*lieu*' or '*non lieu*' that still appear in the French Code of Criminal Procedure. The *procureur du roi*, renamed *commissaire du roi*, had the limited role of assisting the judge.

It was only with Napoleon that the executive and the role of the accusation mixed together. The *Code d'instruction criminelle* entered into force in 1810 and was based on the role of the *Cour de Cassation* and the *procureur du roi*, which replaced the jury and acted as representative of the executive in the justice system. In contemporary France, the prosecutor still hierarchically depends from the executive, even if the she is part of the judicial system.

Two main principles of French criminal procedure play a crucial role in this analysis.

The first relevant principle ruling French criminal procedure since the reform of the Code of Criminal Procedure (CPP) in 2000 is the separation of functions between prosecuting authorities, investigative authorities and judging authorities. The reason for the principle is twofold: avoiding abuses on the one side and granting impartiality on the other[295]. In particular, the French system foresees the separation between prosecuting and judging authorities, as ruled in the 'Preliminary Article', para. (2) CPP: 'criminal procedure shall ensure the separation of the authorities in charge of the public prosecution from those in charge of judgement'.

A first relevant corollary of the principle is the independence of the public prosecutor from judging authorities.[296] Moreover, investigative authorities shall be separated from prosecuting authorities. Therefore, the Code of Criminal Procedure provides for the role of the *juge d'instruction*, who is in charge of investigation, while the public prosecutor is in charge of prosecution.[297] The separation between investigation and prosecution shall be complied with even before the *juge d'instruction*, who, as any other judge, must be impartial and

[294] GIULIANI A., *Sintesi dei modelli storici delle procedure d'accusa*, in GAITO A. (ed.), *Accusa penale e ruolo del pubblico ministero*, Jovene, 1991, p.53 at 60-61.

[295] DESPORTES F., LAZERGERES-COUSQUER L., *Traité de Procédure pénale*, Economica, 2016, p. 197, who flags the risk of absorbing the separation of functions into the principle of impartiality and warns against the use of the expression separation of authorities (*séparation d'autorités*) instead of separation of functions, by the *Conseil Contitutionnel*.

[296] DESPORTES F., LAZERGERES-COUSQUER L., *Traité de Procédure pénale*, Economica, 2016, p. 202.

[297] GUINCHARD S., BUISSON J., *Procédure pénale*, LexisNexis, 2011, p. 70.

independent. She must respect the independent role of the public prosecutor and cannot act as a judging authority in the same case. Accordingly, the proceedings is divided into three main stages: the investigation and initiation of the proceedings, the *instruction* and the trial.

In the second place, French criminal procedure follows the principle of discretionary prosecution (or the so-called opportunity principle), i.e. every offence susceptible of being prosecuted is not necessarily prosecuted. Before being included in the Code of Criminal Procedure with the amendment of 2004,[298] the principle of opportunity emerged from Art. 40 CPP from the 1959 version of the Code ('the prosecutor receives denunciations, to which she can *decide the most appropriate way* to continue with', emphasis added) and from some judicial decisions.[299]

The public prosecutor discretionally decides whether to initiate a prosecution (Art. 31 CPP) on the basis of two main parameters: i) the legal basis of the case; ii) the appropriateness of the prosecution. Abovementioned Art. 40-1 CPP further reaffirms the principle ruling that the prosecutor decides whether it is *opportune* to prosecute.

In a more adjourned version, scholars define this principle as the 'opportunity principle with regards to criminal response', rather than 'opportunity of criminal prosecution', because this old definition seems too restrictive and oriented only at punishment. It could be affirmed that nowadays the prosecutor has three possible choices: non prosecuting, prosecuting and applying alternative procedures. Therefore, the prosecution and the choice of an alternative measure can be summarised under the broader concept of 'criminal response'.

The margin of discretion of the prosecutor has some limits.[300] First of all, the prosecutor must be seized by the victim, a public administration or a formal request, but cannot act only upon her autonomous discretion. Secondly, as it will be seen below, the decision not to follow up a case can be seized by the victim. More specifically, the two great limits to the prosecutor's discretion are the following. Firstly, the prosecutor acts within the limits of a public determination of the criminal policy: the criteria that the prosecutor should follow in her

[298] Art. 40-1 CPP.

[299] The *Chambre criminelle* indirectly affirmed the opportunity principle already in 1826, stating that the legislator was not intentioned to let the prosecutor pursue every tiny and insignificant case, that in any way affected the public order. *See* Crim., 8 Dec. 1826, B. no. 250. Later on, the same Chambre criminelle acknowledged the consistency of the opportunity principle with the principle of fair trial and that the opportunity principle had been affirmed in practice of the prosecutor and in the jurisprudence well before being provided for by the law. Crim., 21 Sep. 1993, No. 92-885854, 92-85855, 92-85856. DESPORTES F., LAZERGERES-COUSQUER L., *Traité de Procédure pénale*, Economica, 2016, p. 790 ff.

[300] *Ibid.*, p. 7995 ff.

determination shall be the result of the political determinations of the Minister of Justice and the *procureur de la Republique* at local level. Secondly, the prosecutor cannot revoke a decision to prosecute. This principle is the result of the impossibility to dispose of the public prosecution, which cannot be annulled once it has commenced. The aim of such provision is avoiding arbitrariness and possible violations of fair trial.

2.3.1. The Public Prosecutor: structure and role in the preliminary stage

The public prosecutor in France is a single and indivisible party in criminal proceedings (the members of the *parquet* are interchangeable, since they act in the name of the Office), and has a hierarchical character.[301] It is further ruled by the principles of non-recusability, i.e. she cannot be recused as judges do;[302] the principle of non-responsibility, i.e. it cannot be obliged to pay expenses or damages if she loses the case;[303] the principle of independency.[304] According to Art. 31(1) CPP, the public prosecutor brings public actions, enforces the application of the law and is bound by the principle of impartiality.[305] This is the primary function of the prosecutor, who also has secondary functions, that will not be analysed in this work[306].

As mentioned above, the office of the public prosecutor (*Ministère Public*) has a hierarchical structure and directly depends from the Minister of Justice, since 'the magistrates of the *parquet* are placed under the direction and control of their hierarchical superiors and under the authority of the Minister of Justice'.[307] The Minister of Justice represents the top of the hierarchy. Authority is exercised from the Minister of Justice towards lower grades in the following order: the *Procureur général* at the *Cour de Cassation*, the *Procureur généraux* at the *cours d'appel*, the *procureurs de la République* at local level. Only the *Procureur général* at the *Cour de Cassation* is not subordinate to the Minister of Justice.[308] The hierarchical principle becomes clear when analysing the wording of the Code of Criminal Procedure, as amended by Law of 9 May 2004, that devotes two separate chapters to the Minister of Justice

[301] PRADEL J., *Manuel de Procédure pénale*, Cujas, 2008, p. 140.
[302] *See* Art, 669(2) CPP; PRADEL J., *Manuel de Procédure pénale*, Cujas, 2008, p. 133.
[303] *Ibid.*, p. 134.
[304] *Ibid.*, p. 134.
[305] DERVIEUX V., *The French system*, in DELMAS-MARTY M., SPENCER J.R. (eds.), *European Criminal Procedures*, Cambridge University Press, 2005, p. 223.
[306] The prosecutor has directing functions with regards to the police judiciaire, she is in charge of the execution of sentences and has preventive functions. PRADEL J., *Manuel de Procédure pénale*, Cujas, 2008, p. 144 ff., DESPORTES F., LAZERGERES-COUSQUER L., *Traité de Procédure pénale*, Economica, 2016, p. 586.
[307] Art. 5, ord. No. 58-1270 of 22 Dec. 1958. DESPORTES F., LAZERGERES-COUSQUER L., *Traité de Procédure pénale*, Economica, 2016, p. 593 ff.
[308] PRADEL J., *Manuel de Procédure pénale*, Cujas, 2008, p. 137.

(*garde de Sceaux*) and to the prosecutor (*Ministère Public*).[309] The Minister of Justice is in charge of the criminal policy determined by the Government and oversees its consistent application on the territory of the Republic (Art. 30 CPP). Therefore, the Minister addresses the magistrates of the office of the prosecutor general directions (*instructions générales*), but she is forbidden to issue instructions on specific cases. He addresses the Parliament with an annual report on the criminal policy enforcement, its application and the application of the general directions. Both *Assemblée nationale* and the *Sénat* can debate the report.

The hierarchical principle imposes all prosecutors to obey to the orders and directives of their superiors. The directives can impose different kinds of obligations on the prosecutor, be they policy directives, technical directives or specific directives on a case. Art. 39-1 CPP rules that the *procureur de la République* applies the criminal policy defined by the general directions of the Minister of Justice. The *Procureur général* is a sort of intermediary between the *procureur de la République* and the Minister of Justice,[310] and, according to Art. 36 CPP, she can give instructions to the *procureur de la République* to prosecute or to resort to the competent judicial authorities. These directions can be précised and exceptionally adapted by the *Procureur général*. Pursuant to the hierarchical principle, the *procureur de la Rèpublique* addresses to the *Procureur general* an annual report on criminal policy on law enforcement, the general directions and the activities of her office. The hierarchical principle is enforced thanks to disciplinary sanctions in case of non-compliance with the orders of a superior, since the prosecutor in France does not enjoy the same irrevocable and non-movable character of the judge, but can be transferred, demoted or removed from office.[311] Moreover, the subordination of the prosecutor has two main limitations: the proper power (*pouvoir propre*) of the *chefs de parquets* (Chief of the Public Prosecutor's Offices), that can act also against the orders of a superior, and the freedom of speech the prosecutor enjoys as a magistrate in court, i.e. she has to obey orders when acting as an official at the Office, but has freedom as a magistrate at trial (*la plume est serve mais la parole est libre*).[312]

The subjection to the Minister of Justice has been harshly criticised in France, and a subordination only to the *Procureur général* has been suggested, in order to avoid the risks of politicisation. The usual counter-argument is the democratic legitimacy of the Minister of Justice, who is an expression of the majority in Parliament. Nevertheless, several proposals

[309] *Ibid.*, p. 134.
[310] *Ibid.*, p. 137.
[311] *Ibid.*, p. 138.
[312] *Ibid.*, p. 139; DESPORTES F., LAZERGERES-COUSQUER L., *Traité de Procédure pénale*, Economica, 2016, p. 598.

have been made to amend or abrogate Art. 30 CPP, but until now the provision is still in force.[313]

With regards to prosecutorial discretion in the first phase of investigation and prosecution, the prosecutor directs the activities of the *police judiciaire*, as a subordinate of the *procureur général*, who has general supervision over the police[314] and receives denunciations, to which she can decide the most appropriate way to continue with.[315] The *police judiciaire*[316] gathers evidence, seeks the perpetrators and records offences upon instruction from the *procureurs de la République* or *ex officio*.[317]

Having carried out the investigations, the prosecutor can decide which proceedings to initiate, according to the kind of offence before him: *crimes* must be referred to the *juged'instruction* for investigation (*instruction* and then *courd'assises* for trial); *délits* are directly put before a tribunal if they are less serious or are requested to be investigated in instructions if they are more serious (instruction and then *tribunal correctionnel*). *Contravéntions* are directly referred to the *Tribunal de police*.[318]

2.3.3. The Public Prosecutor and the decision not to prosecute.

In all cases the prosecutor has discretionary power on the pursuit of the case: the prosecutor can abandon the prosecution not only if it is time-barred but also if she deems necessary to dismiss the case in the exercise of her prosecutorial discretion.[319] According to Art. 40-1 CPP the prosecutor has three alternatives, among which she can choose exercising discretion: i) prosecuting; ii) proceeding with an alternative procedure;[320] iii) if the circumstances of the case justify it, classifying the procedure among the 'procedures without following'(*poursuites sans suite*).

The so called '*classement sans suite*' is a judicial-administrative measure that cannot be challenged in court and is not susceptible of becoming *res judicata.*[321] The dossier is archived but can be re-opened until the elapse of the statute of limitations.[322] Among the

[313] PRADEL J., *Manuel de Procédure pénale*, Cujas, 2008, p. 136 f.
[314] Arts 38, 40(1) and 41(2) CPP.
[315] Art. 40 CPP.
[316] Art. 14 CPP.
[317] Art. 75 CPP.
[318] GUINCHARD S., BUISSON J., *Procédure pénale*, LexisNexis, 2011, p. 271 ff.
[319] Art. 40-1 CPP.
[320] Art. 41-1 and 41-2 CPP.
[321] DESPORTES F., LAZERGERES-COUSQUER L., *Traité de Procédure pénale*, Economica, 2016, p. 798.
[322] *Ibid.*, p. 798 f.

'procedures without following' two kinds of procedures can be distinguished, namely the procedures that cannot be pursued and those that could be pursued, but that shall not be pursued for reasons of opportunity. The first kind of *procedures sans suite* is the majority and includes unclear cases, cases where the suspect remains unknown or cases where legal reasons hinder the continuation of the proceedings (e.g. time barring). The second kind of procedures are the *poursuites sans suite d'opportunité* (procedures without following for opportunity reasons). Among these measures, there are those classified 'without following' without any warning or procedure (the so called *classements secs*) and those following the good results of an alternative measure to prosecution listed at Art. 41-1 CPP. The legislator generally opposes the so called *classements secs*, since Art. 40-1 CPP prescribes that they shall be motivated by 'particular circumstances linked to the commission of the offence'.[323]

The decisions of the prosecutor can be the object of a hierarchical appeal by the victims, that the prosecutor shall inform in case the procedure is classified among the 'procedures without following' (*poursuites sans suite*).[324] Art. 40-3 states that each person having denounced facts to the *procureur* can appeal her decision classifying the case '*sans suite*' before the *procureur général* after having received notification of the decision. The power to review the decision has a peculiarity. The review does not compete to a judge, but, pursuant to the hierarchical principle, to the *procureur general*. The *procureur général* can dismiss the appeal or order the *procureur de la République* to proceed.

2.3.2. The juge d'instruction.

The *juge d'instruction* is a peculiar kind of judge typical of the French legal system. The *juge d'instruction* has a twofold role, since she has both judging and investigative tasks.[325] Therefore, the *juge d'instruction* is in charge of the *instruction préparatoire*. The main purpose of *instruction* is for the judge to decide whether the person shall be committed to trial or not. For this purpose, the judge collects evidence on the commission of the offence and identifies the suspect, if at the preliminary stage it was not possible or, if the suspect is identified, she

[323] *Ibid.*, p. 799 f. According to practice, the *classements secs* usually happen in case of minor impact of the offence, when the victim is not interested in prosecution or if she has opposed it, when there is spontaneous restoration of damage or similar circumstances.

[324] Art. 40-2 CPP.

[325] Historically, the *juge d'instruction* was mainly in charge of investigations and had no judging powers. Moreover, in the Code of 1808 she was subordinated to the *parquet* of the *Ministère public* (*see* DESPORTES F., LAZERGERES-COUSQUER L., *Traité de Procédure pénale*, Economica, 2016, p. 22 ff.). The ancestor of this judge is the lieutenant criminal created by the Declaration of King Francis I in 1522. After the French Revolution, these functions were accomplished by the *juge de paix* and the *directeur du jury* (*see* CHAMBON P., *Le juge d'instruction*, Dalloz, 1997, p. 3).

assesses the basis for prosecution. Moreover, the judge creates the trial dossier and shall decide whether to refer the case to trial or to drop it.[326]

The investigating and judging functions shall be carried out by the judge *à charge* and *à décharge*, i.e. both in favour of the prosecution and the defence.[327] The proper *instruction* (investigation) is carried out by the judge herself or through a police officer under a *commission rogatoire*.[328] The judge is bound to act within the scope of the facts contained in the prosecutor's acts (*saisine in rem*). She is not bound with regards to the persons identified in the prosecutor's dossier and she is not obliged to give the same legal characterisation of the facts.[329]

More importantly, the judge formulates a preliminary charge (*mise en examen*), after having heard the suspect (or having given him the opportunity to be heard). Because of the peculiar nature of this stage, the suspect is entitled to some rights, that are particularly strict in case the *mise en examen* is formally issued. After having completed the instruction, the judge notifies the parties and awaits twenty days to pass the dossier to the prosecutor to collect her observations. In the end, the judge figuratively "leaves" her investigating function and assumes the judging role. The judge issues an *ordonnance de règlement* (order) that can entail different outcomes:[330]

i) *Ordonnance de non-lieu* (Art. 177 CPP). The judge issues an order that drops the case, declaring the *non-lieu* to prosecute for the reasons listed in the above-mentioned article: the facts do not constitute a criminal offence (*crime*, *délit*, or *contravéntion*); that the offender remained unknown; there are no sufficient charges against the suspect, subject to the *mise en examen*. Therefore, the *non-lieu* can be issued both for reasons of fact and for reasons of law. In theory, the reasons of fact should give rise to temporary and relative order, while reasons of law should determine an absolute and definitive order. The practice however demonstrates that these distinctions are not as drastic as they may seem[331].

[326] GUINCHARD S., BUISSON J., *Procédure pénale*, LexisNexis, 2011, p. 1037 ff.; CHAMBON P., *Le juge d'instruction*, Dalloz, 1997, p. 47 ff.

[327] Art. 81 CPP.

[328] Art. 151 CPP.

[329] DESPORTES F., LAZERGERES-COUSQUER L., *Traité de Procédure pénale*, Economica, 2016, p. 1128. The possibility to recharacterise the facts is limited when the recharacterisation results in affecting the *saisine* itself, *de facto* introducing new facts into the accusation acts.

[330] Art. 175 CPP. Originally, the possible ordonnances were only two: the *non lieux* and the renvoi that referred the case directly to trial. DESPORTES F., LAZERGERES-COUSQUER L., *Traité de Procédure pénale*, Economica, 2016, p. 1297-1300.

[331] *Ibid.*, 1302. *See* below Chapter III, Section V, 2. The ruling of analogous situations in civil law systems.

ii) *Ordonnance de renvoi* (Art. 178 CPP). The judge refers the case to the *Tribunal de police* if she deems that the offence has to be characterised as a *contravéntion*.

iii) *Ordonnance de renvoi* (Art. 179 CPP). The judge refers the case to the *Tribunal correctionnel*, if she deems that the offence has to be characterised as a *délit*.

iv) *Mise en accusation* (Art. 181 CPP). The judge orders the charge (*mise en accusation*) of the person before the *cour d'assise*, if she deems that the offence has to be characterised as a *crime*.

The effects of the *renvoi* and the *mise en accusation* (ii), (iii) and (iv) are the referral to the competent judicial authority for trial. However, in order to schedule the first hearing and commence the trial, further acts are necessary. As seen above, the referred judicial authorities differ according to the different nature of the offence. Moreover, once these orders become *res judicata*, they cover the possible procedural vices of the previous proceedings.[332]

The judge shall consider both the charges and the legal characterisation of the facts and Art. 176 CPP sets forth that the judge issuing one of the orders shall examine whether charges of an offence against the person exist and shall provide a legal characterisation of the facts.[333] Moreover, Art. 184 CPP lists the elements the order shall entail. The order shall indicate the personal data regarding the person under *examen* and the legal characterisation of the facts together with a detailed reasoning on the elements supporting or denying the sufficient charges against her. The abovementioned article also prescribes that the reasoning is based on the public prosecutor's arguments in court and the parties' observations, that include the elements *à charge* and *à décharge*. In the past, this judge also decided on custody issues, but the 2000 reform attributed this power to the *juge des libertés et de la detention*.

The person under examination has right to appeal decisions under Art. 186 CPP.[334]

2.3.3. Function of the public prosecutor in instruction.

At the beginning of the *instruction*, the public prosecutor limits the investigation of the *juge d'instruction* by naming the facts to be investigated by her. As usual, the prosecutor intervenes with written submissions (*réquisition*) and oral observations. In particular, Art. 33 CPP sets forth that the oral observations of the prosecutor are free, as long as she deems them

[332] *Ibid.*, p. 1320 ff.
[333] *Ibid.*, p. 1300.
[334] *See* GUINCHARD S., BUISSON J., *Procédure pénale*, LexisNexis, 2011, p. 1269 ff.

necessary for the sake of justice (*au bien de la justice*). Art. 82 CPP prescribes that the prosecutor can require any act useful to the discovery of the truth and any security measure. If the judge does not follow the requests of the prosecutor, she shall issue a reasoned order or, if not, the prosecutor can seize the *Chambre d'instruction*. The prosecutor has a role in the *instruction préliminaire* that resembles that of the parties, but she enjoys a privileged position, especially with regards to the power to appeal the judge's orders and the requests listed in Art. 82 CPP. She makes her final remarks once she receives the dossier back from the judge.[335]

2.3.4. The Chambre de l'instruction.

The control over the *juge d'instruction* is exercised by the *Chambre de l'instruction*, attached to each *cour d'appel*. It is composed of a President and two members and is a judge of second instance with respect to the decisions of the *judge d'instruction*.[336] In this paragraph, the powers of the *Chambre* will be considered only with regards to its supervisory tasks on the activities of the *juge d'instruction.*

The *Chambre* has appeal functions over the orders issued by the *juge d'instruction* or the *juge des libertés et de la détention.* It further intervenes upon the request to annul an order or in cases of inactivity of the *juge d'instruction*.[337] The powers of the *Chambre* include ordering additional investigations she deems useful, *ex officio* or if requested by the prosecutor or the parties.[338] She is entitled, *ex officio* or upon request of the prosecutor, to request information about the persons under examination and other possible offences listed in the prosecutor's dossier, but not included in the order of the *juge d'instruction*, or eliminated in a partial ordonnance *de non-lieu*, disjunction or renvoi to the *Tribunal correctionnel* or the *Tribunal de police*.[339] Moreover, the *Chambre* can order that persons not referred to it shall be put under examination with regards to the offences resulting from the dossier, except for the case these persons have been already object of a non-appealable *non-lieu*.

The *Chambre* examines whether there are sufficient charges against the person under examination (*mise en examen*). It can declare the *non-lieu* when it assesses that the facts do not constitute a *crime*, a *délit*, or a *contravéntion*; if the perpetrator has remained unknown or if there is no perpetrator; if the charges against the person *mise en examen* are insufficient.[340] In

[335] *See* DESPORTES F., LAZERGERES-COUSQUER L., *Traité de Procédure pénale*, Economica, 2016, p. 1149 ff.
[336] GUINCHARD S., BUISSON J., *Procédure pénale*, LexisNexis, 2011, p. 1268.
[337] *Ibid.*, p. 1293.
[338] Art. 201 CPP.
[339] Art. 202 CPP.
[340] Art. 212 CPP.

opposition, if the Chamber deems the facts which the person is charged of in the *mise en accusation* to constitute an offence characterised as a crime, it declares the *mise en accusation* before the *cour d'assise*.[341]

[341] Art. 214 CPP. *See* DESPORTES F., LAZERGERES-COUSQUER L., *Traité de Procédure pénale*, Economica, 2016, p. 1429 ff.

SECTION III

THE PROSECUTOR IN INTERNATIONAL CRIMINAL LAW

The Prosecutor is the subject who, for certain aspects more than the Judges, has the power and the responsibility of leading the way of international criminal justice. Borrowing the words of Antonio Cassese, the Prosecutor is 'the key to the Tribunal's action'.[342] Hence, her possible discretionary powers are often under attentive scrutiny. On one side the discretion is an assurance for independence,[343] on the other side, 'discretion must be judiciously, if not judicially, exercised'.[344]

The role of the Office of the Prosecutor (OTP) in international criminal law (ICL) is often associated to the role of the Prosecution in the common law systems.[345] But as pointed out by Vasiliev, besides the '"partisan actor" driven by zeal to prevail in trial combat and seeking the full-extent conviction and maximum sentence for the accused person' there is the model – spread in many civil law systems – of the Prosecutor acting as '"international civil servant" concerned with impartial and neutral administration of justice and acting in the public interest'.[346] Sometimes, the wording used to define these two models makes them sound more distant than in practice, since also in common law countries the respect of ethical principles and her quasi-judicial functions requires the Prosecutor's action to be driven by the interests of justice, sometimes even recognising her role as minister of justice. Many supranational instruments[347] testify the common features in the performance of the prosecutorial duties as

[342] CASSESE A., *Address to the General Assembly of the United Nations*, 14 Nov. 1994, cited by MARSTON DANNER A., *Enhancing the legitimacy and accountability of prosecutorial discretion at the International Criminal Court*, in *American Journal of International Law*, 97, 3, 2003, p. 510 at 512.

[343] JALLOW H.B., *Prosecutorial Discretion and International Criminal Justice*, in *Journal of International Criminal Justice*, 3, 1, 2005, p. 145 at 154. *See* also BRUBACHER M.R., *Prosecutorial Discretion within the International Criminal Court*, in *Journal of International Criminal Justice*, 2, 2004, p. 71 at 76 stating that 'the prosecutorial discretion is [...] the cornerstone of prosecutorial independence'; CÔTÉ L., *Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law*, in *Journal of International Criminal Justice*, 3, 2005, p. 162 at 165; MARSTON DANNER A., *Enhancing the legitimacy and accountability of prosecutorial discretion at the International Criminal Court*, in *American Journal of International La*w, 97, 3, 2003, p. 510 at 516, stating that discretion is the necessary corollary of independence; NSEREKO D.D.N., *Prosecutorial Discretion Before National Courts and International Tribunals*, in *Journal of International Criminal Justice*, 3, 1, 2005, p. 124 at 129.

[344] JALLOW H.B., *Prosecutorial Discretion and International Criminal Justice*, in *Journal of International Criminal Justice*, 3, 1, 2005, p. 145 at 154.

[345] BRUBACHER M.R., *Prosecutorial Discretion within the International Criminal Court*, in *Journal of International Criminal Justice*, 2, 2004, p. 71 at 76; TURONE G., *Powers and Duties of the Prosecutor*, in CASSESE A., GAETA P., JONES J.R.W.D., *The Rome Statute of the International Criminal Court. A Commentary*, vol. 2, Oxford University Press, 2002, p. 1174-1175.

[346] VASILIEV S., *The Role and Legal Statuts of the Prosecutor in International Criminal Trials*, 25 Nov. 2010, available at SSRN: https://ssrn.com/abstract=1715465, p. 6.

[347] *See* above, Introduction.

well, although some of them may be more or less emphasised depending on the followed approach. Even if criminal procedure in ICL has been predominantly influenced by common law systems, it seems inappropriate to always refer to legal arrangements of common law, because the supranational nature of the international criminal jurisdiction imposes to find solutions compatible with its specific features.[348] Moreover, international Prosecutors and Judges – who oversee the correct conduct of the trials – have different legal backgrounds and imposing through the practice legal solutions familiar only to part of them may render an harmonious development of international criminal justice rather difficult.

The need of shared procedural solutions not emerging from a simple juxtaposition of elements belonging to different family systems but from an actual 'hybridisation'[349] raises out of the recent experience of the International Criminal Court (ICC). The Rome Statute is the result of a long negotiation and neither the procedural provisions nor the substantive law is openly expression of adherence to a civil or common law tradition. Further, many provisions can be interpreted and applied in different ways, but using a national system as a reference may endanger the harmonic development of the practice of the Court. For example, with regard to the role of the Prosecutor, it can be preliminarly noted that a Prosecutor mastering the trial in complete autonomy in front judges acting as passive arbiters may be acceptable for some Chambers, while other Chambers seem having adopted a more incisive role in conducting the trials, in particular through the conducts of the proceedings that each Chamber adopts during the preparation of the trial.[350] A more or less intrusive conduct of the proceedings may affect the prosecutorial action, inducing the Prosecutor to modify her approach to a case. Significant procedural disagreements between the Prosecutor and the Chambers, or between the Prosecutor and some of the Judges (often associated with evidentiary deficiencies) seem having affected the outcome of more than one trial.[351]

[348] In the same vein *see* NIV A., *The Schizophrenia of the 'No Case To Answer' test in International Criminal Tribunals*, in *Journal of International Criminal Justice*, 14, 2016, p. 1121.

[349] DELMAS-MARTY M., *The Contribution of Comparative Law to a Pluralist Conception of International Criminal Law*, in *Journal of International Criminal Justice*, 1, 2003, p. 13 at 18 ff.

[350] *See* SCHABAS W.A., *An Introduction to the International Criminal Court*, Cambridge University Press, 2020, pp. 297 ff.

[351] For example, in the case of the *Prosecutor v. Gbagbo and Blé Goudé* contrasts between the TC I and the Prosecutor and within the Chamber emerged with regards to the system of admission/submission of evidence and with regards to the ending of the trial; but analogous problem raised in the *Bemba case*, where a different approach to the analysis of the evidence, of the applicable standard and the very role of the AC emerged in Appeal. On the problems related to the mechanism for admission of evidence *see* CAIANIELLO M., *Law of evidence at the International Criminal Court: Blending Accusatorial and Inquisitorial Models*, in *North Carolina Journal of International Law & Commercial Regulation*, 36, p. 287; GUARIGLIA F., *'Submission' v. 'Admission' of Evidence at the International Criminal Court: Lost in Translation?*, in *Journal of International Criminal Justice*, 16, 2, p. 315. On the tensions between the Chambers and the OTP *see* POLTRONERI ROSSETTI L., *The Pre-Trial*

This discussion on the role of the Prosecutor can be traced back to the classical and broader discussion concerning the nature of the trial in front of the ICC, whether accusatorial or inquisitorial. Differently to the system of the *ad hoc* Tribunals, where the proactive approach of the Judiciary on the case[352] has not been considered as affecting the adversarial nature of the trial,[353] the structure of the ICC System is more articulated and the influence of civil law tradition is more evident. Moreover, the Directions on the Conduct of the Proceedings adopted by each Chamber may significantly vary the development of the proceedings.[354] The complexity of the ICC system is usually recognised, but while some scholars believe that the traditional theoretical models allow to assess the consistency of a system with its objectives and to solve the so called 'hard cases',[355] others scholars prefer not

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Chamber's Afghanistan Decision, in *Journal of International Criminal Justice*, 17, 2019, p. 585 at 600, who nevertheless seem to ignore the evidentiary deficiencies, accusing the preliminary judges of a 'disillusion […] with regard to the OTP's ability to build solid situation and case hypothesis, leading the PTCs to substitute their legal and factual assessment to that of the primary fact-finder.'

[352] Among others, these powers include: the control over the number of witnesses, the control over the manner of examination, the power to decide on the time allocated to each witness, the power to call witnesses *proprio motu*. *See*, for example, ICTY, AC, *The Prosecutor v. Jandranko Prlić, Bruno Stojić, Slobodan Praliak, Milivoj Petković, Valentin Ćorić, Berislav Pušić*, *Decision on Joint Defence Interlocutory Appeal against the Trial Chamber's Oral Decision of 8 May 2006 Relating to Cross-Examination By Defence and on Association of Defence Counsel's Request for Leave to File an* Amicus Curiae *Brief*, 4 Jul. 2006, IT-04-74-AR73.2; ICTY, Bench of Three Judges of the AC, *The Prosecutor v. Stanislav Galić, Decision on Application by Prosecution for leave to Appeal*, 14 Dec. 2001, IT-98-29-AR73, paras 7 (referring to Rule 73(E) as a powerful tool preventing excessive and unnecessary time being taken by the prosecution)

[353] *See* JALLOW H.B., *Prosecutorial Discretion and International Criminal Justice*, in *Journal of International Criminal Justice*, 3, 1, 2005, p. 145 at 149; WERLE G., JESSBERGER F., *Principles of International Criminal Law*, 4th ed., Oxford University Press, 2020, pp. 72. *Cf*. also the debate among the experts in charge of organising the OTP at the beginning of its activity in BERGSMO M., *Institutional History, Behaviour and Development*, in BERGSMO M., RACKWITZ K., TYANING S. (eds.), *Historical Origin of International Criminal Law: Volume 5*, Torkel Opsahl Academic EPublishers, 2017, p. 1 at 9. *See* also MCCLOSKEY P., *Leadership and control of Investigations*, in BERGSMO M., RACKWITZ K., TYANING S. (eds.), *Historical Origin of International Criminal Law: Volume 5*, Torkel Opsahl Academic EPublishers, Brussels, 2017, p. 205 with regards to the more limited problem of conducting the investigations.

[354] In this regard, the *Gbagbo and Blé Goudé case* is particularly instructive. When, the case arrived in trial, the TC I adopted its Directions on the conduct of the proceedings (ICC, TC I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, *Directions on the conduct of the proceedings*, 3 Sep. 2015, ICC-01/11-01/15-205). Nevertheless, immediatly before the commencement of the trial, one Judge of the bench was replaced and the Chamber in the new composition decided to replace the Presiding Judge. Moreover the TC I in the new composition adopted new directions on the conduct of the proceedings (ICC, TC I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, *Decision adopting amended and supplemented directions on the conduct of the proceedings*, 4 May 2016, ICC-02/11-01/15-498 and relative annex), which, among other, deleted some mechanisms typical of the common law system (for example, the ruling of the hostile witnesses; the necessity for the accused to take a solemn undertaking if they wanted their declarations to be tendered as evidence; the reference to the cross-examination etc.). The decision concluding the trial and the debate on the no case to answer procedure which will be discussed in Chapter III is an additional proof of the consequences which a different approach may have on the trial.

[355] CAIANIELLO M., *Law of evidence at the International Criminal Court: Blending Accusatorial and Inquisitorial Models*, in *North Carolina Journal of International Law & Commercial*

to adhere to classic models that do not fit with the proceedings delineated by the Statute and the RPE.[356]

As duly noted by Ambos, opposing inquisitorial and accusatorial models after the French Revolution may be artificial because, despite the different origins, now both the systems include 'inquisitorial' and 'accusatorial' features.[357] They are both inquisitorial because they are initiated and directed in the pre-trial phase by public subjects and they are accusatorial because in both cases the prosecution is in the hands of a subject who does not act as a pre-trial judge (the prosecutor or the *juge d'instruction*). Moreover, the reference to a generic 'inquisitorial' system[358] which should correspond to the procedural systems of civil law Countries is often incorrect since it gives for granted that all civil law systems adopt the French model. Moreover, the opposition between accusatorial and inquisitorial systems has in recent years lost part of its strength, because civil law countries have gradually abandoned or reduced the role of the investigative judge and common law countries have introduced public prosecution bodies.[359] The discussion on the model adopted by the Rome Statute is even less relevant, since it includes aspects of both systems, reducing the distance between them.[360]

Regulation, 36, p. 287 at 289-290. Caianiello, for example, highlights that even if the shape of the trial at the ICC is predominately accusatorial, many provisions on the law of evidence recall the inquisitorial system (such as Art. 69 of the Statute; Rule 68 RPE) to the point that he does not exclude that it would be appropriate to amend the Statute pointing towards an inquisitorial model characterised by the principle of the free admission and evaluation of evidence. *See* DAMAŠKA M.R., *What is the point of International Criminal Justice?*, in *Chicago-Kent Law Review*, 83, 2008, p. 329.

[356] AMBOS K., *International criminal procedure: "adversarial", "inquisitorial" or mixed?*, in *International Criminal Law Review*, 3, 2003, p. 1. For an historical overview of the development of the accusatorial systems, *see* AMBOS K., *Zum heutigen Verständnis von Akkusationsprinzip und -verfahren aus historischer Sicht*, in *Jura*, 30, 8, 2008, p. 586, who also notes that, contrary to national systems, at the supranational level, the tendency is to introduce inquisitorial features in predominantly accusatorial models stimulating the active role of the judges.

[357] AMBOS K., *International criminal procedure: "adversarial", "inquisitorial" or mixed?*, in *International Criminal Law Review*, 3, 2003, p. 1 at 2-3.

[358] In addition, it should be avoided the parallel between the inquisitorial system and the inquisition where the system sinks its roots. *See* AMBOS K., *International criminal procedure: "adversarial", "inquisitorial" or mixed?*, in *International Criminal Law Review*, 3, 2003, p. 1 at 2; CAPRIOLI S., *Evoluzione storica della funzione d'accusa (ovvero: il caso Giacopuccio e poche note introduttive)*, in GAITO A. (ed.), *Accusa penale e ruolo del pubblico ministero*, Jovene, 1991, p. 33 at 34.

[359] *See* above Section II

The Prosecutor in National Legal Systems; DELMAS-MARTY M., *The Contribution of Comparative Law to a Pluralist Conception of International Criminal Law*, in *Journal of International Criminal Justice*, 1, 2003, p. 13.

[360] AMBOS K., *International criminal procedure: "adversarial", "inquisitorial" or mixed?*, in *International Criminal Law Review*, 3, 2003, p. 1 at 5; DELMAS-MARTY M., *The Contribution of Comparative Law to a Pluralist Conception of International Criminal Law*, in *Journal of International Criminal Justice*, 1, 2003, p. 13; WERLE G., JESSBERGER F., *Principles of International Criminal Law*, 4th ed., Oxford University Press, 2020, pp. 72-73, *see* also p. 127 and 134; SCHABAS W.A., *An Introduction to the International Criminal Court*, Cambridge University Press, 2020, pp. 249-250 who states that the ICC is 'largerly a hybrid of two systems: the adversarial approach of the English common law and the inquisitorial approach of the Napoleonic code and other European legislations of the

With this premise in mind it is possible to turn towards the main features of the discretionary powers of the prosecutors of some international criminal jurisdiction since the creation of the International Military Tribunal,[361] which may be helpful in order to introduce the features of the Prosecutor of the ICC. The permanent nature of the Court (and therefore of its OTP) imposes to give special attention to its developing practices in order not to jeopardise the future action of the Court.

1. The Prosecutor of the International Military Tribunals

The International Military Tribunal (IMT) was created by the Allies at the end of World War II[362] 'for the just and prompt trial and punishment of the major war criminal of the European Axis'.[363] The jurisdiction *ratione materiae* of the Tribunal included common plan and conspiracy, crime against peace, war crimes and crimes against humanity. Each winning nation (U.S., United Kingdom, France and U.R.S.S.) appointed one primary and one alternate Judge.

Romano-Germanic tradition (often described, somewhat erroneously, as the 'civil law' system)' but adds that this is an 'oversemplification, because within the English and continental models there is enormous variation from one country to another'. Schabas also notes that 'the Rome Statute provides for an adversarial approach, but one in which the Court has dramatic powers to intervene and control the procedure.' Nevertheless, ha also notes that '[a]lthough the inquisitorial system is often criticized by lawyers of the adversarial tradition for its inadequate protection of the rights of the defence, in an international context, where the defence may have insurmountable obstacles to obtaining evidence and interviewing witnesses within uncooperative States, the inquisitorial system may ultimately prove the better approach'. *Ibid.* at 251.

[361] In the light of the procedural nature of the investigation at stake it does not seem necessary to refer to previous experiences of prosecution of international crimes, namely the prosecution of Peter von Hagenbach in 1474; the attempt prosecution of the German emperor William II of Hohenzollern after World War I; the Leipzig trials and the attempt prosecution of members of the Turkish Government for the crimes committed between 1914 and 1922 contained in the Treaty of Sèvres signed in 1920 since it was replaced in 1923 by the Treaty of Lausanne which included an express amnesty. It seems also unnecessary to refer to some post-Nuremberg National trials, such as those celebrated pursuant to the Control Council Law no. 10; or the investigations made by the UN War Crimes Commission established in October 1943, which documented almost ninety war crime trials and that published a report in volumes entitled *Law Reports of Trials of War Criminals between 1947 and 1949*. For an in-depth analysis of the limited prosecution of international crimes in history and the consequent 'selective' nature of the international prosecution *see* CRYER R., *Prosecuting International Crimes: Selectivity and the International Law Regime*, Cambridge University Press, 2005. *See* also MOYNIER G., *Note sur la création d'une institution judiciaire internationale proper à prévenir et à réprimer les infractions à la Convention de Genève*, in *Bullettin international des Sociétés de secours aux militaries blessés*, 3, 11, 1872, p. 129.

[362] The Charter of the IMT was attached to the London Agreement, signed on 8 Aug. 1945 by U.S., France, U.K. and U.R.S.S.

[363] Art. 1 IMT Statute. For an overview *see* CRYER R., FRIMAN H., ROBINSON D., VASILIEV S. (eds.), *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, 2019, pp. 116 ff.; WERLE G., JESSBERGER F., *Principles of International Criminal Law*, 4th ed., Oxford University Press, 2020, pp. 6 ff.

With regards to the organ in charge of investigating and prosecuting, Art. 14 of the Nuremberg Charter (i.e. IMT Statute) stated that '[e]ach Signatory shall appoint a Chief Prosecutor for the investigation of the charges against and the prosecution of major war criminals'. Nevertheless the Chief Prosecutors were requested to act as a committee for the purposes of '(a) [...] agree[ing] upon a plan of the individual work of each of the Chief Prosecutors and his staff; (b) [...] settl[ing] the final designation of major war criminals to be tried by the Tribunal; [...] (d) [...] lodg[ing] an Indictment and the accompanying documents with the Tribunal'. Thus, the IMT did not experience the problem of the prosecutorial discretion in *whether* to investigate and prosecute or not. A margin for discretion was left with regards to the selection of the individuals to be tried, but the prosecutorial activity was strictly linked to the will of the States who appointed the Chief Prosecutors.[364] No provision in the Charter even referred to the independence of the Prosecutors.[365]

The Charter did not establish express criteria for selecting the individuals to be tried. Some general hints may come from some provisions: Art. 1 of the Nuremberg Charter referred to 'the major war criminal of the European Axis'. The same concept was contained in Art. 6 of the Charter, claiming that the Tribunal was established with the purpose of trying and punishing 'the major war criminals of the European Axis countries' which had acted 'in the interests of the European Axis countries'. Immediately after the definition of the jurisdiction *ratione materiae*, Art. 7 clarified that '[t]he official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment', possibly suggesting that these individuals

[364] It is apparent that the decision to establish a tribunal for prosecuting exclusively the crimes committed by the powers of the Axis and not also those committed by the Allies was the first 'selective' decision. It is well known that this decision was harshly criticised and reinforced the idea of the 'victor's justice', but it is probably less known that also some Judges, especially of the IMTFE did not approve the limited jurisdiction provided for by the Statutes. *See* CRYER R., *Prosecuting International Crimes. Selectivity and the International Criminal Law Regime*, Cambridge University Press, 2005, p. 206 ff.; SCHABAS, W.A., *Victor's Justice: Selecting Situations at the International Criminal Court*, in *John Marshall Law Review*, 43, 3, 2010, p. 535 ff.

[365] Scholars also note that the Charter did not establish a proper OTP with its own staff and its own resources, which were always under the control of the Governments. With regards to the investigative powers of the Prosecutor, Art. 15(a) expressly gave the Prosecutor the power to investigate, collect the evidence and produce them in trial. The military nature of the Tribunal and the situation in which it operated rendered immaterial the attribution of investigative powers to the police or the introduction of provisions on judicial cooperation. The Prosecutors relied instead on the Governments who had appointed them. *See* BERGSMO M., CISSÉ C., STAKER C., *The Prosecutor of the International Criminal Tribunals: The Cases of the Nuremberg and Tokyo Tribunals, the ICTY and ICTR, and the ICC Compared*, in ARBOUR L., ESER A., AMBOS K., SANDERS A. (eds.), *The Prosecutor of a Permanent International Criminal Court, International Workshop in co-operation with the Office of the Prosecutor of the International Criminal Tribunals (ICTY and ICTR), Freiburg im Breisgau, May 1998*, Edition Iuscrim, 2000, p. 121 at 129. On the selection of cases *see* also SALTER M., *Nazi War Crimes, US Intelligence and Selective Prosecutions at Nuremberg: Controversies Regarding the Role of the Office of Strategic Services*, Glass House, 2007.

would have been included among the main targets of the Tribunal. The reliance of the accused with organisations qualified as 'criminal' by the Tribunal implicitly emerged from Art. 9. But the lack of express selective criteria was self-evident to the point that also one of the Prosecutors of the IMT noted that 'the task of selecting the defendants was hastily and negligently discharged, mainly because no guiding principles of selection had been agreed on'.[366]

A memorandum filed by the French Chief Prosecutor highlighted that the Tribunal had not the right to interfere with the decision of the Prosecution to file an indictment.[367] The wording of the memorandum is instructive: the Chief Prosecutor 'informed' the judges that they could 'not reject the declaration contained [in the motion signed by the Prosecutor], according to which "The Committee of the Prosecutors created according to the Charter, designate[d] Alfred Krupp von Bohlen und Halbach as a defendant" because this declaration [had] been made as last resort, under Article 14 b of the Charter'. Consequently he 'informed' the Judges that the Prosecution had agreed 'in the designation of Alfred Krupp as a major war criminal under Article 14 b of the Charter', that it was 'engaged in the examination of the cases of other leading German industrialists, as well as certain other major war criminals, with a view to their attachment with Alfred Krupp' and it would have 'let [the Judges] know of this new indictment as soon as it is established'.[368]

An analogous International Military Tribunal for the Far East (IMTFE) was established through an order of General MacArtur in 1946 'for the just and prompt trial and punishment of the major war criminal in the Far East'.[369] Art. 8(a) IMTFE Statute ruled the designation of only one Chief of Counsel by the Supreme Commander for the Allied Powers. The Chief of counsel was responsible for the investigation and prosecution of charges against

[366] TAYLOR T., *The Anatomy of the Nuremberg Trials*, Little, Brown & Co., 1992, p. 90. In the end, the Prosecutors issued twenty-four indictments against representatives of the Nazi regime; twenty-two Defendants attended the trial, one was tried *in absentia*; nineteen were found guilty (including the defendant tried *in absentia*), three were found not guilty. Two indictments did not lead to trial as one defendant committed suicide before the commencement of the trial, and in the second case the charges had to be dismissed due to incompetence to stand in trial.

[367] IMT, Prosecution, French Delegation, *Memorandum of the French Prosecution on the Order of the Tribunal Rejecting the Motion to Amend the Indictment*, 20 Nov. 1945. *See* also BERGSMO M., CISSÉ C., STAKER C., *The Prosecutor of the International Criminal Tribunals: The Cases of the Nuremberg and Tokyo Tribunals, the ICTY and ICTR, and the ICC Compared*, in ARBOUR L., ESER A., AMBOS K., SANDERS A. (eds.), *The Prosecutor of a Permanent International Criminal Court, International Workshop in co-operation with the Office of the Prosecutor of the International Criminal Tribunals (ICTY and ICTR)*, Freiburg im Breisgau, May 1998, Edition Iuscrim, 2000, p. 121 at 134.

[368] The attention of the prosecution on Alfred Krupp started when the Tribunal declared his father not fit to stand trial. His indictment required an amendment of the indictment issued against his father, therefore the prosecution had to file a motion that was eventually dismissed by the tribunal.

[369] Art. 1 IMTFE Statute.

war criminals within the jurisdiction of the Tribunal. Art. 8(b) gave 'any United Nation with which Japan [had] been at war' the possibility to appoint an Associate Counsel to assist the Chief Counsel. Associate Counsels were appointed by Australia, Canada, China, France, India, the Netherlands, New Zeeland, the Philippines, the United Kingdom and the U.R.S.S.

2. The Prosecutor of the *ad hoc* Tribunals

The International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) were created *ex post facto* with the purpose of adjudicating liability for the crimes committed in the two Countries. The Tribunals were established by the UN Security Council (UNSC) acting under Chapter VII of the UN Charter respectively with the Resolution 827 (1993) of 25 May 1993 and Resolution 955 (1994) of 8 November 1994.[370]

Both the Statutes qualified the Prosecutor as an organ of the Tribunal.[371] The main features of the Prosecutor of the ICTY and the ICTR were drafted respectively at Art. 16 ICTY Statute and at Art. 15 ICTR Statute. Both these provisions vested the Prosecutor with the responsibility of investigating and prosecuting the persons responsible for the crimes committed under the jurisdiction of the tribunals and urged once more the Prosecutor to 'act independently as a separate organ' prohibiting her to 'receive instruction from Government or from any other source'. The UNSC was in charge of appointing the Prosecutors on nomination by the Secretary-General for a four-year term eligible for reappointment.[372]

According to Art. 18 ICTY Statute and Art. 17 ICTR Statute, the Prosecutor had the duty ('shall') to initiate investigations *ex-officio* or on the basis of information obtained from any source, particularly from Governments, UN organs, intergovernmental and non-governmental organisations. She also had to assess the information received or obtained and to

[370] For an overview *see* CRYER R., FRIMAN H., ROBINSON D., VASILIEV S. (eds.), *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, 2019, pp. 127 ff.; WERLE G., JESSBERGER F., *Principles of International Criminal Law*, 4th ed., Oxford University Press, 2020, pp. 14 ff.

[371] Art. 11 ICTY Statute; Art. 10 ICTR Statute.

[372] With regards to the staff of the Office, the ICTR AC noted: 'The Tribunal's instruments do not prescribe qualification requirements for members of the staff of the Office of the Prosecutor appearing before it. While Rule 44(A) of the Tribunal's Rules of Procedure and Evidence ("Rules") stipulates that a counsel engaged by a suspect or an accused "shall be considered qualified to represent a suspect or accused, provided that he is admitted to the practice of law in a State, or is a University professor of law," the Rules and other instruments of the Tribunal contain no corresponding qualification provision for Prosecution counsel. In consequence, the integrity of the trial process before the Tribunal cannot be undermined, *per se*, by the status a Prosecution counsel may or may not have as a member of the bar in any State'. ICTR, AC, *The Prosecutor v. Niyitegeka, Judgment*, 9 Jul. 2004, ICTR-96-14-A, para. 14.

decide whether there was sufficient basis to proceed. If, according to this information, the Prosecutor believed that a *prima facie* case existed she submitted the request to the Judge of a Trial Chamber (TC) for review. The Judge confirmed if satisfied that a *prima facie* case had been established by the Prosecutor, otherwise the indictment should be dismissed (Art. 19(1) ICTY Statute and Art. 18(1) ICTR Statute). The main accusation moved against the Prosecutor of the *ad hoc* Tribunals concerned her lack of independence emerging especially in the selection of the cases.

2.1. The independence

The Prosecutors was expressly required to act independently. Nevertheless, the first accusation moved against her was that of not being independent from the UNSC, which not only had founded the Tribunals, but also endorsed the activity of the Prosecutor at the initiation of the investigation. Responding to the challenge of the Prosecutor's (and Tribunal's) independence submitted by the Defence for Mr Milosević and some *amici curiae*, the Prosecutor of the ICTY held that to be urged by the UNSC did not compromise her independence more than to be urged by NGOs and other groups to commence investigations. 'Encouraging' did not equate to 'instructing'. Also the Judges found that the calls of the UNSC to the Prosecutor to investigate specific crimes was not inconsistent with the spirit of the provisions: premising that the *mala fides* on the part of the Prosecutor in indicting the accused would have been in violation of Art. 16(2) of the Statute, the Chamber did not find any 'scintilla of evidence' supporting the contention of the abuse of power. Moreover, it clarified that:

> 'the fact that the Security Council urged the Prosecutor to "begin gathering information related to the violence in Kosovo that may fall within its jurisdiction"; and that the accused was indicted by the Prosecutor following her investigations cannot vitiate the independence of the Prosecutor. That is no different from a government in a domestic jurisdiction setting a prosecutorial policy.'[373]

Ultimately, in light of the obligation for the Prosecutor to initiate investigations *ex-officio*, it added:

> 'What would impugn [the Prosecutor's] independence is not the initiation of investigations on the basis of information from a particular source, such as the Security Council, but whether, in assessing that information and making her decision as to the indictment of a particular person, she acts on the instructions of any government, any institution or any person.'[374]

[373] ICTY, TC, *The Prosecutor v. Milosević*, *Decision on preliminary motions*, 8 Nov. 2001, IT-02-54, para. 15.

[374] *Ibid*.

Some scholars highlight that the independence of the Prosecutor was not affected by the appointment by the UNSC because she had the '*pouvoir propre des chefs de parquet*' allowing her to exercise her functions independently.[375] Conversely, according to another opinion,[376] it was inappropriate for the UNSC to set prosecutorial policies, not only because usually Governments do not encourage investigations in a specific geographical area or on specific crimes or groups allegedly responsible for them, but because within the UNSC there were three important members of the NATO which were heavily involved on the ground at that time. Further, even if this specific issue will be further investigated in Chapter III, it is worth recalling that the control of the resources by the UN may be considered as an element potentially affecting the Prosecutor's independence. In fact, Art. 32 ICTY Statute and Art. 30 ICTR Statute stated that the expenses of the Tribunals should be borne by the regular budget of the UN.

Criticisms to the independence of the Prosecutor were raised also with regards to national governments. In the case of *The Prosecutor v. Nahimana et al*., for example, the Prosecutor was accused by the Defendants of acting on behalf of the government of Rwanda in the light of some statements which seemed to reverse the principle of the presumption of innocence. In the Defence's view this situation risked of compromising the independence of the whole Tribunal. The Appeals Chamber (AC), after having recalled the TC's reaction to the Prosecutor's words and reaffirming the principle of the presumption of innocence, dismissed the Defence's argument but on the same time recognised that the duty of the Prosecutor to act independently is distinct from that of the Judges, 'given the particular role played by the Prosecutor within the Tribunal. The Prosecutor is effectively a party to the proceedings like the accused'.[377]

2.2. The selection of the cases, discretion and limits

The adoption of discriminatory policies in the selection of the cases and of the accused was the natural consequence and main concern of the alleged lack of impartiality. An in-depth

[375] BERGSMO M., CISSÉ C., STAKER C., *The Prosecutor of the International Criminal Tribunals: The Cases of the Nuremberg and Tokyo Tribunals, the ICTY and ICTR, and the ICC Compared*, in ARBOUR L., ESER A., AMBOS K., SANDERS A. (eds.), *The Prosecutor of a Permanent International Criminal Court, International Workshop in co-operation with the Office of the Prosecutor of the International Criminal Tribunals (ICTY and ICTR)*, Freiburg im Breisgau, May 1998, Edition Iuscrim, 2000, p. 121 at 128.

[376] R. CRYER, *Prosecuting International Crimes: Selectivity and the International Law Regime*, Cambridge University Press, 2005, p. 213-214.

[377] ICTR, AC, *The Prosecutor v. Barayagwiza*, *Decision (Prosecutor's Request for Review or Reconsideration)*, 21 Mar. 2000, ICTR-97-19-AR72, para. 40. *See* also VASILIEV S., *The Role and Legal Statuts of the Prosecutor in International Criminal Trials*, 25 Nov. 2010, available at SSRN: https://ssrn.com/abstract=1715465, p. 68 ff.

analysis of the criteria leading the case selection, in particular with regards to the concept of 'person most responsible', is deferred to Chapter II.[378] In this paragraph it will be enough to offer an overview of the developing approach adopted by the Tribunals and then concentrate on the limits to the prosecutorial discretion.

Likewise the IMT, also the ICTY and the ICTR were created with a specific purpose, therefore at least the object of the investigation, if not of the prosecution, was partially established. Moreover, Art. 18 ICTY Statute and Art. 17 ICTR Statute expressly referred to a *duty* to investigate. For these reasons it has been argued that there was no room for discretion once the Prosecutor had determined that there were grounds for initiating an investigation, sufficient credible evidence was available and she had determined that the suspects were among those persons bearing 'the greatest responsibility'.[379] Notwithstanding this, the Prosecutor of ICTY and ICTR was given discretion with regard to the selection of individuals and crimes to the point that prosecutorial strategies and priorities have been the object of judicial attention. Although the primacy of the Tribunals over national courts and the possible request for deferral to the Tribunals have been considered as a hint that 'the most important cases should be brought before the Tribunals',[380] the rules for the identification of the individuals to try was not clearly established, since Art. 9 ICTY Statute and Art. 8 ICTR Statute only referred to 'people [responsible] for serious violations of international humanitarian law'.

The lack of a clear definition of the gravity threshold for the cases to be adjudicated in front of the Tribunals and of a clause limiting the competence to the leaders undermined a restrictive selective approach until the approval of the Tribunals' Completion Strategies by the UNSC in 2002.[381] But if the Tribunals had to identify selective criteria at a late stage it was probably also due to the pressure that the UNSC put on their shoulders in the first years of activity. The first cases were indeed chosen in order to demonstrate to the UNSC that the Prosecutor was actively investigating. Therefore, the first indictments were issued against low-level perpetrators. When the Judges convened a meeting with the Prosecutor expressing their

[378] *See* below, Chapter II, Section III, 2.4.1.2 Gravity in relation to the alleged perpetrator.

[379] NSEREKO D.D.N., *Prosecutorial Discretion Before National Courts and International Tribunals*, in *Journal of International Criminal Justice*, 3, 1, 2005, p. 124 at 135-136.

[380] WEBB P., *The ICC Prosecutor's Discretion Not to Proceed in the 'Interests of Justice'*, in *Criminal Law Quarterly*, 50, 2005, p. 305 at 309.

[381] For an historical overview of the selection of the cases at the ICTY, *see* DEGUZMAN M.M., SCHABAS W.A., *Initiation of investigations and Selection of Cases*, in SLUITER G., FRIMAN H., LINTON S., VASILIEV S., ZAPPALÀ S. (eds), *International Criminal Procedure*, Oxford University Press, 2013, pp. 137-141.

disappointment for his strategy, the Prosecutor opposed his independence in the selection of the cases.[382]

In order to comply with the Completion Strategy, in 1997 the ICTY adopted Rule 11*bis* requiring the Tribunal to use 'the gravity of the crimes charged and the level of responsibility of the accused' as relevant criteria when deciding on whether transferring a case to national courts. Moreover, in 2004, the ICTY Judges adopted Rule 28(A) establishing a mechanism aiming at concentrating the activity of the Prosecutor on 'the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the Tribunal'.[383] On the contrary, their colleagues of ICTR refused to adopt an analogous Rule as in their view it would have limited the Prosecutor's independence.[384] At the ICTR, when the UNSC requested the Tribunal to adopt a Completion Strategy, the President of the Tribunal responded expressly recognising to the Prosecutor discretion in the selection of the cases.[385] The President stated that the Prosecutor would have been guided by the need to focus on those who were alleged to have been in positions of leadership and those who, according to the Prosecutor, bore the greatest responsibility for genocide. He also provided a list of suggested criteria that the Prosecutor could have used in order to reach her determination, including: (i) the alleged status and extent of participation of the individual during the genocide; (ii) the alleged connection an individual might had with other cases; (iii) the need to cover the major geographical areas of Rwanda in which the crimes were allegedly committed; (iv) the availability of evidence with regard to the individual concerned; (v) the concrete possibility of arresting the individual concerned; and (vi) the availability of investigative material for transmission to a State for national prosecution.

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[382] GOLDSTONE R., *A View from the Prosecution*, in *Journal of International Criminal Justice*, 2, 2, 2004, p. 380.

[383] The adoption of the completion strategy did not only impose a selection of cases to be handled before the Tribunals, but it also shaped the cases of the Prosecutor, for example reducing the time at the disposal in their presentation. *See*, for example, ICTY, AC, *The Prosecutor v. Prlić et al., Decision on Prosecution Appeal Concerning the Trial Chamber's Ruling Reducing Time for the Prosecution Case*, 6 Feb. 2007, IT-04-74-AR73.4, para. 23, stating that the TC 'merely considered the Completion Strategy as one factor to be weighed in the Impugned Decision while correctly stressing that it would not allow the "considerations of economy" to "violate the right of the Parties to a fair trial."'

[384] Côté also notes that this rule attributed to a judicial administrative body (the *Bureau*) an additional judicial function respect to those provided by the Statute. *See* CÔTÉ L., *Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law*, in *Journal of International Criminal Justice*, 3, 2005, p. 162 at 186.

[385] *Completion strategy of the International Criminal Tribunal for Rwanda, Annex to Letter dated 30 Apr. 2004 from the President of the ICTR addressed to the President of the Security Council*, 3 May 2004, S/2004/341. This principle had already been affirmed in the Tribunal's case law, see, for example, ICTR, TC II, *The Prosecutor v. Barayagwiza, Decision on the Extremely Urgent Motion by the defence fir Orders to Review and/or Nullify the Arrest and Provisional Detention of the Suspect*, 17 Nov. 1998, ICTR-97-19-I.

The selection of cases at the *ad hoc* Tribunals was compulsory and, as recalled by the AC, had to be kept distinct from the jurisdiction of the Court. In the *Karadžić* case, it stated that:

> 'prosecutors possess the discretion not to bring before the court cases that theoretically fall within the court's jurisdiction. In other words, the fact that the Prosecution may decide not to prosecute an individual does not necessarily mean that, had the Prosecution decided to prosecute that individual, the Tribunal would not have jurisdiction over him or her'[386]

Nevertheless, prosecutorial discretion was not uncontested and the discretion founding the selection was not absolute. In the *Čelebići case* the Defence for Mr. Landžo accused the Prosecutor of selecting persons for the prosecution not only in light of considerations of apparent criminal responsibility but also on discriminatory grounds.[387] The Prosecutor responded underlying her broad discretion in deciding which cases should be investigated and which persons should be indicted. It also identified some criteria, including, the gravity of the crimes in question, the strength of the evidence, the effective allocation of resources within the OTP, the relationship of the case to the overall prosecution strategy, 'and other similar considerations'.[388] In light of this, the ICTY AC recognised as follows:

> 'In the present context, indeed in many criminal justice systems, the entity responsible for prosecutions has finite and human resources and cannot realistically be expected to prosecute every offender which may fall within the strict terms of jurisdiction. It must necessarily make decisions as to the nature of the crimes and the offenders to be prosecuted. It is beyond question that the Prosecutor has a broad discretion in relation to the initiation of the investigations and in the preparation of the indictments. This is acknowledged in Article 18(1) of the Statute'.[389]

But the AC also recalled that 'a discretion of this nature is not unlimited.'[390] In addition to the limits imposed by the Statute preventing the Prosecutor from seeking or receiving instructions from any government or any source, the AC said that:

> '[t]he discretion of the Prosecutor at all times is circumscribed in a more general way by the nature of her position as an official vested with specific duties imposed by

[386] ICTY, AC, *The Prosecutor v. Karadžić*, *Decision on Karadžić's Appeal of the Trial Chamber's Decision on Alleged Holbrooke Agreement*, 12 Oct. 2009, IT-95-5/18-AR73.4, para. 39.

[387] The same accusation was moved to the ICC Prosecutor in the *Gbagbo and Blé Goudé case* in the *Demande d'autorisation d'intervenir comme Amicus Curiae dans l'affaire Le Procureur c. Laurent Gbagbo et Charles Blé Goudé, en vertu de la règle 103 du Règlement de procédure et de preuve de la Cour* attached to the *Transmission of a Request for Leave to Submit Amicus Curiae Observations*, 5 Jan. 2018, ICC 02/11-01/15-1093. The Chamber rejected the request and therefore did not enter in the merit of the issue.

[388] ICTY, OTP, *The Prosecutor v. Delalić et al*., *Prosecution Response, Respondent's Brief of the Prosecution*, 17 Sep. 1999

[389] ICTY, AC, *The Prosecutor v. Delalić et al*., *Judgment*, 20 Feb. 2001, IT-96-21-A, para. 602.

[390] *Ibid*.

> the Statute of the Tribunal. The Prosecutor is committed to discharge those duties with full respect of the law. In this regard, the Secretary-General's Report stressed that the Tribunal, which encompasses all of its organs, including the Office of the Prosecutor, must abide by the recognised principles of human rights.'[391]

The main limit to discretion imposed by human rights is clearly the principle of non-discrimination. Art. 21(1) ICTY Statute, providing the equality of all persons in front of the Tribunal, bound the prosecutorial discretion to the principle of non-discrimination. The burden of proof of its improper exercise fell on the accused alleging the violation who had to demonstrate that the decision to prosecute was based on impermissible motives and that the Prosecutor had failed to prosecute similarly situated defendants. This wording has been interpreted as a two-stage proceedings: if the accused did not provide evidence of the impermissible motives leading to the prosecution of the accused, the assessment of the treatment given to similarly situated persons who were not prosecuted or against whom prosecutions were discontinued became superfluous.[392]

In a similar vein, the ICTR AC rejected Akayesu's arguments on the Tribunal's partiality due to the lack of prosecution of possible perpetrators of crimes committed against Hutu population. Expressly referring to the *Čelebići* jurisprudence, the Chamber recalled that the onus of investigating and prosecuting fell on the Prosecutor and that possible allegations of discriminatory prosecutorial policy must be adequately supported by the accused.[393] In the *Ntakirutimana case* the Defence submitted an analogous request and the ICTR TC I reiterated that it was the appellant alleging selective prosecution who had to demonstrate that the Prosecutor 'improperly exercised her prosecutorial discretion in relation to the appellant'.[394]

When the same request was submitted by Ndindiliymana's Defence, the Prosecutor highlighted the temporal scope of her mandate and that her schedule was not pre-established. She interpreted Arts 15 and 17 ICTR Statute as giving her discretion consistent with the judicial principle of prosecutorial independence, requiring, *inter alia*, secrecy and confidentiality. Therefore, she asked the ICTR TC II to declare itself incompetent to rule on Prosecution's discretionary policy. The ICTR TC II, although reiterating the Prosecutor's broad discretion in the preparation of the indictments and its statutory independence, found the

[391] *Ibid*., para. 604.

[392] *Ibid*., paras 605-618. Scholars note that providing a particular improper or unlawful motive might be very difficult even if it would emerge from the violation of the prosecutorial impartiality. Moreover, the focus was on the prosecutor rather than on the jurisdictional scope of the Tribunal. CRYER R., *Prosecuting International Crimes. Selectivity and the International Criminal Law Regime*, Cambridge University Press, 2005, p. 193-194.

[393] ICTR, AC, *The Prosecutor v. Akayesu*, *Judgment*, 1 Jun. 2001, ICTR-96-4-A, paras 93-97.

[394] ICTR, TC I, *The Prosecutor v. Ntakirutimana*, *Judgment and Sentence*, 21 Feb., ICTR,-96-10-T & ICTR-96-17-T, para. 871.

Prosecutor's request on the incompetence inconsistent with the Tribunal's jurisprudence as the Prosecutor's discretion 'is not absolute, but subject to the principle of equality before the law and to this requirement of non-discrimination'.[395] Recalling the *Čelebići*, *Akayesu* and *Ntakirutimana* jurisprudence, it reiterated that it fell on the Defence the burden of rebutting the presumption of prosecutorial impartiality by establishing an unlawful motive for prosecution and that other individuals in similar situations were not prosecuted.

This strong presumption in favour of the Prosecutor was probably justified by her official position.[396] As pointed out by the TC of the ICTY:

> 'the Prosecutor of the tribunal is not, or not only, a Party to adversarial proceedings, but is an organ of the Tribunal and an organ of international criminal justice whose object is not simply to secure a conviction but to present the case for the Prosecution, which includes not only inculpatory, but also exculpatory evidence, in order to assist the Chamber to discover the truth in a judicial setting'[397].

In the same vein, Judge Shahabuddeen at the ICTR noted that the Prosecutor 'is not a partisan'.[398]

Nevertheless, even if the decision to limit the investigations to the crimes committed by one side of the parties involved in the conflict was not moved by discriminatory intent, according to Cryer the decision was basically political.[399] He recalls that when the Prosecutor declared her intention to investigate all the crimes committed in Rwanda, the Government of Rwanda opposed to her reappointment. The threat for non-cooperation[400] induced the UNSC to

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[395] ICTR, TCII, *The Prosecutor v. Ndindiliymana et al*., *Decision on urgent motion for a stay of the indictment, or in the alternative a reference to the Security Council*, 26 Mar. 2004, ICTR-2000-56-I, para. 23.

[396] According to some scholars, this understanding of the role of the Prosecutor is 'no more than wishful thinking' in light of the highly adversarial nature of the proceedings. VASILIEV S., *The Role and Legal Statuts of the Prosecutor in International Criminal Trials*, 25 Nov. 2010, available at SSRN: https://ssrn.com/abstract=1715465, p. 18.

[397] ICTY, TC, *The Prosecutor v. Kupreškić et al*., *Decision on communications between the parties and their witnesses*, 21 Sep. 1998, IT-95-16.

[398] ICTR, AC, *The Prosecutor v. Barayagwiza*, *Separate Opinion of Judge Shahabuddeen*, annexed to *Decision*, 3 Nov. 1999, para. 68, ICTR-97-19-R72.

[399] R. CRYER, *Prosecuting International Crimes: Selectivity and the International Law Regime*, Cambridge University Press, 2005, p. 221.

[400] In order to perform her duties, including the collection of evidence and the site visits, the Prosecutor of the ICTY and the ICTR might seek assistance of the States authorities. For most of the investigative activities she had therefore to rely on the action of the States and she had no control over the performance of national authorities. *See* BERGSMO M., CISSÉ C., STAKER C., *The Prosecutor of the International Criminal Tribunals: The Cases of the Nuremberg and Tokyo Tribunals, the ICTY and ICTR, and the ICC Compared*, in ARBOUR L., ESER A., AMBOS K., SANDERS A. (eds.), *The Prosecutor of a Permanent International Criminal Court, International Workshop in co-operation with the Office of the Prosecutor of the International Criminal Tribunals (ICTY and ICTR),* Freiburg im Breisgau, May 1998, Edition Iuscrim, 2000, p. 121 at 145.

reappoint the Prosecutor only at the ICTY and to appoint another Prosecutor at the ICTR.[401] Côté further notes that the selection of the accused at the international level is often driven by reasons such as the affiliation because in this way the groups involved in the conflicts that usually characterise the international crimes may be all represented, or, to the contrary, because proceedings only against one side may be useful in order to highlight the gravity of some crimes (as happened at the ICTR where the focus was on genocide).[402] Therefore, he also notes that in the *Čelebići case* the Prosecutor honestly admitted that the decision to continue the proceedings against Mr Landžo was not *solely* based on his affiliation.[403]

Eventually, the Defence for Mr Nzirorera argued that the Prosecutor's decision not to investigate alleged crimes committed by the Tutsis was the result of an impermissible discrimination based on political grounds. In that case the ICTR TC III noted that the Defence had failed to demonstrate that '*his* prosecution occurred *but for* invidious discrimination' and had therefore failed to demonstrate that the prosecution was politically motivated.[404] Moreover, even assuming that Mr Nzirorera was prosecuted by virtue of his political affiliation, he had not demonstrated the invidious nature of the alleged discrimination. More importantly, on that occasion the TC recalled that the Prosecutor had publicly discussed her prosecutorial policy and had determined that the crime of genocide was her main concern and that people responsible for it would have been the main target of her activity. It further noted that the indictment issued by the Tribunal 'accurately depict[ed] prosecutorial strategy'.[405]

2.3. Concluding remarks

From the case-law of the *ad hoc* Tribunals, it clearly emerges that in thier system the Prosecutor had some discretionary powers. As for any sort of discretion, in order to avoid the trespass into the domain of arbitrariness, her prosecutorial discretion was not absolute but subject to limitations. The principle of equality and the principle of non-discrimination were – as in any legal system[406] – the main and more important limits identified by the jurisprudence

[401] *Ibid*.

[402] CÔTÉ L., *Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law*, in *Journal of International Criminal Justice*, 3, 2005, p. 162 at 176.

[403] *Ibid*.

[404] ICTR, TC III, *The Prosecutor v. Kamarera et al., Decision on Joseph Nzirorera's Motion for Selective Prosecution Documents. Rule 66(B) of the Rules of Procedure and Evidence*, 30 Sep. 2009, ICTR-98-44-T, para.16.

[405] *Ibid*., para. 20.

[406] Even if these principles did not clearly emerge in the case law of the ICC, they must also lead the decisions of the ICC Prosecutor. *See* AMBOS K., *Introductory Note to Office of the Prosecutor: Policy Paper on Case Selection and Prioritisation (Int'l Crim. Ct.) by Kai Ambos*, in *International Legal Materials, Vol. 57*, 15 Sep. 2016, p. 1131; HEINZE A., FYFE S., *Prosecutorial Ethics and Preliminary*

of the Tribunals. On the same time, it must be noted that these limitations have been applied narrowly, favouring the presumption of regularity of the action of the Prosecutor. An abuse of discretion apparently existed only if the Prosecutor had selected a defendant purely because of his or her ethnicity or on other individual grounds.[407] The second consideration is that even if the judiciary showed some deference towards the discretion of the Prosecutor, this discretion was nevertheless subject to judicial scrutiny.

3. The Prosecutor of the International Criminal Court

The ICC is the first permanent institution responsible for adjudicating international crimes, namely genocide, crimes against humanity, war crimes and the crime of aggression. The founding document of the Court is the Rome Statute, signed in Rome on 17 July 1998 and entered into force on 1 July 2002.[408]

The organ in charge of investigating and prosecuting the crimes is the OTP, which, with the Presidency, the Chambers and the Registry, is one of the four organs of the Court.[409] Still in 1996, although her main features were quite clear,[410] a detailed definition of the Prosecutor's functions was not definitive and the debate during the negotiations was intense. Art. 53 of the Statute in particular, together with Art. 15 recognising the possibility for the Prosecutor to initiate investigations *proprio motu*, was one of the most debated provisions during the drafting of the Statute.

Examinations at the ICC, in BERGSMO M., STAHN C., (ed.), *Quality Control in Preliminary Examination: Volume 2*, Brussels, Torkel Opsahl Academic EPublisher, 2018, pp. 43-44.

[407] *See* DEGUZMAN M.M., SCHABAS W.A., *Initiation of investigations and Selection of Cases*, in SLUITER G., FRIMAN H., LINTON S., VASILIEV S., ZAPPALÀ S. (eds), *International Criminal Procedure*, Oxford University Press, 2013, p. 156. *See* also JALLOW H.B., *Prosecutorial Discretion and International Criminal Justice*, in *Journal of International Criminal Justice*, 3, 1, 2005, p. 145.

[408] For an overview *see* CRYER R., FRIMAN H., ROBINSON D., VASILIEV S. (eds.), *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, 2019, pp. 144 ff.; WERLE G., JESSBERGER F., *Principles of International Criminal Law*, 4th ed., Oxford University Press, 2020, pp. 18 ff.; SCHABAS W.A., *An Introduction to the International Criminal Court*, Cambridge University Press, 2020, pp. 1 ff.

[409] Art. 34 ICC Statute.

[410] "The Prosecutor should conduct an independent and impartial investigation on behalf of the international community and should collect incriminating and exonerating information to determine the truth of the charges and to protect the interest of justice; he or she should seek the cooperation of States in conducting investigations rather than carrying out such activities directly for reasons of efficiency and effectiveness, and the investigations would be conducted in accordance with the Statute and the rules of the Court as well as the national law of the State in whose territory the investigation was conducted; the Prosecutor should be able to seek cooperation directly from States or could be authorized to conduct direct investigations in exceptional situations in which there were concerns regarding the objectivity of the national authorities". *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I, (Proceedings of the Preparatory Committee During March-April and August 1996)*, G.A. 51st Sess., Supp. No. A/51/22, 1996, para. (226), p. 49.

After a preliminary overview of the historical development of the Rome Statue, with the focus on the provisions ruling the role of the Prosecutor,[411] the main legal provisions ruling the independence of the Prosecutor will be analysed, starting from Art. 42 of the Staute. Ultimately, it will be discussed whether the Rome system – and in particular Art. 53 of the Statute – opts for a mandatory or discretionary model of investigation.

3.1. Historical background

In 1947, the GA mandated the International Law Commission (ILC) (the former Committee on the Codification of International Law) to elaborate the principles of Nuremberg starting from the IMT Charter and to identify the substantive law and crimes that could have been considered crimes under ICL.[412] With the exclusion of the IMT and the IMTFE experiences, the first proposals for the establishment of a (permanent) international criminal court barely mentioned the prosecutor, while a great number of provisions defined many aspects of the role of judges.[413]

In 1950 a Special Committee of the GA composed of representatives of seventeen States was established and charged with drafting a convention and making proposals on the establishment of an international criminal court. Modelling the draft of the Statute of the International Court of Justice, the Committee accomplished its task in the following year.[414] The draft included only two provisions on the prosecution, *vis-à-vis* the seventeen on the judges, and only one of them was focused on the role of the prosecutor.

Art. 33 of the 1951 Draft Statute suggested to establish, within the framework of the UN, a Committing Authority composed of nine members. The procedure, the timing and the terms for the election of the members of the Authority was the same provided for the election of the judges and the qualities of the potential members had to be the same provided for the judges. The mission of the Committing Authority was to examine the evidence offered by a complainant to support its allegation. The presentation of the evidence before the Authority had to be conducted by one or more agents designated by the complainant. If the Authority was satisfied that the evidence was sufficient and did support the complaint, it had to notify its

[411] Specific problematic issues during the preparatory works will be discussed further in the text when appropriate.

[412] G.A. Res. 174, U.N. GOAR, 2nd Sess., U.N. Doc. A/519 (1947)

[413] For an in-depth study *see* BASSIOUNI M.C. AND SCHABAS W.A. (eds.), *The Legislative History of the International Criminal Court, Two Volumes*, Brill, 2016.

[414] *Draft Statute for an International Criminal Court (annexed to the Report of the Committee on International Criminal Jurisdiction on its Session held from 1 to 31 August 1951)*, G.A., 7th Sess., Supp. No. 11, A/2136, 1952.

finding both to the Court and the complainant, after giving the accused a reasonable opportunity to be heard and to adduce evidence as he might have desired.

Under Art. 34 of the 1951 Draft Statute the States Parties were in charge of appointing a panel of ten persons, whose duty was, whenever a certificate for trial was issued by the Committing Authority, to elect forthwith a Prosecuting Attorney possessing the same qualification of the members of the Court. The Prosecuting Attorney had to file the indictment on the ground of the findings certified by the Committing Authority. Moreover, the Prosecuting Attorney was responsible for conducting the prosecution before the Court.

The 1951 Draft Statute was revised by the Special Committee in 1953.[415] Political pressure and the tensions between the U.S. and the Soviet Union influenced its structure making the new version of the draft less optimistic.[416] Also Articles 33 and 34 were partially modified: the Committing Authority was transformed in the Committing Chamber, composed of five judges appointed annually for one year. The judges members of the Committing Chamber committing a case could not adjudicate the substance of the cases. The function of the Chamber was the same of the Authority, namely examining the evidence offered by the complainant supporting the complaint and, where appropriate, issuing the certificate for trial. The Chamber was provided with the additional power of ordering further inquiry or investigations on specific matters.

More significant was the amendment affecting the Prosecuting Attorney: under the 1953 draft statute the Attorney had to be appointed directly by the complainant (or complainants). Since only States that had recognised the jurisdiction to the Court, and not even the UN Organs,[417] were allowed to 'institute a proceeding' under Art. 29, it is apparent that this system valued the inter-state relationships.

Regardless of the optimistic nature of the 1951 Draft and of the sceptical features of the 1953 Draft, the structure of the procedures outlined in both of them appears to be influenced by the IMT experience, characterised by the relevance of the States in the constitution of the Tribunal and in the appointment of Judges and Prosecutors. Moreover, the idea of adjudicating cases related to individuals connected to the governmental and military apparatus seems having influenced the initial conception of the drafters. It must also be noted

[415] *Report of the Committee on International Criminal Jurisdiction on its session held from 1 to 31 August 1951*, U.N. GAOR, 7th Sess., Supp. No. 11, U.N. Doc. A/2136 (1952).

[416] *See* BASSIOUNI C. (compiled by), *The Statute of the International Criminal Court: a Documentary History*, Transnational Publishers, 1998, p.13.

[417] Art. 29 provided, as alternative to be discussed, the possibility for a UN organ designated by the UN to interrupt the presentation or the prosecution of a particular case before the court.

that the existing legal instruments at that time, like the Hague and the Geneva Conventions or the Convention on the Prevention and Punishment of the Crime of Genocide and the Convention Against Torture were centred-State treaties. Their violations originated therefore an international and not an individual personal responsibility.

When the GA received the 1953 Draft, it found inappropriate to discuss procedural aspects and the statute of a court without a clear definition of the crimes possibly falling under its jurisdiction, therefore it postponed the discussion after an assessment of the work of the committee in charge of preparing a Draft Code of Offences Against Peace and Security of Mankind. The Draft Code was finalised in 1954, but the absence of agreement on the definition of the crime of aggression brought to the postponement of the discussion.[418] The difficulties in defining the crime of aggression let the 1953 Draft Statute waiting until 1974,[419] and additional delays brought to the adoption of a Draft Code of Crimes only in 1991.[420] But the end of the Cold War induced the ILC to work on a new Draft Statute for an International Criminal Court.

The new Draft Statute was not based on the draft of 1953. In 1979 the U.N. *Ad Hoc* Committee for Southern Africa requested Prof. Bassiouni to prepare a draft statute to establish an international criminal jurisdiction to prosecute violators of the Apartheid Convention. This draft statute[421] was much more articulated than the 1953s' and ruled in detail the proceedings in front of the so called 'International Penal Tribunal for the suppression and punishment of the crime of Apartheid (and other international crimes)'. Art. 15 of the draft was completely deputed to the *Procuracy*. This organ was headed by a Procurator and divided into an administrative, an investigative and a prosecutorial division. Each division was headed by a Deputy Procurator. More importantly the daft included a mechanism allowing not only States but also other subjects to initiate a proceeding. The commentary to Art. 8 of the draft (*Initiation of process*) stated as follows:

> 'The procedures presented herein differ from the 1953 Geneva Committee draft and 1979 ILA Draft in that it concentrates the investigation and prosecution of any case with the Procuracy, but a State party, organ of the United Nations, intergovernmental organization and individual may file a complaint with the

[418] G.A. Res. 898, U.N. GAOR, 9th Sess., U.N. Doc. A/2890 (1954).

[419] G.A. Res. 3314, U.N. GAOR, 29th Sess., U.N. Doc A/9619 (1974)

[420] *Report of the ILC*, U.N. GAOR, 46th Sess., Supp. No. 10, U.N. Doc. A/46/10 (1991). The 1991 Draft Code of Crimes was revised and adopted by the ILC only in 1996 (*Draft Code of Crimes Against the Peace and Security of Mankind: Titles and Articles on the Draft Code of Crimes Against the Peace and Security of Mankind, adopted by the ILC on its forty-eight session*, U.N. GAOR, 51th Sess., U.N. Doc. A/CN.4L.532 (1996)).

[421]U.N. Doc E/CN.4 1426, (1981).

> Procuracy which shall accept such communications. The Procuracy then makes an initial determination as to whether the complaint is "not manifestly unfounded" or "manifestly unfounded". That determination is quite similar to the one made by the European Commission on Human Rights as to complaints concerning violations of the European Convention on Human Rights. However, the Procuracy is not without controls as to its discretion in that a State party and an organ of the United Nations are entitled to recognition of their complaints as being "not manifestly unfounded" while other States and intergovernmental organizations are entitled to an appeal to the Court of a determination by the Procuracy that the complaint has been found "manifestly unfounded". Communications and complaints by individuals and non-governmental organizations are not entitled the same status. The Procuracy's decisions are thus reviewable in the case of certain complaint "not manifestly unfounded" will then travel two alternate channels: (a) the possibility of mediation and conciliation through the Standing Committee; (b) adjudication before the Court.'[422]

This innovative proposal, although not giving the same status to the complains lodged by States or UN organs and by individuals and NGOs, deprived the Sates of their monopoly in ICL and paved the way for the subsequent introduction of a mechanism authorising the Prosecutor to open an investigation *proprio motu* (with the authorisation of the PTC) on the basis of the information received by individuals and NGOs.

In 1989 Trinidad and Tobago submitted a proposal to the GA entitled 'International criminal responsibility of individuals and entities engaged in illicit trafficking in narcotic drugs across national frontiers and other transnational criminal activities: establishment of an international criminal court with jurisdiction over such crimes'.[423] Therefore the GA gave mandate to the ILC to further consider 'the question of establishing an international criminal court or other international criminal trial mechanism' and the Commission worked on the draft prepared to implement the Apartheid convention. Extending its mandate and receiving the approval of the GA, the ILC finally produced the Draft Statute for a Permanent Criminal Court in 1993. The Draft was then revised the following year.[424]

The 1994 Draft Statute was much more detailed than the previous proposals and started to delineate the most important characteristics of the proceeding before the Court. Attention was given not only to the role of the Judges but also to that of the Prosecutor. Art. 12

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[422] *Implementation of the International Convention on the Suppression and Punishment of the Crime of Apartheid. Study on ways and Means of Insuring the Implementation of International Instruments such as the International Convention on the Suppression and Punishment of the Crime of Apartheid, including the Establishment of the International Jurisdiction envisaged by the Convention*, U.N. Doc E/CN.4 1426, (1981), in BASSIOUNI C. (compiled by), *The Statute of the International Criminal Court: a Documentary History*, Transnational Publishers, 1998, p. 708.

[423] G.A. Res. 44/39 , U.N. GOAR, 44th Sess., U.N. A/RES/44/39 (1989)

[424] *Report of the ILC on the work of its forty-sixth session*, 2 May-22 Jul. 1994, U.N. GAOR, 49th Sess., U.N. Doc. A/49/10 (1994).

was dedicated to the Procuracy, an independent organ of the Court, responsible for the investigation of complaints and for the conduct of the prosecutions.

The *Ad Hoc* Committee on the Establishment of an ICC,[425] convened by the GA in 1994, met twice in 1995. It spent most of the time on procedural aspects discussing issues related to jurisdiction.[426] Nevertheless there was general agreement on the need to further reconsider the whole part 4 of the Draft ruling the investigation and the prosecution, in order 'to ensure, *inter alia*, a proper balance between two concerns, namely effectiveness of the prosecution and respect of the rights of the suspect or accused'.[427] Even the so called Siracusa Draft, an alternative draft statute prepared by an external committee of experts in 1995, proposed some amendments to the provisions concerning the initiation of the investigation and prosecution.[428] The Preparatory Committee worked on the 1994 Draft from 1996 to 1998, amending it and making proposals, and prepared a final version to be discussed during the Diplomatic Conference of Plenipotentiaries that took place in Rome from 15 June to 17 July 1998.

The 'unsatisfactory delineation'[429] of the status of the Prosecutor of the ICC in the final Draft was highlighted by a large group of distinguished experts who attended a workshop organised by the Max Planck Institute for Foreign and International Criminal Law and the Prosecutor of the ICTY and ICTR in Freiburg im Breisgau on 28 and 29 May 1998. The outcome of the meeting was a Declaration containing 'the fundamental principles relating to the independence and accountability of prosecutors, as recognised and applied in international instruments and in national criminal justice systems, which should also be reflected in a criminal justice institution at the international level'.[430]

The declaration was composed of ten paragraphs, requesting that the forthcoming OTP was (i) independent from other organs of the Court; (ii) responsible for both investigation and prosecution; (iii) mindful of the interests of the international community and transparent

[425] U.N. GA, 6th Comm., 49th Sess., U.N. Doc. A/C.6/49/L.24, 23 Nov. 1994.

[426] *Report of the* Ad Hoc *Committee on the Establishment of an International Criminal Court*, G.A., 50th Sess. Supp. No. 22, A/50/22, 1995, para. 129, p. 29.

[427] *Report of the* Ad Hoc *Committee on the Establishment of an International Criminal Court*, G.A., 50th Sess. Supp. No. 22, A/50/22, 1995, para. 132, p. 30.

[428] AIDP, ISISC, MPI, *Draft Statute for an International Criminal Court. Alternative to ILC-Draft (Siracusa Draft)*, Jul. 1995.

[429] ESER A., *Opening remarks*, in ARBOUR L., ESER A., AMBOS K., SANDERS A. (eds.), *The Prosecutor of a Permanent International Criminal Court, International Workshop in co-operation with the Office of the Prosecutor of the International Criminal Tribunals (ICTY and ICTR)*, Freiburg im Breisgau, May 1998, Edition Iuscrim, 2000, p. 121 at 603.

[430] *Freiburg Declaration on the Position of the Prosecutor of a Permanent International Criminal Court*, in *European Journal of Crime, Criminal Law and Criminal Justice*, 6, 3, 1998, p. 301.

through reasoned decisions; (iv) respectful of the international human rights standards and of the rights of the victims (v) equipped with all the powers and the resources for an effective action; (vi) capable of obtaining the cooperation of the States (vii) able of initiating investigations *proprio motu* and capable of exercising its discretion independently from the will of the referring entities, but also guided in the exercise of discretion; (viii) subject to the *ex ante* control of the judiciary when adopting measures affecting the individual rights and liberties; (ix) or subject to *ex post facto* judicial review; (x) unable to try a suspect without the prior review of the indictment by a judicial authority.

The declaration was made public and put at the disposal of the delegations at the Conference in Rome that finally led to the adoption of the Convention on the Establishment of the ICC.

3.2. The independence of the Prosecutor and the legal framework

Almost the whole Art. 42 of the Statute is devoted to the independence of the Prosecutor and her Office.[431] Para. (1) states that, like the homologous of the *ad hoc* Tribunals,[432] the OTP 'shall act independently as a separate organ of the Court'. Moreover, the same provision prevents the Office from seeking or acting on instructions from any external source.

The Office is headed by the Prosecutor, who shall be assisted by one or more Deputy Prosecutors. The first guarantee for independence should come from the qualities required for the election: high moral character, competence, extensive practical experience.[433] The Prosecutor has 'full authority over the management and administration of the Office, including the staff, facilities and other resources thereof'.[434] For this purpose, the Prosecutor shall adopt

[431] *See* BERGSMO M., HARHOFF F., ZHU D., *Article* 42, in AMBOS K., *The Rome Statute of the International Criminal Court*, 4th ed., Beck/Hart/Nomos, 2021, MOULIER I., *Article 42*, in FERNANDEZ J., PACREAU X., *Statut de Rome de la Cour pénale internationale. Commentaire article par article*, Pedone, 2012, pp. 1019 ff.; SAFFERLING C., *International Criminal Procedure*, Oxford University Press, 2012, pp. 147 ff.; OLÁSOLO H., *Issues Regarding Article 42*, in BERGSMO M., RACKWITZ K., TYANING S. (eds.), *Historical Origin of International Criminal Law: Volume 5*, Torkel Opsahl Academic EPublishers, 2017, p. 423.

[432] *See* also MARSTON DANNER A., *Enhancing the legitimacy and accountability of prosecutorial discretion at the International Criminal Court*, in *American Journal of International Law*, 97, 3, 2003, p. 510 at 515 stating that '[t]he independent prosecutor also bring the ICC closer to the best practices of domestic criminal justice systems'.

[433] Article 42(3) ICC Statute. For an overview of the structure and functioning of the OTP, *see* SCHABAS W.A., *An Introduction to the International Criminal Court*, Cambridge University Press, 2020, pp. 390 ff.

[434] Article 42(2) ICC Statute. *See* HEINZE A., FYFE S., *Prosecutorial Ethics and Preliminary Examinations at the ICC*, in BERGSMO M., STAHN C., (ed.), *Quality Control in Preliminary Examination: Volume 2*, Brussels, Torkel Opsahl Academic EPublisher, 2018, p. 27. Generally, *see*

regulations after consulting the Registrar with matters that may affect its operation.[435] Also Art. 43, devoted to the Registry, parallelly clarifies that the Registry is 'responsible for the non-judicial aspects of the administration and servicing of the Court, without prejudice to the functions and powers of the Prosecutor in accordance with article 42'. The Prosecutor is also autonomously responsible for the appointment of her staff under Art. 44. The autonomous management of the resources is an important component of the independence of the Office, even if the annual budget at its disposal depends on the decision of the Assembly of the States Parties (ASP).[436] The Prosecutor is therefore responsible for convincing the ASP of the reasonableness of her annual requests and is accountable for justifying her annual expenses.

The Statute also expressly mentions the independence of the OTP from the Presidency, which is responsible for the proper administration of the Court, with the exception of the OTP.[437]

The Statute prohibits the Prosecutor and the Deputy Prosecutors to engage in activities which are likely to interfere with their functions or which may affect confidence in their independence. It also prohibits them to engage in any other occupation of professional nature.[438] More in general they cannot participate 'in any matter in which their impartiality might reasonably be doubted on any ground'. In particular the Statute seems to take into account the possible previous involvement of the Prosecutor or of the Deputy Prosecutors in the cases before the Court.[439] In order to safeguard this independence, the Statute includes the possibility for the Presidency to excuse the Prosecutor and the Deputy from acting in a particular case,[440] and the possibility for the person under investigation or prosecution to submit to the AC a request for disqualification.[441] The request for excusal must be submitted in writing to the Presidency and must include the reasons for the request that may be confidential.[442] The Prosecutor and the Deputy Prosecutor (and the Judges) have the duty to present a request for excusal if they believe that a ground for disqualification exists.[443] With regards to the request for disqualification, it has been seen that the Statute generally states that the Prosecutor's or the Deputy Prosecutor's impartiality 'might reasonably be doubted on any

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HEINZE A., FYFE S., *The Role of the Prosecutor*, in AMBOS K. (ed.), *Core Concepts in Criminal Law and Criminal Justice*, Cambridge University Press, 2020, pp. 344 ff.

[435] Rule 9 RPE.
[436] *See* Chapter III, Section I, 1. The Assembly of the States Parties.
[437] Article 38(3) ICC Statute.
[438] Article 42(5) ICC Statute.
[439] Article 42(7) ICC Statute.
[440] Article 42(6) ICC Statute.
[441] Article 42(7) and (8) ICC Statute.
[442] Rule 33 RPE.
[443] Rule 35 RPE.

ground'. Rule 34 RPE includes a non-exhaustive list of specific possible grounds leading to the request.[444] The request shall state the grounds and attach any relevant evidence. The procedure includes the transmission of the request to the person concerned, who is entitled to present written submissions. Rule 34(3) RPE ultimately states that '[a]ny question relating to the disqualification of the Prosecutor or a Deputy Prosecutor shall be decided by a majority of the judges of the Appeals Chamber'.

In this regard, turning to the Court's case-law, the Defence for Mr Gaddafi and Mr Al-Senussi requested the disqualification of the Prosecutor Moreno Ocampo for some statements he had released on the press. The AC, in charge of deciding on the issue, noted that the statements of the Prosecutor were 'clearly inappropriate in the light of the presumption of innocence' and warned him given that he 'is an elected official of the Court and that his statements are often imputed to the Court as a whole, and therefore this may lead observers to question the integrity of the Court as a whole'. [445] Nevertheless it did not disqualify the Prosecutor, adducing that 'a reasonable observer' would have understood that 'the Prosecutor manifested a certain conviction about the evidence is to be expected' and 'would not conclude that the Prosecutor's conviction was not based on the evidence, was otherwise biased or would lead to the neglect of his duties under article 54 (1) (a) and (c) of the Statute'. Therefore, the AC did not find that the Prosecutor's statements put in doubt the Prosecutor's impartiality.[446] The second alleged ground for disqualification, i.e. the appearance that the Prosecutor was affiliated to the positions of the Libyan Government concerning the admissibility of the case, was rejected, since the AC found that the behaviour of the Prosecutor in this regard did not raise doubts about his impartiality.[447]

The removal of the Prosecutor or the Deputy from the office is the extreme measure in case of a 'serious misconduct or a serious breach of his or her duties under the Statute as provided for in the Rules of Procedure and Evidence'. The procedure is established by Art. 46 of the Statute. Since both the Prosecutor and the Deputy are elected officials by the ASP, it is

[444] The list includes: (i) Personal interest in the case, including a spousal, parental or other close family, personal or professional relationship, or a subordinate relationship, with any of the parties; (ii) Involvement, in his or her private capacity, in any legal proceedings initiated prior to his or her involvement in the case, or initiated by him or her subsequently, in which the person being investigated or prosecuted was or is an opposing party (iii) Performance of functions, prior to taking office, during which he or she could be expected to have formed an opinion on the case in question, on the parties or on their legal representatives that, objectively, could adversely affect the required impartiality of the person concerned; (iv) Expression of opinions, through the communications media, in writing or in public actions, that, objectively, could adversely affect the required impartiality of the person concerned.

[445] ICC, AC, *The Prosecutor v. Gaddafi and Al-Senussi, Decision on the Request for Disqualification of the Prosecutor*, 12 Jun. 2012, ICC-01/11-01/11 OA 3, para. 33.

[446] *Ibid.*, para. 33.

[447] *Ibid.*, paras 37 ff.

up to the ASP to adopt a decision of removal: in both cases the Statute requires an absolute majority of the States Parties, and with regards to the Deputy Prosecutor, the Prosecutor shall make a recommendation. The complaints, which must include the identity of the complainant, the grounds of the complaint and possibly the relevant evidence, shall be transmitted to the Presidency, which, according to Rule 26 RPE, may also initiate the proceedings on its own motion. The Presidency, which has the authority of setting aside the anonymous or manifestly unfounded complaints, shall transmit the other complaints to the competent organ. If the allegation is 'of sufficiently serious nature' the person may be suspended from duty pending the final decision.[448] The removal shall take effect immediately.[449]

The definitions of serious misconduct and serious breach of duties, that is applicable not only to the Prosecutor and the Deputy Prosecutor, but also to the Judges, the Registrar and the Deputy Registrar, are provided for by Rule 24 RPE. With regards to the serious misconduct, the Rule distinguishes between misconduct occurred in the course and outside the course of official duties. The former must be 'incompatible with official functions' and cause or likely cause 'serious harm to the proper administration of justice before the Court or the proper internal functioning of the Court[450]; the latter must be of a 'grave nature' and cause or likely cause 'serious harm to the standing of the Court'. With regard to the serious breach of duties, it occurs 'where a person has been grossly negligent in the performance of his or her duties or has knowingly acted in contravention of those duties[451].

Art. 47 further rules the applicability of disciplinary measures in case of misconduct of less serious nature. The discipline is completed by the Rules of Procedure and Evidence (RPE), offering a definition of misconduct of less serious nature at Rule 25. With regards to the misconducts occurred in the course of duties, the Rule does not expressly require the incompatibility with the official functions, which seems to be implicit in the concept of misconduct. Therefore, the difference with the serious breach of duties seems to be only the seriousness of harm respectively caused (i) 'to the proper administration of justice before the

[448] Rule 28 RPE.

[449] Rule 31 RPE.

[450] Rule 24 RPE includes some examples of serious misconduct occurred in the course of official duties, namely: (i) disclosing facts or information that he or she has acquired in the course of his or her duties or on a matter which is *sub judice*, where the disclosure is seriously prejudicial to the judicial proceedings or to any person; (ii) concealing information or circumstances of a nature sufficiently serious to have precluded him or her from holding office; (iii) abuse of judicial office in order to obtain unwarranted favourable treatment from any authorities, officials or professionals.

[451] Rule 24 RPE includes two examples of situation integrating the requirements of the serious breach of duties: when the person (i) fails to comply with the duty to request to be excused knowing that there are grounds for doing so; (ii) repeatedly causes unwarranted delay in the initiation, prosecution or trial of cases, or in the exercise of judicial powers.

Court or the proper internal functioning of the Court'; and (ii) 'to the standing of the Court'.[452] The disciplinary measures are listed in Rule 32 RPE and may be a reprimand or a pecuniary sanction that may not exceed six months of the salary paid by the Court to the person concerned. They are adopted against the Prosecutor by the Bureau of the ASP by absolute majority, while with regards to the Deputy Prosecutor, the reprimand is adopted by the Prosecutor and the pecuniary sanction by the Bureau.[453]

In 2013 the OTP published the Code of Conduct for the OTP,[454] whose purpose is to set out minimum standards of conduct applicable to the members of the Office.[455] This Code adds to the general Code of Conduct for Staff Members, the Staff Regulations and the Staff Rules and is linked to the peculiar features of the activity of the Office. It contains also a section on independence, which reiterates the duty of exercising functions free of any external influences, inducements, pressures, threats or interference, direct or indirect. In addition, it

[452] Rule 25 RPE provides some examples of misconduct of less serious nature only occurred in the course of official duties: (i) interfering in the exercise of the functions of a Judge, the Prosecutor, the Deputy Prosecutor, the Registrar or the Deputy Registrar; (ii) repeatedly failing to comply with or ignoring requests made by the Presiding Judge or the Presidency in their exercise of their lawful authority; (iii) failing to enforce the disciplinary measures to which the Registrar or a Deputy Registrar and other officers of the Court are subject when a judge knows or should know of serious breach of duty on their part.

[453] Rule 30 RPE.

[454] Also at the *ad hoc* Tribunals, the Office of the Prosecutor had adopted similar documents. *See Prosecutor's Regulation no. 2 of 1999 entitled Standards of Professional Conduct for Prosecution Counsel*.

[455] ICC, OTP, Art. 6, *Code of Conduct for the Office of the Prosecutor*, 5 Sep. 2013. On prosecutorial ethic at the ICC, *see* HEINZE A., FYFE S., *The Role of the Prosecutor*, in AMBOS K. (ed.), *Core Concepts in Criminal Law and Criminal Justice*, Cambridge University Press, 2020, pp. 344 ff.; HEINZE A., FYFE S., *Prosecutorial Ethics and Preliminary Examinations at the ICC*, in BERGSMO M., STAHN C., (ed.), *Quality Control in Preliminary Examination: Volume 2*, Brussels, Torkel Opsahl Academic EPublisher, 2018, pp. 3 ff. and esp. on ethic rules binding the Prosecutor pp. 27 ff. Before the publishing of the Code, Lepard flagged the need for the Prosecutorto be guided by 'fundamental ethical principles' i.e. principles of international law 'related to a foundational principle of unity in diversity' (equal dignity of all human beings; right to life, right to freedom of moral choice; open minded consultation; individual criminal responsibility; interdependence between peace and human rights etc.). The rationale of both the proposal and the Code is essentially the same, even if the the focus of the Lepard's proposal seems limited to the effects of the Prosecutor's activity on victims, peace and reconciliation. LEPARD B.D., *How should the ICC Prosecutor exercise his or her discretion? The role of fundamental ethical principles*, in *John Marshall Law Review*, 43, 3, 2010, p. 553. *See* also RASTAN R., *Comment on Victor's Justice & the Viability of* Ex Ante *Standards*, in *The John Marshall Law Review*, 43, 3, 2010, p. 569 at 588 ff. who refers to Lepard's ethical values in order to identify *ex ante* standards ruling the indispensable selective activity of the OTP. The importance of *ex ante* standards for verifying their compliance by the Prosecutor is further highlighted by MARKOVIC M., *The ICC Prosecutor's Missing Code of Conduct*, in *Texas International Law Journal*, 47, 1, 2011, p. 201. His paper, written before the adoption of the Code by the Office, takes note of the conflicting obligations often burdening on the Prosecutor, but notes that the conduct of the Prosecutor in some circumstances undermined the Court's credibility. Therefore, also in the light of the existence of mechanisms for the removal of the Prosecutor, he pointed out the importance of identifying parameters in order to fully appreciate her conduct. On the origin of the Code of Conduct *see* NAKHJAVANI S.A., *The Origins and Development of the Code of Conduct*, in BERGSMO M., RACKWITZ K., TYANING S. (eds.), *Historical Origin of International Criminal Law: Volume 5*, Torkel Opsahl Academic EPublishers, 2017, p. 951.

provides for a non-exhaustive list of duties of all the members of the Office.[456] Independence is not the only requirement to the Prosecutor's conduct. For this reason, the Code includes the duty of maintaining an honourable, faithful and conscientious conduct (respectively sections 3, 4 and 5); reiterates the duties of impartiality (section 6) and confidentiality (section 7); rules the public expression and associations (Section 8); the conflict of interests (Section 9); and the prohibition of accepting gifts, remunerations and favours from external sources (section 10).

From this rapid analysis, of the relevant provisions ruling the independence of the Prosecutor, it emerges that her independence must be granted first *vis-à-vis* from external subjects: personal interests of the Prosecutor, the interests of States, of the UN UNSC, but also NGOs and civil society.[457] Nevertheless, it is also apparent that the Prosecutor must also maintain her independence from the other organs of the Court, especially the Presidency and the Registry. According to Brubacher, Art. 42(1) the Statute seems to picture the Prosecutor's independence as a burden and an 'objective valuable resource' rather than a prerogative.[458] This consideration certainly catches the responsibility weighing on the Prosecutor. She is required to be careful in performing her activities, remaining within the boundaries of the law, managing her legal functions and maintaining institutional relationships with international actors whose cooperation is crucial for her successful investigations. In this context, she must maintain not only her substantial independence but the appearance of independence as well. Instead, independence cannot be used for rhetorical purposes, diminishing it to an instrument to support unjustified choices.

[456] 'In particular, Members of the Office shall, *inter alia*, (a) not seek or act upon instructions from any external source; (b) remain unaffected by any individual or sectional interests and, in particular, by any pressure from any State, or any international, intergovernmental or non-governmental organisation or the media; (c) refrain from any activity which is likely to negatively affect the confidence of others in the independence or integrity of the Office; (d) refrain from any activity which may lead to any reasonable inference that their independence has been compromised; (e) refrain from the exercise of other occupations of a professional nature without the prior approval of the Prosecutor; and (f) refrain from any activity which is likely to interfere with the performance of duties and the exercise of functions as Members of the Office'. ICC, OTP, Art. 23, *Code of Conduct for the Office of the Prosecutor*, 5 Sep. 2013.

[457][457] *See* below, Chapter III, Section I
The Control from External Entities.

[458] BRUBACHER M.R., *Prosecutorial Discretion within the International Criminal Court*, in *Journal of International Criminal Justice*, 2, 2004, p. 71 at 84-85; TURONE G., *Powers and Duties of the Prosecutor*, in CASSESE A., GAETA P., JONES J.R.W.D., *The Rome Statute of the International Criminal Court. A Commentary*, vol. 2, Oxford University Press, 2002, p. 1137 at 1140.

3.3. The initiation of the investigations: discretionary or mandatory? Article 53 of the Statute: an overview

Once that the legal framework of the Prosecutor's independence has been clarified, it is possible to move to the analysis of the approach adopted by the Rome Statute with regards to the initiation of the investigations and of prosecution of the crimes. The first problem is to determine whether the Statute adopts a mandatory or a discretionary model, or possibly a mixture of the two.

Art. 53 of the Statute is entitled 'Initiation of an investigation'.[459] Despite the heading, this provision has a broader content, as it also rules the initiation of the prosecution and the possible disagreement between the Prosecutor on one side and the referring entity and the Pre-Trial Chamber (PTC) on the other. The analysis of this provision is further complicated by the existence of three different mechanisms triggering the jurisdiction of the Court, one of whom includes the authorisation of the PTC for the initiation of the investigation.

Art. 53 reads as follows:

> (1) The Prosecutor shall, having evaluated the information made available to him or 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 interest of justice.
>
> If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.
>
> (2) If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because:
>
> (a) There is not a sufficient legal or factual basis to seek a warrant or summons under article 58;
> (b) The case is inadmissible under article 17;

[459] *See* BERGSMO M., KRUGER P., BEKOU O., *Article 53*, in AMBOS K., *The Rome Statute of the International Criminal Court*, 4th ed., Beck/Hart/Nomos, 2021, BITTI G., *Article 53*, in FERNANDEZ J., PACREAU X., *Statut de Rome de la Cour pénale internationale. Commentaire article par article*, Pedone, 2012; SCHABAS W.A, *Article 53*, in SCHABAS W.A., *Commentary on the Rome Statute*, 2nd ed., 2016.

> (c) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime;
>
> the prosecutor shall inform the Pre-Trial Chamber and the State making a referral under article 14 or the Security Council in a case under article 13, paragraph (b), of his or her conclusions and the reasons for the conclusion.
>
> (3) (a) At the request of the State making a referral under article 14 or the Security Council under article 13, paragraph (b), the Pre-Trial Chamber may review a decision of the Prosecutor's under paragraph 1 or 2 not to proceed and may request the Prosecutor to reconsider that decision.
>
> (b) In addition, the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed if it is based solely on paragraph 1(c) or 2(c). In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber.
>
> (4) The Prosecutor may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information.

Generally speaking, the discussion on Art. 53 and other connected themes often gives the impression that the Statute recognises the Prosecutor a significant margin for discretion.

Brubacher suggests that the Prosecutor's discretion is implicit in the absence of an obligation to initiate an investigation even when a situation is referred to her Office by a State or the UNSC.[460] Moreover, in his view, the wording of Art. 13, stating that '[t]he Court *may* exercise its jurisdiction' (*emphasis added*);[461] and of Art. 54(2), stating that '[t]he Prosecutor *may* conduct investigations of the territory of a State' (*emphasis added*) reinforces this conclusion. Arts 15*bis* and 15*ter* ruling the exercise of the jurisdiction on the crime of aggression use the verb 'may' rather than 'shall' as well. Differently, most of the scholars ground the Prosecutor's discretion on the 'interests of justice clause' which will be better analysed in Chapter II. According to some of them, the principle of discretionary prosecution is implied in the interests of justice clause that would enable the Prosecutor to be 'rather

[460] BRUBACHER M.R., *Prosecutorial Discretion within the International Criminal Court*, in *Journal of International Criminal Justice*, 2, 2004, p. 71 at 75. *See* also MARINIELLO T., *Judicial Control over Prosecutorial Discretion at the International Criminal Court*, in *International Criminal Law Review*, 19, 2019, p. 979 at 981, who nevertheless clarify that this discretion is not unfettered.

[461] *See* also BERGSMO M., CISSÉ C., STAKER C., *The Prosecutor of the International Criminal Tribunals: The Cases of the Nuremberg and Tokyo Tribunals, the ICTY and ICTR, and the ICC Compared*, in ARBOUR L., ESER A., AMBOS K., SANDERS A. (eds.), *The Prosecutor of a Permanent International Criminal Court, International Workshop in co-operation with the Office of the Prosecutor of the International Criminal Tribunals (ICTY and ICTR)*, Freiburg im Breisgau, May 1998, Edition Iuscrim, 2000, p. 121 at 136.

selective' and to bring in front of the Court 'only the most important cases'.[462] Some observers even go so far as to say that the Prosecutor's discretion is 'enormous' and warn against possible abuses.[463]

Nevertheless, none of these arguments seems conclusive. First, the fact that the Prosecutor is not obliged to initiate and investigation once a situation has been referred to her Office does not exclude the obligation after a positive assessment of the requirements of Art. 53(1). The wording of Art. 53 requires a clarification on the reference to a duty to commence an investigation. The clause 'unless he or she determines that there is no reasonable basis to proceed' makes it apparent that the decision to open the investigation is preceded by a stage where the Prosecutor ascertain whether the requirements of Art. 53 are met. This stage is called Preliminary Examination.[464] Therefore, the duty of the Prosecutor would be first of all a duty to make the Art. 53(1) assessment, possibly accompanied by a duty to investigate if the requirements are met.

Second, a plain reading of Art. 53(1) seems to support the idea of a mandatory system, since it states that the Prosecutor 'shall' initiate an investigation. Also Art. 26 of the 1994 Draft Statute included a duty ('shall') for the Prosecutor to initiate the investigations, unless she concluded that there was no 'possible basis' for a prosecution. In case of adoption of a decision not to investigate, the Prosecutor had to inform the Presidency. Para. (4) provided for the same mechanism with regards to the adoption of a decision not to prosecute. Some scholars point out that the activity of the OTP is driven by the obligation to prosecute international crimes, while discretion would intervene in second instance, in order to promote fairness, efficiency and transparency.[465] The duty to investigate and prosecute international crimes would result not only from the wording of the Statute, but also from the Court's restricted

[462] TURONE G., *Powers and Duties of the Prosecutor*, in CASSESE A., GAETA P., JONES J.R.W.D., *The Rome Statute of the International Criminal Court. A Commentary*, vol. 2, Oxford University Press, 2002, p. 1137 at 1153; 1174; CRYER R., FRIMAN H., ROBINSON D., VASILIEV S. (eds.), *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, 2019, p. 162; SAFFERLING C., *International Criminal Procedure*, Oxford University Press, 2012, p. 221. Nevertheless, Safferling notes that 'the discretion granted to the Prosecutor with one hand is taken away with the other' referring to the mechanism of review set forth in Art. 53(3).

[463] RUBIN A.P., *The International Criminal Court: Possibilities for Prosecutorial Abuse*, in *Law and Contemporary Problems*, 64, 1, 2001, p. 153 at 154. *See* also WEBB P., *The ICC Prosecutor's Discretion Not to Proceed in the 'Interests of Justice'*, in *Criminal Law Quarterly*, 1 Jan. 2005, p. 305 at 318 referring to the 'enormous discretion' in the assessment of the interests of justice.

[464] *See* below, Section II, 3.2 The preliminary examination; and Section IV, 1.3.2 The relationship between Article 15 and Article 53 of the Statute.

[465] OLÁSOLO H., *The Prosecutor of the ICC before the initiation of investigations: a quasi-judicial or a political body?*, in *International Criminal Law Review*, 3, 2003, p. 87 at 131; WEBB P., *The ICC Prosecutor's Discretion Not to Proceed in the 'Interests of Justice'*, in *Criminal Law Quarterly*, 50, 2005, p. 305 at 307.

jurisdictional regime and from the international duty to prosecute people responsible for international crimes incumbent on States under international law.[466]

The relevance of the verb 'shall' cannot be underestimated. The identification at Art. 53(1) of legal requirements ruling the initiation of the investigations suggests that the Prosecutor has the duty to commence investigations once they are met.[467] The existence of requirements beneath which the Prosecutor cannot initiate an investigation do not give the Prosecutor the power to decide whether initiating an investigation is opportune or not.[468] Bitti refers alternatively to *opportunité contrôlée* or *légalité comportant une certain souplesse*.[469] He also quotes Delmas-Marty stating that '*la régle de l'article 53, placée sous le contrôle de la Chambre préliminaire, apparaît comme un compromis entre le choiz d'une stricte légalité et celui de l'opportunité des pursuites; elle exprime ainsi une sorte d'hybridation entre les diverses traditions nationales*'.[470] Between these two suggested alternatives, the latter seems more appropriate, because, as it will be seen in Chapter II, the duty is the rule and the (limited) '*souplesse'* is materialised by the interests of justice clause. Bitti duly notes that the Statute never refers to prosecutorial discretion but goes too far when he infers her discretion from the need to grant the Prosecutor's independence.[471] Since independence is a quality whose objective is avoiding any form of influence from external entities, the link between independence and discretion is not immediately clear: as seen in Section I, independence characterises the prosecutor also in those systems adopting the principle of mandatory prosecution. Similarly, Stegmiller states that the interpretation of Art. 53 includes the principle of mandatory investigation, but he considers the criteria required under Art. 53(1) 'exceptions' to this principle.[472] Nevertheless, it seems inappropriate to always refer to them as exceptions:

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[466] DUKIĆ D., *Transitional justice and the International Criminal Court – in 'the interests of justice'?*, in *International Review of the Red Cross*, 89, 867, 30 Sep. 2007, p. 691 at 701; WEBB P., *The ICC Prosecutor's Discretion Not to Proceed in the 'Interests of Justice'*, in *Criminal Law Quarterly*, 50, 2005, p. 305 at 308. CLARK T.H., *The Prosecutor of the International Criminal Court, Amnesties, and the 'Interests of Justice': Striking a Delicate Balance*, in *Washington University Global Studies Law Review*, 4, 2, 2005, p. 389 at 398-399. While the conventional and customary obligation to prosecute individual responsible for genocide and the grave breaches of the Geneva Conventions is undisputed, it is debated whether a similar obligation exists with regard to other war crimes and crimes against humanity.

[467] Recentrly in the same vein *see* ICC, PTC I, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia*, *Decision on the 'Application for Judicial Review by the Government of the Comoros'*, 16 Sep. 2020, ICC-01/13-111, para. 15.

[468] *See* also GREY R., WHARTON S., *Lifting the Curtain. Opening a Preliminary Examination at the International Criminal Court*, in *Journal of International Criminal Justice*, 16, 2018, p. 593 at 598.

[469] BITTI G., *Article 53,* in FERNANDEZ J., PACREAU X., *Statut de Rome de la Cour pénale internationale. Commentaire article par article*, Pedone, 2012, p. 1173 at 1184.

[470] *Ibid.*

[471] *Ibid.*, at 1185.

[472] STEGMILLER I., *The Pre-Investigation Stage of the ICC*, Dunker & Humbolt, 2011, p. 252 ff.

while this concept is certainly applicable in the case of the interests of justice clause, the reasonable basis standard and the possible deferral due to jurisdictional or admissibility reasons are not proper exceptions to the principle of mandatory prosecution. In all these cases the deferral of the Court does not preclude national investigations or prosecution and in the case of admissibility, the national investigation or prosecution may be the reason for the declaration of inadmissibility. It is therefore apparent that, should the Prosecutor be prevented to investigate, it could hardly be considered as an exception to the principle of mandatory prosecution.

Third, as to the use of the verb 'may' with regards to the crime of aggression, authoritative doctrine notes it can easily be referred to the ability of the Court to exercise jurisdiction over this crime rather than referring to a specific discretionary power of investigation.[473]

Fourth, the discretion implied in the interests of justice clause is overestimated, especially as far as it is grounded in the vagueness of this concept. The notion of interests of justice, as well as the notion of gravity under Art. 17 of the Statute – which is recalled by Art. 53(1)(b) – are usually referred to with regards to the Prosecutor's discretion because of their vagueness. Although gravity and interests of justice may be considered vague or elastic concepts which may be given a different weigh, a stricter or broader concept of gravity or interests of justice does not take or grant discretion to the Prosecutor. Leaving aside gravity, which should be considered objectively as a threshold for admissibility,[474] the interests of justice clause 'creates' an alternative to the investigation or the prosecution, i.e. the non-investigation and non-prosecution despite the existence of the other legal requirements. But as seen in Section I, the vagueness of the concept is not the source of discretion. The different alternatives exist irrespective to the extent of the concept of interests of justice. A stricter or broader concept could at best reduce or extend the number of cases where the interests of justice clause may be applied. But as it will be seen in Chapter II, not only despite the apparent vagueness it is possible to interpretatively limit the extent of the concept of interests of justice, but a restrictive interpretation is advisable as well in the light of the legal function it is required to pursue and in the light of the exceptional applicability of this clause. It is precisely this exceptional applicability that makes investigation and prosecution 'the rule'

[473] ZIMMERMANN A., FREIBURG-BRAUN E., *Article 15bis*, in AMBOS K., *The Rome Statute of the International Criminal Court*, 4th ed., Beck/Hart/Nomos, 2021, mn. 4; ZIMMERMANN A., FREIBURG-BRAUN E., *Article 15ter*, in AMBOS K., *The Rome Statute of the International Criminal Court*, 4th ed., Beck/Hart/Nomos, 2021, mn. 3.

[474] *See* below, Chapter II, Section III, 2.4.1.4. Gravity: the 'selective approach' and the 'threshold approach'.

once that the other objective requirements are met. Further, since the interests of justice is a legal requirement, its interpretation is in the hands of the Chambers, and not exclusively of the Prosecutor. For this reason, some scholars suggest the *mandatory* nature of the prosecution after a positive determination of jurisdiction and admissibility, *unless* the interests of justice clause (which entails a limited discretionary power) applies.[475] If non-investigation and non-prosecution are exceptions, it means that Art. 53 should be predominantly be considered as adhering to a mandatory model. Should the Prosecutor exceptionally decide not to investigate or prosecute under Art. 53(1)(c) or (2)(c) her decision shall be driven by a legal understanding of the concept of interests of justice, because this clause is a legal criterion. As to that element of judgment which characterises any decision including a discretionary factor, the need to tend towards 'the right answer' should indicate the road, but the more the interests of justice is clearly defined (by the jurisprudence of the Chambers), the less the assessment includes a subjective component.

Also the case law of the Court, although never denying a certain margin for discretion, seems to enhance the mandatory nature of the Prosecutor's intervention.[476] Even the AC has recently supported the mandatory nature of the initiation of the investigation under Art. 53.[477]

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[475] RASTAN R., *Comment on Victor's Justice & the Viability of Ex Ante Standards*, in *The John Marshall Law Review*, 43, 3, 2010, p. 569 at 598. Similarly *see* STEGMILLER I., *The Pre-Investigation Stage of the ICC*, Dunker & Humbolt, Berlin, 2011, p. 251, stating that 'the duty is only established insofar as there is a reasonable basis to proceed. Through the backdoor, the apparent legality principle is softened and linked to the three criteria enlisted in article 53(1)(1)(a)-(c) and article 53(2)(a)-(c) respectively'; and at 266 ff.

[476] ICC, PTC II, *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 Mar. 2010, ICC-01-09-19, para. 20, stating that: 'On the basis of a finding by the Prosecutor that there is "a reasonable basis to proceed with an investigation", the Prosecutor "shall submit" to the Chamber a request for authorization of the investigation. The Chamber, in turn, is mandated to review the conclusion of the Prosecutor by examining the available information, including his request, the supporting material as well as the victims' representations (collectively, the "available information").'; ICC, PTC I, *Situation on the Registered Vessels of the Union of the Comoros, The Hellenic Republic and the Kingdom of Cambodia*, *Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation*, 16 Jul. 2015, ICC-01/13-34, para. 13, stating that: 'In the presence of several plausible explanations of the available information, the presumption of article 53(1) of the Statute, as reflected by the use of the word "shall" in the chapeau of that article, and of common sense, is that the Prosecutor investigates in order to be able to properly assess the relevant facts.'; ICC, PTC I, *Request under Regulation 46(3) of the Regulations of the Court*, *Decision on the 'Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute*, 6 Sep. 2018, ICC-RoC46(3)-01/18-37, para. 84, stating that 'If the Prosecutor reaches a positive determination according to the "reasonable basis" standard under articles 15(3) and 53(1), she "shall submit" to the Chamber a request for authorization of the investigation.131 As held by this Chamber in a previous composition, "the presumption of article 53(1), as reflected by the use of the word 'shall' in the chapeau of that article, and of common sense, is that the Prosecutor investigates in order to be able to properly assess the relevant facts"'.

[477] ICC, AC, *Situation in the Islamic Republic of Afghanistan*, *Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan*, 5 Mar. 2020, ICC-02/17-138 OA4, paras. 28-31. Nevertheless, it deems this provision

The Prosecutor's statement to the effect that the verb 'shall' does not introduce a presumption in favour of an investigation when there is no reasonable basis to proceed according to the requirements of Art. 53(1) does not contradict this interpretation.[478]

As to the way of avoiding an overwhelming number of situations to deal with, the correct approach seems having been identified by Judge Kaul when adopting a restrictive applicable standard in the assessment of the parameters set forth in Art. 53(1). He highlighted that while national prosecutors are called upon to commence investigations if they become aware of *any* information that a crime may have occurred, '[t]he differing nature of the mandate of the ICC Prosecutor and that of national prosecutors [...] warrants a more nuanced approach'.[479] Only if she reaches a determination that the parameters of Art. 53(1)(a), (b) and (c) are met and that the reasonable basis standard is satisfied the Prosecutor has the duty to initiate an investigation (or ask the PTC to authorise an investigation). Once again, the need to clearly determine the parameters of Art. 53(1) emerges. Identifying a relatively high *legal standard* for these parameters it would be possible to limit the intervention of the Court where appropriate and to exclude the margin for discretion of the Prosecutor in the selection activities.

applicable only in case of referral, while in case of *proprio motu* investigations it interprets the Statute (Art. 15) as vesting the Prosecutor of a discretionary power. *See* below Section IV, 1.3.2. The relationship between Article 15 and Article 53 of the Statute.

[478] ICC, OTP, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia, Final decision of the Prosecution concerning the "Article 53(1) Report" (ICC-01/13-6-AnxA), dated 6 November 2014*, 29 Nov. 2017, ICC-01/13-57, para. 54.

[479] ICC, PTC II, *Situation in the Republic of Kenya, Dissenting Opinion of Judge Hans-Peter Kaul*, annexed to *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, 31 Mar. 2010, ICC-01-09-19, para. 16.

SECTION IV

INTRODUCTION TO THE ACTIVITY OF THE ICC PROSECUTOR

This section aims at providing some relevant information on the functioning of the Court, in particular when relevant for a better comprehension of the action of the Prosecutor. After a brief overview of the extent of the jurisdiction of the Court, the triggering mechanism, i.e. the procedure triggering the jurisdiction of the Court, will be analysed (1). Particular attention will be given to Art. 15 of the Statute, ruling the initiation of the investigation *proprio motu*. The control of the PTC over the activity of the Prosecutor will be analysed in depth in Chapter III. It is also important to clarify the distinction between 'situation' and 'case' (2) and clarify the various stages of the activity of the Prosecutor: the preliminary examination, the investigation and the prosecution (3). In the light of its peculiarities, major attention will be given to the preliminary examination.

1. The jurisdiction of the Court and the triggering mechanism

The procedure leading to the initiation of an investigation depends on the mechanism triggering the jurisdiction of the Court. According to Art. 13 of the Statute – 'Exercise jurisdiction' – the jurisdiction of the Court can be triggered in three different ways by three different subjects: a State Party, the UNSC and the Prosecutor herself.[480]

The concept of jurisdiction has different components that must be taken into account by the referring entity and the Prosecutor deciding to open an investigation. The jurisdiction of the Court is first of all limited *ratione materiae*. It means that the Court has jurisdiction only over the crimes listed in Art. 5, namely, genocide, crimes against humanity, war crimes and the crime of aggression.[481]

The jurisdiction of the Court is also temporarily limited to crimes committed after the entry into force of the Statute, on 1 July 2002 (jurisdiction *ratione temporis*).[482] Even if the non-retroactivity principle is a common feature to all international treaties (unless they codify customary law), it is even more important in the Statute which deals with individual criminal liability. Moreover, since the Rome Statute is open to further adherence by other States, Art.

[480] S*ee* ARSANJANI M., *Reflections on the jurisdiction and Trigger mechanism of the International Criminal Court*, in VON HEBEL H. (ed.), *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos*, Asser Press, 1999; OLÁSOLO H., *The Triggering Procedure of the International Criminal Court*, Nijhoff, 2005. TINE A., *Article 13*, in FERNANDEZ J., PACREAU X., *Statut de Rome de la Cour pénale internationale. Commentaire article par article*, Pedone, 2012, pp. 607 ff.

[481] Art. 12(1) ICC Statute.

[482] Art. 11(1) ICC Statute.

11(2) establishes that if a State becomes party to the Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of the Statute for that State, unless the State has made a declaration under Art. 12(3).

The third relevant factor is the existence of a link between the crime and a State Party: the two alternatives adopted by the Statute are the territoriality principle (jurisdiction *ratione loci*) and the active personality principle (jurisdiction *ratione personae*) provided for by Art. 12(2).[483]

In addition, Art. 12(3) recognises the possibility for non-State Parties to lodge a declaration accepting the jurisdiction of the Court on a specific situation. It is superfluous distinguishing between States that ratified the Statute after having lodged a declaration under Art. 12(3) (Côte d'Ivoire[484] and Palestine[485]) and States that, despite the acceptance of the Court's jurisdiction, did not ratify the Statute (Ukraine[486]) because, differently from the

[483] *See* below, Chapter II, Section II.

[484] Côte d'Ivoire was the first non-State party invoking Art. 12(3) (*Déclaration de connaissance de la Compétence de la Cour Pénale Internationale*, 18 Apr. 2003). The acceptance of jurisdiction was confirmed twice, respectively on 14 Dec. 2010 and 3 May 2011. The acceptance of the jurisdiction of the Court and the request to investigate into the post-electoral crisis of 2010 led the OTP to request the PTC an authorisation to commence an investigation according to Art. 15. In 2013, Côte d'Ivoire ratified the Rome Statute.

[485] The Government of Palestine lodged an Art. 12(3) declaration on 1 Jan. 2015 (*Declaration of the State of Palestine Accepting the Jurisdiction of the International Criminal Court*, 31 Dec. 2016) the day before its accession to the Rome Statute. This declaration extended the jurisdiction of the Court over crimes committed in the occupied territory, including East Jerusalem, since 13 Jun. 2014, i.e. since the UN GA's recognition of Palestine as a 'non-member observer State'. Palestine had already tried to refer a situation on its own territory in 2009, but the Prosecutor had to close the preliminary examination in few months. In her statement '*The public deserves to know the truth about the ICC's Jurisdiction over Palestine*' (2 Sep. 2014), the Prosecutor explained the proceedings leading the Court to accept the 2015 declaration. Until Palestine was an "observer entity" within the UN bodies, it could not ratify the Statute that is open only to States.The UN Secretary General acting as treaty depositary supports this conclusion. After the adoption of Resolution 67/19 by the UN GA declaring Palestine a 'non-member observer State' (A/Res/67/19, 4 Dec. 2012) Palestine could ratify the Statute in accordance to the 'all States' formula contained in Art. 12(3) and lodge a declaration accepting the jurisdiction by the Court. Therefore, in the light of the non-retroactivity principle, on 16 Feb. 2016, the Prosecutor opened a new preliminary examination in Palestine (ICC-OTP-20150116-PR1083). On the approach adopted by the Prosecutor in this regard, *see* EL ZEIDY M.M., *Ad Hoc Declarations of Acceptance of Jurisdiction: The Palestinian Situation under Scrutiny*, in STAHN C. (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015, p. 179; MARINIELLO T., *Judicial Control over Prosecutorial Discretion at the International Criminal Court*, in *International Criminal Law Review*, 19, 2019, p. 979 at 992-996 who regrets that the OTP did not open an investigation *proprio motu* and rather deferred the matter on the ASP and the UN GA, nevertheless ignoring that the Court did not have jurisdiction until the ratification by Palestine.

[486] The Government of Ukraine lodged a declaration under Art. 12(3) on 17 Apr. 2014, accepting to Court's jurisdiction over alleged crimes committed from 21 Nov. 2013 to 22 Feb. 2014. On 8 Sep. 2015, the Government lodged a second declaration accepting jurisdiction for crimes committed from 20 Feb. onwards. On 25 Apr. the Office formally opened a preliminary examination into the situation and following the second declaration the Prosecutor confirmed the extension of the examination accordingly.

referral, the submission of a declaration does not automatically trigger the jurisdiction of the Court. The declaration only allows the Court to exercise its jurisdiction on a specific situation, but in order to open an investigation, the Prosecutor still needs the authorisation of the PTC under Art. 15.[487]

1.1. The State referral

States are the main actors of international law. Therefore, it is not surprising that States are the first subjects entitled to refer a situation to the Court, even if ICL deals with individual criminal responsibility.

With regards to the triggering mechanism, according to Art. 25 of the 1994 Draft Statute, a complaint could be lodged with the Prosecutor by States parties, with a distinction between the crime of genocide and the other crimes (aggression, serious violation of the laws and customs applicable in armed conflict, crimes against humanity, crimes established under or pursuant to the treaty provisions listed in the Annex, which, having regard to the conduct alleged, constitute exceptionally serious crimes of international concern) on the basis of the so called *inherent jurisdiction* of the Court over the crime of genocide. According to this proposal, the Court had jurisdiction over the crime of genocide without requiring any further acceptance by the States, but it requested that the complainant was a contracting party to the Convention on the Prevention and Punishment of the Crime of Genocide. This twofold system for jurisdiction was later abolished[488] and a unitary model was established.[489]

The commentary to the Draft explained for which reasons only States should have been entitled to lodge a complaint to the Court. First, this system should have encouraged the States to accept the rights and obligations provided for in the Statute and to share the financial burden relating to the operating costs of the Court. Second, the drafters found that only the cooperation of the complainant could lead to a successful prosecution.

Some delegations of the Preparatory Committee were doubtful about the introduction of a general provision allowing every State Party to refer a situation to the Court, and proposed

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[487] On the requirements of the declaration under Article 12 *see* AMBOS, K., *Treatise on International Criminal Law, Vol. III: International Criminal Procedure*, Oxford University Press, 2016, p. 248; SCHABAS W.A., PECORELLA G., *Article 12*, in AMBOS K., *The Rome Statute of the International Criminal Court*, 4th ed., Beck/Hart/Nomos, 2021; STEGMILLER I., *The Pre-Investigation Stage of the ICC*, Dunker & Humbolt, 2011, p. 204 ff.;

[488] *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I, (Proceedings of the Preparatory Committee During March-April and August 1996)*, G.A. 51st Sess., Supp. No. A/51/22, 1996, para. 222, p. 49.

[489] *International Commission of Jurists, 3rd Position Paper*, Aug. 1995, 1st Preparatory Committee meeting 25 Mar.-12 Apr. 1996

to limit this power to the States Parties having an interest in the case: the custodial State, the State where the crime was committed, the State of nationality of the suspect, the State whose nationals were victims and the State which was the target of the crime.[490] This proposal was abandoned in the light of the general interest of the international community in fighting against the impunity of international crimes.

The State referral is ruled at Art. 14 of the Statute. In the drafters' expectations, the rationale of the provision was the same of Art. 33 of the ECHR i.e. to create a system where each State controlled the other States and whose behaviour was under the scrutiny of the other States. The fear of a referral of a situation falling under their jurisdiction should have encouraged the States to prevent the commission of international crimes. But like in the ECHR system,[491] this kind of mechanism is not often used by States, which are more concerned about retaliations in the inter-States relationships and tend to give high consideration to the principle of non-interference.[492] Only almost 20 years after the entry into force of the Stuatute, on 27 September 2018, a group of States Parties (Argentine Republic, Canada, the Republic of Colombia, the Republic of Chile, the Republic of Paraguay and the Republic of Peru) referred to the Court a situation occurring in another State Party, namely the Bolivarian Republic of Venezuela.[493] Even if the Prosecutor had already opened a preliminary examination on crimes committed in Venezuela since April 2017, the referral has a broader content as it concerns crimes against humanity possibly committed since 12 February 2014. But above all it allows the Prosecutor, where appropriate, to directly open an investigation without submitting a request for authorisation under Art. 15 to the PTC.[494] Conversely, most of the situations actually pending before the ICC have been self-referred by State parties.[495]

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[490] *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I, (Proceedings of the Preparatory Committee During March-April and August 1996)*, G.A. 51st Sess., Supp. No. A/51/22, 1996, para. 147, p. 34.

[491] Since 1956 there have been only twenty-nine inter-States applications before the ECtHR. Most of these applications were submitted by the applicants in connection to inter-State conflicts, where the protection of human rights has been used as an instrument to pursue national interests.

[492] *See* SCHABAS W.A., *An Introduction to the International Criminal Court*, Cambridge University Press, 2020, p. 154.

[493] *Referral of the situation in Venezuela under Article 14 of the Rome Statute submitted by the Argentine Republic, Canada, the Republic of Colombia, the Republic of Chile, the Republic of Paraguay and the Republic of Peru*, 27 Sep. 2018. For an overview of the States' practice *see* SCHABAS W.A., *An Introduction to the International Criminal Court*, Cambridge University Press, 2020, pp. 154 ff.

[494] *Referral submitted by the Government of Venezuela*, 12 Feb. 2020.

[495] The situation in Uganda has been referred by the Government of Uganda in January 2004, and the situations in the Democratic Republic of the Congo and in the Central African Republic respectively in April and December of the same year by the governmental authorities of these two States; in July 2012 the Government of Mali asked the OTP to examine the crimes committed in the northern regions Gao, Kidal and Timbuktu, with certain incidents in Bamako and Sévaré in the South; and in May 2014 the Government of the Central African Republic asked the Court to consider other

1.2. The referral by the UN Security Council

The creation of a permanent international criminal court has always been discussed within the context of the UN Since the 1950's proposals, the UN (especially the GA) were always involved in the development of the international criminal justice system. The discussion on the establishment of the Court also included the possible amendment of the UN Charter, including the new court among the UN organs.[496] It is therefore not surprising that one of the topics of the discussion was the relationship between the UN organs and the forthcoming institution.[497] The organ deputed to interact with the Court was the UNSC. Some members of the ILC proposed to confer also to the GA the power to refer a 'matter' to the Court, 'particularly in cases in which the Security Council might be hampered in its actions by veto'.[498] This idea was set aside as the UN Charter does not allow the GA to adopt measures directly affecting States, especially with regard to criminal jurisdiction and it would have been therefore inappropriate to increase its powers through another international treaty.

The link between a permanent international criminal court and the UNSC was not limited to some shared values and the objective of favouring peace and security. When the *Ad Hoc* Committee and the Preparatory Commission were working on the Draft Statute, the UNSC, acting under Chapter VII of the UN Charter, established the *ad hoc* Tribunals for adjudicating the crimes committed in Yugoslavia and Rwanda. Therefore, the *Ad Hoc* Committee also noted that the introduction of the power of referral to the UNSC, not only enhanced the effectiveness of the Court (and maybe its legitimacy), but also obviated the need for other *ad hoc* tribunals.[499]

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violations for war crimes and crimes against humanity committed in the context of renewed violence starting in 2012. The closed preliminary examination related to the facts occurred on the registered vessels of Comoros, Greece and Cambodia was grounded on a self-referral in the light of the applicability of the flag principle, a corollary of the territoriality principle. On 12 Feb. 2020 the OTP received another referral from the Government of Venezuela requesting to investigate alleged crimes against humanity committed by the US on the territory of Venezuela. Even if this referral has the same temporal and special boundaries of the abovementioned referral it has a different subject matter and has been classified by the OTP as an autonomous preliminary examination called 'Venezuela II'. The last self-referral was submitted by the Plurinational State of Bolivia on 9 September 2020.

[496] *Report of the ILC on the work of its forty-sixth session*, 2 May-22 Jul. 1994, G.A., 49th Sess., Supp. No. 10 (A/49/10), p. 32.

[497] KNOTTNERUS A.S., *The Security Council and the International Criminal Court: the Unsolved Puzzle of Article 16*, in *Netherlands International Law Review*, 61, 2014, p. 195 at 196.

[498] Art. 23 Commentary, *Report of the ILC on the work of its forty-sixth session, Draft Statute for an International Criminal Court with commentaries*, 2 May – 22 Jul. 1994, G.A. 49th Sess. Supp. No. 10, A/49/10, 1994.

[499] *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, G.A., 50th Sess. Supp. No. 22, A/50/22, 1995, par. (12), p. 3; para. 55, p. 11.

The reports of the *Ad Hoc* Committee and the Preparatory Committee testify that there was a contrast between the delegations that supported the role of the UNSC in the Statute,[500] and those who thought it would have reduced 'the credibility and moral authority of the court, excessively limit[ed] its role, undermine[d] its independence, impartiality and autonomy; introduce[d] an inappropriate political influence over the functioning of the institution; confer[red] additional powers on the Security Council that were not provided for in the Charter; and enable[ed] the permanent members of the Security Council to exercise a veto with respect to the work of the court'.[501] Doubts about the opportunity to create a connection between the UNSC and the Court arose also in the light of the different nature of the two bodies: political the first one and judicial the second one.[502]

The 1994 Draft Statute included a provision ruling the relationship between the Court and the UNSC. Under Art. 23 of the Draft, the UNSC could refer a 'matter' to the Court. It expressly stated that the UNSC had to act under Chapter VII of the UN Charter. From the commentary to the Draft it emerges that the drafters were aware of the necessity for the UNSC to refer a 'matter', 'that is to say, a situation', rather than a 'case', because in this way the Statute did not increase the powers of the UNSC under Chapter VII of the UN Charter and avoided a direct involvement of the UNSC in the prosecution of individuals. It was deemed appropriate to leave to the Prosecutor the decision on the individuals to prosecute and on the selection of the charges.[503] Furthermore, Art. 23 of the Draft Statute subordinated the possibility for the States to lodge a complaint of or directly related to an act of aggression to the determination of the existence of an act of aggression by the UNSC. The commentary clarified that the determination of the UNSC did not replace the necessity of a complaint by a State, unless the 'matter' was referred directly by the UNSC.[504] According to Art. 25 of the

[500] *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court,* G.A., 50th Sess. Supp. No. 22, A/50/22, 1995, para. 120, p. 27; *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I, (Proceedings of the Preparatory Committee During March-April and August 1996),* G.A. 51st Sess., Supp. No. A/51/22, 1996, para. 131, p. 31.

[501] *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, G.A., 50th Sess. Supp. No. 22, A/50/22, 1995, para. 121, p. 27.

[502] *Ibid*., para. 125, p. 28; *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I, (Proceedings of the Preparatory Committee During March-April and August 1996),* G.A. 51st Sess., Supp. No. A/51/22, 1996, para. 130, 131, p. 31

[503] Art. 23 Commentary, *Report of the ILC on the work of its forty-sixth session, Draft Statute for an International Criminal Court with commentaries*, 2 May – 22 Jul. 1994, G.A. 49th Sess. Supp. No. 10, A/49/10, 1994.

[504] *Ibid*. *See* also the proposal of the US delegation, *Proposed Amendments Pertaining to the Trigger Mechanism*, Apr. 1996.

Draft, in case of referral by the UNSC a complaint was not required for the initiation of an investigation.[505]

The discussion in the following years did not introduce new arguments.[506] One remarkable proposal was presented by the US delegation in 1996 at the Preparatory Committee: while opposing to investigations initiated *proprio motu* by the Prosecutor, the delegation proposed to strengthen the role of the UNSC and to give it the power to refer a matter to the Court also under Chapter VI of the UN Charter, i.e. the chapter ruling the Pacific Settlement of Disputes.[507] On the other side, in 1997 within the discussion on the jurisdiction over the crime of aggression, France proposed to introduce a new paragraph with regards to the preliminary determination by the UNSC of the aggressive nature of the act, stating that '[t]he determination by the Security Council shall not be interpreted as in any way affecting the independence of the Court in its determination of the criminal responsibility of the given person'.[508]

The final version of Art. 13(b) simply states that the UNSC, acting under Chapter VII of the UN Charter may refer a situation to the Court. The main difference with the other triggering mechanisms is that the referral by the UNSC makes the limits to jurisdiction set forth in Art. 12(2) immaterial, and the Court may exercise its jurisdiction also over crimes committed in States non-parties to the Statute. With regards to the crime of aggression, the

[505] Art. 25, *Report of the ILC on the work of its forty-sixth session, Draft Statute for an International Criminal Court with commentaries*, 2 May – 22 Jul. 1994, G.A. 49th Sess. Supp. No. 10, A/49/10, 1994.

[506] *See*, for example, *Ad Hoc Committee on the Establishment of an International Criminal Court, 3-13 Apr. 1995, Comments received pursuant to paragraph 4 of General Assembly Resolution 49/53 on the establishment of an International Criminal Court*, A/AC.244/1/Add.3, 3 Apr. 1995, where the representatives of Libya highlighted that: 'The Libyan Arab Jamahiriya is strongly opposed to the three paragraphs of Article 23, relating to action by the UNSC. It believes that establishing a linkage between the UNSC, which is a political organ by nature and by virtue of its mandate and structure, and the international criminal court, whose establishment is intended to provide a neutral and impartial legal forum, will create enormous problems that will undermine confidence in the court's neutrality and impartiality. Experience in countless cases shows that the resolutions of the UNSC and the positions which the Council has taken on a great many questions can be influenced by the positions and interests of its members. In addition, there is the role played by the veto power enjoyed by the Council's permanent members. As a result of all of these factors, the Council has in the past been unable to deal with numerous situations in which there was blatant aggression. The inclusion of Article 23 in the statute will hardly encourage States to accept the statute of the international criminal court.'; Preparatory Committee on the Establishment of an International Criminal Court, 25 Mar.-12 Apr. 1996, *Proceedings of the Preparatory Committee during the Period 25 March-12 April 1996*, 8 Apr. 1996, A/AC.249/CRP.5.

[507] U.S. Delegation Preparatory Committee on ICC, *"Trigger Mechanism," Second Question The Role of the Security Council and of Complaints by States Articles 23 and 25 April 1996*, Apr. 1996.

[508] *Proposal by France on Article 23*, 8 Aug. 1997, Non-Paper/WG.3/No.15.

jurisdiction of the Court does not necessarily require a referral by the UNSC, even if a referral by a State or an investigation *proprio motu* is subject to additional limitations.[509]

To this date, only two situations have been referred to the Court by the UNSC:[510] the first one on 31 March 2005 through Resolution 1593 (2005) with regards to the situation in Darfur, Sudan, for the alleged crimes of genocide, war crimes and crimes against humanity committed since 1 July 2002; the second one on 26 February 2011 through Resolution 1970 (2011) with regards to the situation in Libya for alleged crimes against humanity and war crimes committed since 15 February 2011. As both these Countries are not States parties, without the referral the Prosecutor would have been prevented from investigating these two situations.

1.3. The *proprio motu* investigation under Article 15 of the Statute

The recognition of an autonomous power of the Prosecutor to initiate an investigation was not included in the 1994 Draft Statute. According to the commentary to the draft, one member of the Commission suggested that the Prosecutor should have been authorised to initiate an investigation even in the absence of a complaint if it appeared that a crime apparently falling within the jurisdiction of the court would not otherwise have been duly investigated. Nevertheless, the majority did not support this proposal because it felt that, at that stage of development of the international legal system, the support of a State or the UNSC to the prosecution was required. Despite this initial decision the discussion was left open.[511]

The discussion about the triggering mechanism during the meeting of the *Ad Hoc* Committee offered the possibility to discuss in depth the idea of a Prosecutor acting *proprio motu*. From the report of the *Ad Hoc* Committee it emerges that some delegations proposed to expand the role of the Prosecutor, allowing her to initiate an investigation even in the absence of a complaint in case of commission of serious crimes under general international law concerning to the international community as a whole.[512] The rationale of conferring an

[509] *See* below, Chapter III, Section I, 2.3. The role of the Security Council with regards to the crime of aggression.

[510] For an overview *see* TRAHAN J., *The Relationship Between the International Criminal Court and the U.N. Security Council: Parameters and Best Practices*, in *Criminal Law Forum*, 24, 2013, p. 417 at 429 ff.

[511] Art. 25 Commentary, *Report of the ILC on the work of its forty-sixth session, Draft Statute for an International Criminal Court with commentaries*, 2 May – 22 Jul. 1994, G.A. 49th Sess. Supp. No. 10, A/49/10, 1994, para. 4.

[512] *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, G.A., 50th Sess. Supp. No. 22, A/50/22, 1995, para. 113, p. 25-26.

autonomous power to the Prosecutor was to enhance her independence,[513] and some delegations found that such a power was consistent with the practice of the *ad hoc* Tribunals.[514] While according to some delegations the absence of a State referral could be interpreted as expression of unwillingness or inability of the State to investigate and prosecute, others tried to reinforce the national primacy pointing out that the absence of a State referral could mirror the insufficiency of the gravity threshold. They furhter harshly criticised the idea of *proprio motu* investigations grounded on complaints lodged by individuals highlighting the risk of politicisation and of waste of the limited resources at the disposal of the Prosecutor.[515]

The same contrasts emerge from the 1996 Report prepared by the Preparatory Committee. Some delegations firmly opposed the introduction of the *proprio motu* investigations[516] while some delegations expressed the view that the Prosecutor should have been allowed to initiate an investigation on the ground of the credible information provided by other sources.[517] Some delegations, even supporting the idea of a Prosecutor who could independently initiate an investigation, suggested to submit the initiation of the *proprio motu* investigation to a judicial authorisation. The objective of the authorisation was overseeing the

[513] *See* also FERNANDEZ DE GURMENDI S.A., *The Role of the Prosecutor*, in POLITI M., NESI G., *The Rome Statute of the International Criminal Court. A challenge to impunity*, Ashgate, 1998, p. 55.

[514] The ICTY itself highlighted the need to include in the draft a provision allowing the Prosecutor to initiate investigations on her own motion. *Ad Hoc* Committee on the Establishment of an International Criminal Court, 3-13 Apr. 1995, *Comments received pursuant to paragraph 4 of General Assembly Resolution 49/53 on the establishment of an International Criminal Court*, *Report of the Secretary-General*, 20 Mar. 1995, A/AC.244/1, *Comments from relevant international organisations*, *ICTY*, para. 10, p. 28. *See* also *Comments of Belarus*, para. 19, p. 5; and *Comments of Swiss*, para. 8, p. 17 stating that: 'Contrary to what was accepted in the case of the Tribunals for the Former Yugoslavia and Rwanda, the prosecutor of the international criminal court cannot act on his own. This means that whoever is chosen to represent the interests of the international community will be deprived of any right of initiative, although that same right will be granted to the UNSC, an eminently political organ. That is a clumsy solution which the Swiss Government has difficulty in endorsing'.

[515] *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, G.A., 50th Sess. Supp. No. 22, A/50/22, 1995, para. 136, p. 30.

[516] *See*, for example, US Delegation Preparatory Committee on ICC, *"Trigger Mechanism," Second Question The Role of the Security Council and of Complaints by States Articles 23 and 25 Apr. 1996*, Apr. 1996: 'Further, we cannot accept the proposition that an independent prosecutor—unconstrained by any other entity—would at all times act in a political void with no political or personal agenda when initiating a case before the Court. We doubt many governments—when faced with ratifying the ICC treaty—would agree to empower the prosecutor with essentially unfettered power to launch any case he or she may wish. Delegations calling for the Court's inherent jurisdiction over all of the core crimes have made it clear that this means automatic acceptance of jurisdiction when one joins the statute, but we question whether they are advocating an independent prosecutor with the power to initiate cases beyond what the ILC draft statute currently provides. Even if the state consent requirements of Article 21 are eliminated, we would hope that delegations would still favour in some form the requirements of Article 25 for the lodging of a complaint'.

[517] *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I, (Proceedings of the Preparatory Committee During March-April and August 1996)*, G.A. 51st Sess., Supp. No. A/51/22, 1996, para. 221, p. 49.

existence of sufficient and verifiable information received from any reliable source.[518] This proposal aimed at avoiding abuse of process by the Prosecutor and the other triggering parties.[519] According to the report:

> 'in case a complaint was lodged by a State or an individual or initiated by the Prosecutor, the Prosecutor would first have to satisfy himself or herself that a *prima facie* case against an individual obtained and the requirements of admissibility has been satisfied. The Prosecutor would then have to present the matter to a Chamber of the Court (which would not ultimately try the case) and inform all interested States so that they would have the opportunity to participate in the proceedings. In this respect the indictment chamber was considered as the appropriate chamber. The chamber, upon a hearing, would decide whether the matter should be pursued by the Prosecutor or the case should be dropped'.[520]

In the report of the working group on complementarity and triggering mechanism, Art. 25*bis* was entirely dedicated to the possibility/duty of the Prosecutor to 'initiate investigations *ex officio*/*proprio motu*, on the basis of information obtained/he may seek from any source, in particular from Governments, UN organs [and intergovernmental and non-governmental organizations]'.[521] Allowing non-State actors to refer a situation to the Prosecutor was therefore an alternative on the table. Even if additional details on the various proposals concerning the oversight of a judicial organ over the initiation of the investigation *proprio motu* will be provided in Chapter III, it is worth mentioning that the *impasse* during the works of the Preparatory Committee was solved by the proposal submitted by Argentina and Germany.[522] This proposal allowed the Prosecutor to initiate an investigation *proprio motu*

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[518] *Ibid*.

[519] It means States and individuals eventually lodging a complaint to the Prosecutor. In the draft there still was a distinction between the lodge of a complaint, and the referral of the situation by the UNSC, that under Art. 25 did not need any complaint.

[520] *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume I, (Proceedings of the Preparatory Committee During March-April and August 1996)*, G.A. 51st Sess., Supp. No. A/51/22, 1996, para. 150, p. 35.

[521] *Decision Taken by the Preparatory Committee at its Session held in New York 4 to 15 August 1997*, A/AC.249/1997/L.8/Rev.1, 1997, *Annex I Report of the Working Group on Complementarity and the Trigger Mechanism*, pp. 9-10; *Annex II Report of the Working Group on Procedural Matters*, p. 14.

[522] *Proposal submitted by Argentina and Germany*, UN Doc. A/AC.249/1998/W.G.4/DP.35, 25 Mar. 1998. The text of the proposal was the following: '1. Upon receipt of information relating to the commission of a crime under Article 5, submitted by victims, associations on their behalf, regional or international organizations or any other reliable source, the Prosecutor shall analyse the seriousness of the information. For this purpose, he or she may seek additional information from States, organs of the United Nations, non-governmental organizations, victims or their representatives or other sources that he or she deems appropriate and may receive written or oral testimony at the seat of the Court. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the PTC a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the PTC, in accordance with the Rules. 2. If the Pre-PTC, upon examination of the request and the accompanying material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, having regard to Article 11, it shall authorize the commencement of the investigation. This

only with the authorisation of the PTC. The rationale was on one side to allow 'victims, associations on their behalf, regional or international organizations or any other reliable source' to stimulate the intervention of the Prosecutor, and on the other side to ensure the judicial backing of the Court in the absence of the political backing of a State or the UNSC, the Prosecutor's action had judicial backing of the Court.[523] These limitations still do not find the support of sceptical States such as the US, whose delegation noted that the Chamber's assessment allowed a control over the legal foundation of the Prosecutor's request and not of its wisdom.[524]

Eventually in Rome the drafters approved the actual version of Art. 13(c) of the Statute expressly recognising the Prosecutor the power to initiate an investigation *proprio motu* in accordance with Art. 15. In order to reply to those States harshly opposing to the *proprio motu* investigations, it has been noted[525] that the introduction of the judicial authorisation was considered by most of the delegations as a sufficient system for check and balances and that the Rome Statute is grounded on the principle of complementarity. Thus, the States may primarily investigate and prosecute international crimes. Consequently, the power of initiating *proprio motu* investigations is first of all limited by the States' action *vis-à-vis* the crimes.

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shall be without prejudice to subsequent determinations by the Court as to jurisdiction and admissibility of the case pursuant to Article 12. The refusal of the PTC to authorize the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence pertaining to the same situation. 3. If, after the preliminary examination referred to in (1), 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 in accordance with (1) pertaining to the same situation in the light of new facts or evidence'.

[523] FERNANDEZ DE GURMENDI S.A., *The Role of the Prosecutor*, in POLITI M., NESI G., *The Rome Statute of the International Criminal Court. A challenge to impunity*, Ashgate, 1998, p. 55 at 56. *See* also HALL C.K., *The Powers and Role of the Prosecutor of the International Criminal Court in the global Fight Against Impunity*, in *Leiden Journal of International Law*, 17, 1, p. 121 at 124. Turone points out the paradox caused by the principle of sovereignty, which introduced a control over the independence of the Prosecutor when acting *proprio motu* rather than when acting under State referral. TURONE G., *Powers and Duties of the Prosecutor*, in CASSESE A., GAETA P., JONES J.R.W.D., *The Rome Statute of the International Criminal Court. A Commentary, Vol. 2*, Oxford University Press, 2002, p. 1159. In the opposite sense Schabas, who argues that the Prosecutor adopts political decisions without the adequate competences in a non-transparent way even when acting *proprio motu* and accuses the Prosecutor of slowing the performance of the Court because of lack of external political guidance. SCHABAS W.A., *Victor's Justice: Selecting Situations at the International Criminal Court*, in *John Marshall Law Review*, 43, 3, 2010, p. 535 at 549; 585-586.

[524] *See Statements of the United States Delegation Expressing Concerns Regarding the Proposal for a Proprio Motu Prosecutor*. *The Concerns of the United States Regarding the Proposal for a Proprio Motu Prosecutor*, 22 Jun. 1998. *See* MARSTON DANNER A., *Enhancing the legitimacy and accountability of prosecutorial discretion at the International Criminal Court*, in *American Journal of International Law*, 97, 3, 2003, p. 510 at 520, p. 4.

[525] FERNANDEZ DE GURMENDI S.A., *The Role of the Prosecutor*, in POLITI M., NESI G., *The Rome Statute of the International Criminal Court. A challenge to impunity*, Ashgate, 1998, p. 55 at 57.

Although the Prosecutor of the ICTY and the ICTR could initiate investigations *ex-officio* the *ad hoc* Tribunals were created directly by the UNSC and their jurisdiction was limited in space and in time. Even then, when the Prosecutor of the ICTY announced the possible investigation of crimes committed by the NATO forces during the bombing campaign against the Republic of Yugoslavia, the political reaction was strong and may have induced her successor to focus on other crimes.[526] It is therefore not surprising that, since the ICC system significantly extended the Prosecutor's action some States maintained a sceptical attitude towards the new institution.[527]

1.3.1. The content of Article 15 of the Statute

The TC II refers to Art. 15[528] 'one of the most delicate provisions of the Statute'.[529] First of all, it subordinates the initiation of the investigations *proprio motu* to the assessment of the seriousness of the information received. The sources of the information are generally agencies or organs of the UN, States, intergovernmental or NGOs, and other reliable sources. Art. 15(2) allows the Prosecutor to look for additional information from the abovementioned sources. If the Prosecutor concludes that the information is serious, she has to decide whether there is reasonable basis to proceed with an investigation or not. Rule 48 RPE clearly states that in determining whether there is reasonable basis to proceed with an investigation under Art. 15(3) the Prosecutor shall consider the factors set out in Art. 53(1)(a), (b) and (c) (respectively jurisdiction, admissibility and the interests of justice clause). If all the requirements of Art. 53(1) are fulfilled, the Prosecutor submits a request for authorization to open an investigation to the PTC, that, if 'upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case'.[530]

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[526] *See* below, Chapter III, Section II.

[527] *See* BERGSMO M., KRUGER P., BEKOU O., *Article 53*, in AMBOS K., *The Rome Statute of the International Criminal Court*, 4th ed., Beck/Hart/Nomos, 2021, mn. 4.

[528] *See* BERGSMO, M., PEJIĆ J., ZHU D., *Article 15*, AMBOS K., *The Rome Statute of the International Criminal Court*, 4th ed., Beck/Hart/Nomos, 2021; NIGNAN B., *Article 15*, in FERNANDEZ J., PACREAU X., *Statut de Rome de la Cour pénale internationale. Commentaire article par article*, Pedone, 2012, pp. 644 ff.; SCHABAS W.A., *Article 15*, SCHABAS W.A., *The International Criminal Court: a commentary on the Rome Statute*, 2nd ed., Oxford University Press, 2016.

[529] ICC, PTC II, *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 Mar. 2010, ICC-01-09-19, para.17.

[530] *See* below, Chapter III, Section II, 2. The authorisation for the initiation of an investigation under Article 15.

The content of the request for authorisation is established by the Reg. 49 RegC. It requires first of all 'a reference to the crimes which the Prosecutor believes have been or are being committed and a statement of the facts being alleged to provide the reasonable basis to believe that those crimes have been or are being committed'. The minimum statement shall include: (a) the places of the alleged commission of the crimes, (b) the time or time period of the alleged commission of the crimes; and (c) the persons involved, if identified, or a description of the persons or groups of persons involved. In second place, the request must contain a declaration of the Prosecutor with reasons that the listed crimes fall within the jurisdiction of the Court. Further procedural details are included in Rule 50 RPE, in particular with regards to the notice and participation of victims.

The procedure under Art. 15 of the Statute triggered the jurisdiction of the Court in five situations (Kenya, Côte d'Ivoire, Georgia and Burundi, in Bangladesh/Myanmar). The Kenyan situation is the first one in which the Prosecutor requested[531] and obtained[532] an authorisation from the PTC to initiate an investigation pursuant to Art. 15. In this decision the PTC II analysed for the first time Art. 53. The requests for authorisation to investigate in Georgia, Burundi and Afghanistan were only based on communications received under Art. 15 and concerned States Parties to the Rome Statute at the time of the alleged crimes (Burundi withdraw after the Prosecutor's decision to open a preliminary examination).

The situation in Côte d'Ivoire and in Bangladesh/Myanmar are more peculiar. With regards to the Ivorian situation, the Prosecutor intervened following a declaration of acceptance of jurisdiction under Art. 12(3), therefore with the explicit support of the State.[533] In 2003 Côte d'Ivoire, that at that time was not a State Party, accepted the jurisdiction of the Court '*aux fins d'identifier, de pursuivre, de juger les auteurs et complices des actes commis sur le territoireivoriendepuis les évènements du 19 September 2002*'[534] At that time the President of the Republic was Laurent Gbagbo, who was later brought in front of the Court for the events that took place during the post-electoral crisis between November 2010 and April 2011. The following President Alassane Ouattara reconfirmed the support of Côte d'Ivoire to the Court in 2011. At first, even if the Prosecutor's request to open a *proprio motu*

[531] ICC, OTP, *Situation in the Republic of Kenya*, *Request for authorisation of an investigation pursuant to Article 15*, 26 Nov. 2009, ICC-01/09-3.

[532] ICC, PTC II, *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 Mar. 2010, ICC-01-09-19.

[533] *See* above fn. 484.

[534] *Dèclaration de reconnaissance de la Compètence de la Cour Pénale Internationale*, 18 Apr. 2003.

investigation included crimes committed since 2002,[535] the PTC III found by majority,[536] Judge Fernández de Gurmendi dissenting,[537] that the Prosecutor had not provided with sufficient information on crimes committed between 2002 and 2010 and limited the authorisation to crimes committed during the post-electoral crisis and possible other crimes that could have been committed *after* the authorisation within the context of the same situation. The time limit was later extended to 2002[538] when the Prosecutor provided the Chamber with additional information.[539] Despite this extension, the focus of the situation remained the events occurred between 2010 and 2011. The ratification of the Rome Statute in 2013 did not alter the procedure that had led to the opening of the investigation.

The situation in Bangladesh/Myanmar is peculiar in the light of the Prosecutor's request for a preliminary ruling on the jurisdiction of the Court which will be analysed in Chapter III.[540]

1.3.2. The relationship between Article 15 and Article 53 of the Statute

In order to reach a conclusion with regards to the effective mandatory or discretionary nature and possibly to the extent of this discretion with regards to the initiation of the investigations it is necessary to analyse the legal requirements set forth in Art. 53(1) of the Statute and the extent of the judicial control over the activity of the Prosecutor. Consequently, a proper determination of the possible differences between the initiation of the investigations under Art. 15 and in case of referral is possible only after having conducted an analysis of these aspects. Nevertheless, there are two main positions with regards to the use of the verb 'may' at Art. 15 as opposed to the use of the verb 'shall' at Art. 53.

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[535] ICC, OTP, *Situation in Côte d'Ivoire, Request for an authorization of an investigation pursuant to article 15*, 23 Jun. 2011, ICC-02/11-3.

[536] ICC, PTC III, *Situation in Côte d'Ivoire, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation in the Republic of Côte d'Ivoire*, 3 Oct. 2011, ICC-02/11-14.

[537] ICC, PTC III, *Situation in Côte d'Ivoire, Judge Fernández de Gurmendi's separate and partially dissenting opinion to the Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation in the Republic of Côte d'Ivoire*, annexed to the *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation in the Republic of Côte d'Ivoire*, 3 Oct. 2011, ICC-02/11-15.

[538] ICC, PTC II, *Situation in Côte d'Ivoire, Decision on the "Prosecution's provision of further information regarding potentially relevant crimes committed between 2002 and 2010*, 22 Feb. 2012, ICC-02/11-36. The Court concluded that the alleged crimes committed in late 2010 were the continuation of the ongoing political crisis and the culmination of a long power struggle in Côte d'Ivoire (para. 12) and determined there were reasonable basis to believe that crimes within the jurisdiction of the Court were committed in the period following the coup attempt in Sep. 2002.

[539] ICC, OTP, *Situation in Côte d'Ivoire, Prosecution's provision of further information regarding potentially relevant crimes committed between 2002 and 2010*, 3 Nov. 2011, ICC-02/11-25.

[540] *See* below, Chapter III, Section II, 1. The control during the preliminary examination.

One may argue that interpreting Art. 53 as recognising the duty for the Prosecutor to initiate an investigation unless there is no reasonable basis to proceed is incompatible with the language of Art. 15 stating that the Prosecutor *may* initiate investigation *proprio motu* under the caveat that reasonable basis to proceed exist ("*if* the Prosecutor concludes ..."). The discretion apparently given to the Prosecutor in case of *proprio motu* investigations seems irreconcilable with the mandatory approach of Art. 53(1).

According to some scholars the mandatory approach under Art. 15 enables any individual or organisation to trigger the Court's jurisdiction and this result runs counter to the Statute's careful structuring of triggering mechanisms.[541] Following this interpretation, Art. 15 is *lex specials*, and therefore the degree of discretion granted to the Prosecutor at the preliminary examination stage is higher than that in case of referral.[542] Therefore, the wording of Art. 15(1) ('the prosecutor *may* initiate investigation *proprio motu*' – *emphasis added*) would prevail on the wording of Art. 53(1) ('the Prosecutor *shall* initiate an investigation' – *emphasis added*). This interpretation would be confirmed by Rule 48 RPE stating that: 'in determining whether there is a reasonable basis to proceed with an investigation under article 15 paragraph 3, the Prosecutor shall consider *the factors set out in article 53, paragraphs 1 (a) to (c)*' (*emphasis added*). As mentioned above,[543] The reference to 'the factors set out in article 53, paragraphs 1 (a) to (c)' may be interpreted as allowing only the applicability of those factors to Art. 15 investigations, excluding the applicability of the *chapeau* of Art. 53(1).[544] Similarly, in the situation in Afghanistan, the AC, Judge Ibáñez Carranza dissenting,[545] states that Art. 53 is applicable only in case of referral, while Art. 15 provides for an autonomous

[541] DEGUZMAN M.M., SCHABAS W.A., I*nitiation of investigations and Selection of Cases*, in SLUITER G., FRIMAN H., LINTON S., VASILIEV S., ZAPPALÀ S. (eds), *International Criminal Procedure*, Oxford University Press, 2013, pp. 143-144; DEGUZMAN M.M., *Gravity and Legitimacy of the International Criminal Court*, in *Fordham International Law Journal*, 32, 5, 2008, p. 1400 at 1410.

[542] DEGUZMAN M.M., *Gravity and Legitimacy of the International Criminal Court*, in *Fordham International Law Journal*, 32, 5, 2008, p. 1400 at 1411; OLASOLO H., *The Triggering Procedure of the International Criminal Court*, 2005 70-71. *See* also SCHABAS W.A., *An Introduction to the International Criminal Court*, Cambridge University Press, 2020, p. 255, arguing that the Prosecutor shall proceed 'only after she has decided to do so after conducting the preliminary examination, whatever its origin'.

[543] *See* above, Section III, 3.3 The initiation of the investigations: discretionary or mandatory? Article 53 of the Statute: an overview.

[544] *Ibid.*

[545] ICC, AC, *Situation in the Islamic Republic of Afghanistan*, *Separate opinion of Judge Luz del Carmen Ibáñez Carranza to the Judgment on the appeal against the decision of Pre-Trial Chamber II on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan*, annexed to *Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan*, 5 Mar. 2020, ICC-02/17-138-Anx-Corr OA4, para. 2.

procedure in case of *proprio motu* investigations where the Prosecutor enjoys discretionary powers.[546]

The majority of scholars believes instead that Art. 53 applies irrespective of the mechanism triggering the jurisdiction of the Court, including Art. 15.[547] Authoritative doctrine even tries to reconcile the mandatory language of Art. 53(1) and the discretionary language of Art. 15(1) noting that the expression 'initiation of an investigation' has different meanings in the two provisions.[548] According to this position, Art. 15 refers to the initiation of a preliminary examination rather than the proper investigation, because the formal opening of an investigation is subject to the authorisation of the PTC. Therefore, the discretionary power would cover these pre-investigative acts, while the proper initiation of the investigation should be covered by Art. 53, which applies irrespective of the mechanism triggering the Court's jurisdiction. Furthermore, Art. 15 states that the Prosecutor *shall* analyse the seriousness of the information, *shall* inform the providers of the information and *shall* request for an authorisation if she concludes that there is a reasonable basis to proceed with an investigation.[549] Even the case law preceeding the abovementioned decision of the AC[550] has always considered Art. 53 applicable irrespective of the mechanism triggering the Court's jurisdiction, including when the Prosecutor decides to initiate an investigation *proprio motu*. The majority of PTC II in the decision authorising an investigation in the Kenya situation

[546] ICC, AC, *Situation in the Islamic Republic of Afghanistan*, *Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan*, 5 Mar. 2020, ICC-02/17-138 OA4, paras 26-27.

[547] BITTI G., *Article 53*, in FERNANDEZ J., PACREAU X., *Statut de Rome de la Cour pénale internationale. Commentaire article par article*, Pedone, 2012, p. 1173 at 1178; TURONE G., *Powers and Duties of the Prosecutor*, in CASSESE A., GAETA P., JONES J.R.W.D., *The Rome Statute of the International Criminal Court. A Commentary, Vol. 2*, Oxford University Press, 2002, p. 1147-1151; STEGMILLER I., *The Pre-Investigation Stage of the ICC*, Dunker & Humbolt, 2011, p. 209. This conclusion is supported by the fact that the applicability of Article 12(2) and Article 18(1) is expressly excluded in case of referral by the UNSC and that the drafters of the Statute have expressly included different procedural mechanisms with regards to the crime of aggression, therefore departing from a common application of the provisions when deemed necessary.

[548] BERGSMO M., KRUGER P., BEKOU O., *Article 53*, in AMBOS K., *The Rome Statute of the International Criminal Court*, 4th ed., Beck/Hart/Nomos, 2021, mn 9; STEGMILLER I., *The Pre-Investigation Stage of the ICC*, Dunker & Humbolt, 2011, p. 187, noting that the Prosecutor may not start full investigations, but only 'pre-investigations'; STEGMILLER I., *Article 15*, in KLAMBERG M. (eds.), *Commentary on the Law of the International Criminal Court*, TOAEP, 2017, p. 182 at 184.

[549] DEGUZMAN M.M., *Gravity and Legitimacy of the International Criminal Court*, in *Fordham International Law Journal*, 32, 5, 2008, p. 1400 at 1410; STEGMILLER I., *The Pre-Investigation Stage of the ICC*, Dunker & Humbolt, 2011, p. 187; STEGMILLER I., *Article 15*, in KLAMBERG M. (eds.), *Commentary on the Law of the International Criminal Court*, TOAEP, 2017, p. 182 at 184-185. *See* also ICC, AC, *Situation in the Islamic Republic of Afghanistan*, *Separate opinion of Judge Luz del Carmen Ibáñez Carranza to the Judgment on the appeal against the decision of Pre-Trial Chamber II on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan*, annexed to *Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan*, 5 Mar. 2020, ICC-02/17-138-Anx-Corr OA4, para. 7(vi).

[550] *See* in detail below, Chapter III, Section II, 2.1. The Pre-Trial Chamber's review.

under Art. 15 reaches the conclusion that the 'reasonable basis standard' must be interpreted in the same way both in Arts 15 and 53. This inference would be supported by a careful reading of the *travaux préparatoires*. The interpretation offered by the PTC II seems appropriate in the light of the lack of any exception provided for in Art. 53 and in the light of the wording of Rule 48 RPE stating that '[i]n determining whether there is a reasonable basis to proceed with an investigation under article 15, paragraph 3, the Prosecutor shall consider the factors set out in article 53, paragraph 1 (a) to (c)'. Consequently, the only difference in case of investigation *proprio motu* is the existence of the intermediary request for authorization to the PTC following the evaluation of the information and the assessment of the reasonable basis to initiate an investigation.[551]

The OTP itself seems to join this interpretation as Reg. 29(1) RegOTP does not distinguish between the procedure to be applied under Art. 53 and under Art. 15 as in both cases the Prosecutor 'shall produce an internal report analysing the seriousness of the information and considering the factors set out in article 53, paragraph 1 (a) to (c)'. The case-law of all the PTCs which will be further analysed in Chapter III endorses this interpretation.

The preference for the mandatory approach does not affect the need for the PTC's authorisation. According to the PTC II, before the leaving of the authorisation the jurisdiction of the Court 'cannot be considered as actually "triggered".[552] The submission of the Prosecutor's request is the first act 'triggering the triggering mechanism'. Until the submission originating the Chamber's authorisation, the Prosecutor does not initiate an investigation, but performs pre-investigative acts which may lead her to submit the request. This applies irrespective of the understanding of the role of the PTC in the release of the authorisation, even if the judgement of the AC in the *Afghanistan situation* significantly undermines the meaning of the judicial control.[553]

[551] *See* MELONI C., *The ICC preliminary examination of the Flotilla situation: An opportunity to contextualise gravity*, in *Questions of International Law*, 30 Nov. 2016.

[552] ICC, PTC II, *Situation in the Islamic Republic of Afghanistan, Decision on the Prosecutor and Victims' Requests for Leave to Appeal the 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan'*, 17 Sep. 2019, ICC-02/17-62, para. 19.

[553] ICC, AC, *Situation in the Islamic Republic of Afghanistan, Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan*, 5 Mar. 2020, ICC-02/17-138 OA4.

2. The distinction between situation and case

In order to fully understand the provisions applicable at the stage of the initiation of the investigation and prosecution, it is necessary to distinguish between the meaning of 'situation' and 'case'. The Statute and the RPE use both these terms, sometimes appropriately, sometimes not.

2.1. Historical background

Art. 25 of the 1994 Draft Statute described the content of the complaint that States could lodge to the OTP. It generally referred to the allegation that 'a crime appear[ed] to have been committed' and added that it should specify 'the circumstances of the crime and the identity and whereabouts of any suspect' as far as possible. It also required to accompany the complaint with the available evidence.

The commentary to Art. 25 of the 1994 Draft Statute explained that the

> 'complaint must be accompanied by supporting documentation [...]. This does not suggest that the complaint must itself establish a *prima facie* case, but rather that it should include sufficient information and supporting documentation to demonstrate that a crime within the jurisdiction of the court has apparently been committed, and to provide a starting point for the investigation'.[554]

The commentary therefore distinguished between 'crime' and 'case' suggesting that the former was only a component of the latter. Stating that apparent jurisdiction *ratione materiae* was only the starting point for the investigation, the commentary inferred that the object of the investigation had to be broader.

Art. 23 of the Draft Statute ruling the action by the UNSC was more specific in distinguishing between situation and case. It gave the UNSC the power to refer 'a matter' to the Prosecutor, and the commentary clarified that 'the Security Council would not normally refer to the court a "case" in the sense of an allegation against named individuals' but 'a "matter", that is to say, a situation to which Chapter VII of the Charter applies. It would then be the responsibility of the Prosecutor to determine which individuals should be charged with crimes referred to in Article 20 in relation to that matter'[555]. Thus, according to this comment,

[554] Art. 25 Commentary, *Report of the ILC on the work of its forty-sixth session, Draft Statute for an International Criminal Court with commentaries*, 2 May – 22 Jul. 1994, G.A. 49th Sess. Supp. No. 10, A/49/10, 1994, para. 5.

[555] Art. 23 Commentary, *Report of the ILC on the work of its forty-sixth session, Draft Statute for an International Criminal Court with commentaries*, 2 May – 22 Jul. 1994, G.A. 49th Sess. Supp. No. 10, A/49/10, 1994, para. 2.

the matter (or situation) was the broad context, possibly including more than one case. It also emerges that, contrary to the matter (or situation), the case was characterised by the identification of named individuals. In clarifying that it is responsibility of the Prosecutor to identify the relevant individuals and the relevant crimes, the comment seems to suggest that these two elements are relevant component of a case.

The report of the *Ad Hoc* Committee shows that some delegations found that Art. 23 of the Draft Statute had to be rewritten because it was too vague and only the commentary made clear the meaning of 'matter'.[556]

During the works of the Preparatory Committee, it was proposed to replace the word 'matter' in Art. 23 of the Draft Statute both with 'situation' and 'case'. The proposals suggesting to use the word 'situation' (sometimes also admitting the word 'dispute' as alternative) linked the object of the referral to the threat to or breach of the peace or an act of aggression. The proposals suggesting to use the word 'case' were instead always accompanied by an additional sentence requiring the complaint to specify as far as possible the circumstances of the alleged crime and the supporting documentation.[557] Even within the Committee some delegations considered the world 'situation' too broad,[558] while others noted that the possibility for the UNSC to refer a 'case' was inappropriate in the light of the political nature of the UNSC's decisions and the negative impact on the credibility of the Court.[559]

The discussion during the preparatory works reveals that the drafters were aware of the different implications coming from the use of these two terms. It also appears that the drafters gave to the word situation a broader content possibly encompassing more crimes and not focused on single individuals. On the contrary the word case was used in order to link the

[556] *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, G.A., 50th Sess. Supp. No. 22, A/50/22, 1995, para. 126, p. 29.

[557] Art. 23, *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. II, (Compilation of Proposals)*, G.A. 51st Sess., Supp. No. 22A, A/51/22, 1996, pp. 75-76.

[558] *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I, (Proceedings of the Preparatory Committee During March-April and August 1996)*, G.A. 51st Sess., Supp. No. A/51/22, 1996, para. 136, p. 32.

[559] *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I, (Proceedings of the Preparatory Committee During March-April and August 1996)*, G.A. 51st Sess., Supp. No. A/51/22, 1996, par. (146), p. 34, 'Some delegations were uneasy with a regime that allowed any State party to select individual suspects and lodge complaints with the Prosecutor with respect to them, for this could encourage politicization of the complaint procedure. Instead, according to these delegations, States parties should be empowered to refer "situations" to the Prosecutor in a manner similar to the way provided for the UNSC in Article 23(1). Once a situation was referred to the Prosecutor, it was noted, he or she could initiate a case against an individual. It was suggested, however, that in certain circumstances a referral of a situation to the Prosecutor might point to particular individuals as likely targets for investigation'.

crimes to one or more specific individuals. Nevertheless, the use of the words 'case' and 'situation' within the Statute and the RPE is not always coherent.

2.2. 'Situation' and 'case' in the statutory framework

The word 'situation' appears in the Statute at Arts 8(2)(d) and (f), 13, 14, 15, 15*bis*, 18 and 19, and in the RPE at Rule 44, 45, 49, 59, 92, 105 and 106. The word 'case' appears at Articles 15, 17, 18, 19, 31, 39, 41, 42, 53, 64, 65, 69, 89, 90 and 94 and at Rule 16, 21, 24, 31, 34, 39, 40, 51, 58, 59, 60, 72, 81, 92, 107, 121, 130, 132, 135, 144, 181, 185, 186, 191, 193, 214. Some Reg. of the RegC. use the words 'situation' and 'case' as well.

With regards to the provisions using the word 'situation', basically all of them follow the scheme traced during the preparatory works using it to refer to the context of the crimes, without reference to the individuals allegedly responsible. The situation stage seems also to correspond to the investigation stage until the issue of a warrant of arrest or a summons to appear.

Art. 8(2)(d) and (f) states that the violations of law applicable in armed conflict of international character also apply in armed conflict of non-international character, but not 'to situations of internal disturbances and tensions such as riots, isolated and sporadic acts of violence or other acts of similar nature'. Even if the word situation may here also have a non-technical meaning, it is nevertheless used in order to describe the context in which the potential crimes are committed.

Arts 13 and 14 of the Statute and Rule 45 RPE are probably the most relevant provisions, because they make it clear that the object of a referral is a situation. Moreover, according to Art. 14(1) the object of the investigation commencing with the referral is to identify one or more specific persons that could be charged with the commissions of the crimes. Therefore, it is possible to infer that the suspects are not the object of the referral. Also Rule 44(2) RPE providing additional details on the procedure for the submission of a declaration of acceptance of the jurisdiction under Art. 12 refers to 'crimes [...] of relevance to the situation'. In addition, Reg. 45(1) RegC states that the Prosecutor shall inform the Presidency in writing as soon as a situation has been referred to the Prosecutor by a State Party under Art. 14 or by the UNSC under Art. 13(b); and shall provide the Presidency with any other information that may facilitate the timely assignment of a situation to a PTC, including, in particular, the intention of the Prosecutor to submit a request under Art. 15(3). Reg. 46 rules instead the assignation of the situation to a PTC immediately after.

Art. 15(5) and (6) state respectively that if the PTC rejects the Prosecutor's request to open an investigation *proprio motu* or the Prosecutor finds that the information collected during the preliminary examination does not constitute reasonable basis for an investigation, the Prosecutor is not prevented from presenting a new request based on 'new facts or evidence regarding the same situation' or considering further information 'regarding the same situation'. Rule 49 RPE deals with the notice of a decision adopted under Art. 15(6) thus it uses the same wording of the statutory provision. From these provisions it emerges that the object of the preliminary examination of the Prosecutor acting *proprio motu* on the basis of the information received to her Office is a situation. The same applies to Art. 15*bis*(6) stating that when the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression referred to her Office by a State or acting *proprio motu*, she shall notify the UNSC 'of the situation before the Court'.

Most of the time the word 'case' is instead used to refer to stages of the proceedings where a suspect or an accused has already been identified: Art. 31(2) rules the applicability of grounds for excluding criminal responsibility; Art. 64(3) refers to the 'assignment of a case for trial'; Art. 65, rules the proceedings on the admission of guilt; Art. 69 (and Rule 72 RPE) refers to the submission of 'evidence relevant to the case'; Art. 89 and Art. 90 refer to the admissibility of a case when a sought for surrender brings a challenge on the basis of the *ne bis in idem* principle in front of a national court; or when there are competing requests for surrender from the Court and other States; Rule 81 RPE, excludes from the duty of disclosure some documents 'prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case'; Rule 121 relates to the organisation of the status conference preceding the confirmation of the charges; Rule 135 is applicable when the accused is unfit to stand trial.

Some provisions use the word case directly in connection with the prosecution. For example, Rule 24(2)(b) includes among the serious breach of duty the situation where a person 'repeatedly causes unwarranted delay in the initiation, prosecution or trial of cases, or in the exercise of judicial powers'; Rule 130 states that after the confirmation of the charges the Presidency 'constitutes a Trial Chamber and refers the case to it'; Rule 132*bis* prevents the judge responsible for the preparation of the trial from rendering decisions touching upon 'the central legal and factual issues in the case'. Reg. 57, applicable in case of Appeals against conviction, acquittals, sentences and reparation orders, requests that the notice of appeal contains 'the name and number of the case' (the same applies to Reg. 61 and Reg. 66). Other relevant regulations are Reg. 63(4), referring to 'a convicted person in a given case'; and Reg.

101, stating that 'the Chamber seized of the case' is responsible for restricting access to news and contacts to the detained person.

Moreover, the word 'case' is also used in many procedural provisions applicable at the trial stage or at the pre-trial stage whose function is often safeguarding the rights of the accused. For example, Art. 39(3)(a) states that judges assigned to Trial or Pre-Trial Divisions shall serve the Division for three years 'and thereafter until the completion of any case the hearing of which has already commenced in the division concerned'; Art. 41(1) (and Rule 34) rules the excusing and disqualification of Judges[560] 'if, *inter alia*, that judge has previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted'; Art. 42(6) authorises the Presidency to excuse the Prosecutor or the Deputy Prosecutor 'from acting in a particular case' and Art. 42(7) rules the disqualification of the Prosecutor or the Deputy Prosecutor; Rule 21(5) empowers 'the Chamber dealing with the case' to make an order of contribution to recover the cost of providing counsel;[561] Rule 31 states that the removal from office causes the cease to form part of the Court 'including for the unfinished cases'; Rule 41 states that the Presidency shall authorise the use of an official language of the Court as a working language when that language 'is understood and spoken by the majority of those involved in a case before the Court'.[562]

As anticipated, there are nevertheless some provisions that appear to be incoherent in their use of the concept of 'situation' and 'case'. More precisely, some provisions use the word 'case' when it would be more appropriate to use the word 'situation' because the stage of the proceedings does not allow to properly identify a 'case'. Arts 17, 18 and 19 are probably the most problematic provisions in this sense. They rule the assessment of admissibility and are respectively entitled 'Issues of admissibility', 'Preliminary rulings regarding admissibility' and 'Challenges to the jurisdiction of the Court or the admissibility of the case'. In Arts 18 and 19 the word 'situation' is only used in order to reaffirm that the object of a referral is a situation (the same applies to Rule 59, 105 and 106). On the other hand, these two provisions, as well as

[560] Here the word 'case' may be given a broader and non-technical meaning.

[561] If it would be possible to apply Art. 42(6) and Rule 21(5) RPE at the situation stage the Prosecutor could be prevented from submitting a request under Article 15 for the initiation of an investigation: Rule 11 RPE expressly states that the powers of the Prosecutor under Arts 15 and 53 of the Statute are inherent powers of the Prosecutor that cannot be delegated.

[562] *See* also Regulation 40(6) RegC, stating that: 'The Registrar shall ensure translation into the language of the person to whom article 55, paragraph 2, or article 58 applies, the accused, convicted or acquitted person, if he or she does not fully understand or speak any of the working languages, of all decisions or orders in his or her case. Counsel shall be responsible for informing that person of the other documents in his or her case'.

Art. 17, i.e. the 'main provision' ruling admissibility, when dealing with the admissibility assessment always refer to the 'case'. Also Articles 15 and 53 and Rules 40, 51, 58, 60, 107, 144, 181 when referring to admissibility follow the wording of Art. 17. If Art. 19 is effectively applicable at the case stage, the same does not apply to Art. 18.

The Court has nevertheless clarified, for reasons that will be analysed in detail in Chapter II,[563] that the word 'case' under Art. 17 must be interpreted in a way consistent with the stage of the proceedings in which the provision is applied. Therefore, the use of the word 'case' with regards to the admissibility assessment must not be interpreted as precluding to assess the admissibility at the situation stage.

Similarly, it seems appropriate not to limit the interpretation of the word 'case' at Art. 94. According to Art. 94, a State may postpone the execution of a request of cooperation '[i]f the immediate execution of [the] request would interfere with an ongoing investigation or prosecution of a case different from that to which the request relates'. Whether the 'case related to the request' is here a proper 'case' or whether it must be interpreted broadly as including also a 'situation' is not clear. Authoritative doctrine refers to the word case as a 'proper case' and the reference to the possible national equivalent tends towards this interpretation.[564] Nevertheless, since a request for cooperation may also be submitted at the investigation stage, where no specific case has already been officially opened in front of the Court, it seems inappropriate to exclude the possibility for the State to request a postponement of the execution of the request only on the basis of the use of the word case under Art. 94.

Ultimately, Rule 92(2) uses both the terms 'situation' and 'case' in the same sentence, leaving no doubt about their different content. The Rule imposes to the Prosecutor a duty of notification of the decision not to investigate or prosecute to the victims and their legal representatives. It includes the victims who have already participated in the proceedings or those who have communicated with the Court 'in respect of the situation or the case in question'. Indeed, the PTC I has recognised to the victims the right to participate also at the situation stage.[565] For the same reason it seems appropriate to extensively interpret the word case under Rule 16, authorising the Registrar to keep a register for victims 'who have expressed their intention to participate in relation to a specific case'.

[563] *See* below, Chapter II, Section III, 2.1. Admissibility and initiation of the investigation.

[564] KREß C., PROST K., *Article 94*, in TRIFFTERER O., AMBOS K. (eds.), *The Rome Statute of the International Criminal Court*, 4th ed., Beck/Hart/Nomos, 2020.

[565] ICC, PTC I, *Situation in the Democratic Republic of the Congo*, *Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6*, 17 Jan. 2006, ICC-01/04-101, para. 65.

In the same decision, the PTC I incidentally traced the distinction between situation and case.[566] While situations are generally defined in terms of temporal, territorial and in some cases personal parameters and entail the proceedings envisaged in the Statute to determine whether a particular situation should give rise to a criminal investigation as well as the investigation as such, cases comprise specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects, and entail proceedings that take place after the issuance of a warrant of arrest or a summons to appear. The AC further shaped the features of the case in the *Gaddafi and Al-Senussi case*, noting that its parameters 'are defined by the suspect under investigation and the conduct that gives rise to criminal liability'[567] and that 'the "conduct" that defines the "case" is both that of the suspect […] *and* that described in the incidents under investigation which is imputed to the suspect',[568] where '[i]ncident is understood as referring to a historical event, defined in time and place, in the course of which crimes within the jurisdiction of the Court were allegedly committed by one or more perpetrators'.[569] In the light of these features, scholars point out that the situation is a course of events, occurring in a given period of time and space, where crimes appear to have been committed[570] and that it frames in objective terms the theatre of investigations.[571] Differently, the concept of case is rather focused on the suspect, the incidents and the conduct.[572]

With regards to the passage from the situation to the case stage, in two decisions under Art. 19 on the admissibility of two cases, the PTC II stated that 'the "case" stage [...] starts with an application by the Prosecutor under article 58 of the Statute for the issuance of a warrant of arrest or summons to appear, where one or more suspects has or have been identified.'[573] The AC confirmed this interpretation by stating that '[t]he cases are defined by

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[566] *Ibid*.

[567] ICC, AC, *The Prosecutor v. Gaddafi and Al-Senussi, Judgment on the^ppeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled "Decision on the admissibility of the case against SaifAl-Islam Gaddafi"*, 21 May 2014, ICC-01/11-01/11-547-Red, OA 4, para. 61.

[568] *Ibid.*, para. 62.

[569] *Ibid.*, para. 62,

[570] AMBOS, K., *Treatise on International Criminal Law, Vol. III: International Criminal Procedure*, Oxford University Press, 2016, p. 256. *See* also STEGMILLER I., *The Pre-Investigation Stage of the ICC*, Dunker & Humbolt, 2011, p.100.

[571] RASTAN R., *Situation and case: defining the parameters*, in STAHN C., EL ZEIDY M. (eds), *The International Criminal Court and complementarity from theory to practice*, Vol. I, Cambridge University Press, 2011, p. 421.

[572] SEILS P., *Putting Complementarity in its Place*, in STAHN C. (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015, p. 305 at 318; SCHABAS W.A., *Selecting Situations and Cases*, in STAHN C. (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015, p. 365 at 367.

[573] ICC, PTC II, *The Prosecutor v. Ruto, Kosgey and Sang*, *Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the*

the warrant of arrest or summons to appear issued under article 58, or the charges brought by the Prosecutor and confirmed by the Pre-Trial Chamber under article 61'.[574] The AC further concluded that the defining elements of a concrete case are the individual and the alleged conduct'.[575]

It has been argued that the distinction between situation and case corresponds to the common law distinction between investigation and prosecution.[576] Other commentators argue that the reference of the PTC II and the AC to the filing of an application under Art. 58 is restrictive as individuals may be the focus of the investigations even before the filing of the application.[577] But this opinion seems inconsistent at least with a formal aspect that may be useful in order to correctly frame the transit from the situation to the case stage: the numbering of the document.[578] Some Regs of the RegC expressly requires documents to include 'the number of the situation or the case' (Reg. 23; Reg. 25; Reg. 64; Reg. 65). It seems hard to imagine that the Prosecutor could file a document containing the number of the case (and the name of the accused) *before* the filing of a warrant of arrest only because it has already focused her attention on a specific individual during the investigation. Moreover, as better analysed in Chapter II, the introduction of a higher threshold for the initiation of the prosecution under Art. 53(2)[579] seems to be the right moment for marking the end of the situation stage and the beginning of the case stage. Since the use of the word 'case' at Art. 53(2)(b) is immaterial as it is used also at Art. 53(1)(b), where it is obviously not possible to identify a case yet, the transition from the situation to the case at the stage of Art. 53(2) emerges from the reference to a 'warrant or summons'. Further the reference to 'the age or

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Statute, 30 May 2011, ICC-01/09-01/11-101, para. 54; ICC, PTC II, *The Prosecutor v. Muthaurs, Kenyatta and Ali, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute*, 30 May 2011, ICC-01/09-02/11-96, para. 50.

[574] ICC, AC, *The Prosecutor v. Ruto and Sang, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute'*, 30 Aug. 2011, ICC-01/09-01/11-307 OA, para. 40.

[575] *Ibid*.

[576] GENEUSS J., V*ölkerrechtsverbrechen und Verfolgungsermessen. §153f StPO im System völkerrechtlicherStrafrechtspflege*, Nomos, 2013.

[577] DE MEESTER K., *Article 53*, in KLAMBERG M. (eds.), *Commentary on the Law of the International Criminal Court*, TOAEP, 2017, p. 387 at 396; SAFFERLING C., *The Rights and Interests of the Defence in the Pre-Trial Phase*, in *Journal of International Criminal Justice*, 9, 2011, p. 651 at 653; SAFFERLING C., *International Criminal Procedure*, Oxford University Press, 2012, p. 226; STEGMILLER I., *The Pre-Investigation Stage of the ICC*, Dunker & Humbolt, 2011, pp. 119-120.

[578] *See* also OLASOLO H., CARNERO ROJO H., *The application of the principle of complementarity to the decision of where to open an investigation: The admissibility of 'situations'*, in STAHN C., EL ZEIDY M.M., *The International Criminal Court and Complementarity. From Theory to Practice*, Vol. I, Cambridge University Press, 2011, p. 393 at 400-402.

[579] *See* below, Chapter II, Section I.

infirmity of the alleged perpetrator and his or her role in the alleged crimes' in Art. 53(2) introduces the additional subjective component typical of the case stage.

3. The Stages of the proceedings

From the provisions of the Rome Statute it is possible to identify three different stages of the proceedings that have already been mentioned in the previous paragraph: the preliminary examination, the investigation and the prosecution.

3.1. Investigation and prosecution

Starting from the concept of investigation, it may be useful to remember the definition offered by the AC, according to which investigation means:

> "the taking of steps directed at ascertaining whether those suspects are responsible for that conduct, for instance by interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses. The mere preparedness to take such steps or the investigation of other suspects is not sufficient."[580]

The Prosecutor is the *dominus* of the investigation.[581] At this stage she has all the investigative powers provided by the Statute and she can use them within some statutory limits. Some of them are of procedural nature, such as the provisions ruling the collection of evidence. Others can be traced back to the respect of the rights of the person during the investigations or to the need to safeguard the well-being of victims and witnesses. In addition, the activities of the Prosecutor are limited by the ruling of judicial cooperation and assistance provided by the States.[582]

Art. 54 requires the Prosecutor to be moved by the purpose of 'establishing the truth' in performing her investigating activities. Therefore, the Prosecutor has the duty ('shall') to 'extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under [the] Statute, and, in doing so, investigate incriminating and exonerating circumstances equally'. This duty did not appear in the 1994 Draft Statute but

[580] ICC, AC, *The Prosecutor v. Ruto and Sang, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute'*, 30 Aug. 2011, ICC-01/09-01/11-307 OA, para. 41.

[581] *See* CHAITIDOU E., *The Judiciary and Enhancement of Classification of Alleged Conduct*, in AGIRRE X., BERGSMO M., DE SMET S., STAHN C., (ed.), *Quality Control in Criminal Investigation*, Torkel Opsahl Academic EPublisher, 2020, p. 943 at 962-963.

[582] *See* below Chapter III, Section I, 3. The States. For an overviews of the main problems during the investigation stage wit hparticular focus on the cooperation *see* SCHABAS W.A., *An Introduction to the International Criminal Court*, Cambridge University Press, 2020, pp. 260 ff.

was introduced among the proposals of the Preparatory Committee.[583] The proposal was submitted by Germany,[584] which highlighted that in the light of the time-consuming and difficult character of the investigations concerning international crimes, it would have been difficult for the accused to conduct autonomous investigations, even with the assistance of a lawyer. In addition, the investigation would have been impossible in a system based on international cooperation such as that of the forthcoming court. Therefore, this provision suggests that the Prosecutor must first of all act as an impartial organ of justice, who becomes party in the proceedings against an individual.[585]

After that the Prosecutor has completed these activities, she can turn to the prosecution. The possibility to distinguish the stage of the investigation from the stage of the prosecution clearly emerges from the wording of Art. 53, which at para. (1) identifies the requirement for the initiation of an investigation and at para. (2) identifies the requirements for the initiation of a prosecution. The Prosecutor is therefore required to formally adopt a decision to prosecute marking the line between the two stages. The outcome of the decision is the submission by the Prosecutor of a request to the PTC to issue a warrant of arrest or a summon to appear according to Art. 58. This issuance does not preclude the continuation of investigating activities, but determines the applicability of other provisions aimed *inter alia* at safeguarding the rights of the accused.

One may wonder whether the word 'proceedings' is necessarily related to the prosecution stage. The PTC I noted that the Statute only rarely opposes the terms 'investigation' and 'proceedings' and the few provisions doing it are not of procedural nature

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[583] Article 26, *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. II, (Compilation of Proposals)*, G.A. 51st Sess., Supp. No. 22A, A/51/22, 1996, p. 113.

[584] *German Delegation's Proposal*, *Article 26*, New York, 12 Aug. 1996, A/AC-249/WP-1. The proposal drawn on the jurisprudence of the *ad hoc* Tribunals, *see* HEINZE A., FYFE S., *Prosecutorial Ethics and Preliminary Examinations at the ICC*, in BERGSMO M., STAHN C., (ed.), *Quality Control in Preliminary Examination: Volume 2*, Brussels, Torkel Opsahl Academic EPublisher, 2018, pp. 29-30.

[585] TURONE G., *Powers and Duties of the Prosecutor*, in CASSESE A., GAETA P., JONES J.R.W.D., *The Rome Statute of the International Criminal Court. A Commentary*, vol. 2, Oxford University Press, 2002, p. 1137 at 1164-1165. *See* also DARQUES-LANE F., MADEC C., GODART S., *Article 54*, in FERNANDEZ J., PACREAU X., *Statut de Rome de la Cour pénale internationale. Commentaire article par article*, Pedone, 2012, p. 1229 at 1231-1236; SCHABAS W.A., *An Introduction to the International Criminal Court*, Cambridge University Press, 2020, p. 259, who compares the ICC Prosecutor to a sort of *juge d'instruction*. According to Vasiliev, even if the duty of establishing the truth officialy only applies at the investigation stage, the statutory framework suggests that also in trial the Prosecutor would be expected to act like the continental one. Also in international criminal law there are examples of prosecutors whose function is more similar to that of the minister of justice, not only at the ECCC, adopting an inquisitorial system, but also at the STL. Nevertheless, the practice shows the tendency to rely on the adversarial scheme. VASILIEV S., *The Role and Legal Statuts of the Prosecutor in International Criminal Trials*, 25 Nov. 2010, available at SSRN: https://ssrn.com/abstract=1715465, pp. 19-20.

(for example Art. 127 ruling the withdrawal of a State from the Rome Statute). Moreover the Statute includes provisions where the word 'proceedings' seems to include also the investigation stage (Arts 17(2) and (3), 54(3)(e), 56(1)(b) and (2) and other Rules).[586] The PTC I reached this conclusion when requested to decide on whether Art. 68(3), providing for the rights of victims to participate to the proceedings, was applicable also at the stage of the investigation. Nevertheless, the issue at stake was to determine whether a 'proceedings' under Art. 68(3) existed at the investigation stage. But the existence of a 'proceedings' also before the issuance of a warrant of arrest does not delete the opposition between investigation and prosecution. In conclusion, using the word 'proceedings' as encompassing even the stage of the investigation does not affect the different nature of these two stages.

More interesting is instead the stage preliminary examination that precedes the stage of the investigations.

3.2. The preliminary examination

The Statute expressly refers to the preliminary examination at Art. 15(6). The introduction of this stage is associated with the proposal submitted by Argentina and Germany that led to the introduction of Art. 15.[587] As seen above, Art. 15 rules the initiation of the investigation *proprio motu* on the basis of the information provided to the Office by various subjects. Art. 15(6) names the analysis of this information by the OTP 'preliminary examination'. Despite the apparently limited applicability of Art. 15(6) to the *proprio motu* investigations, Art. 53 on the initiation of the investigation does not authorise the automatic commencement of an investigation even in case of referral by States or the UNSC. Therefore, the Prosecutor shall always assess the information available in order to decide whether to initiate an investigation irrespective of the subject referring the case (or providing relevant information) to her Office.[588] Hence, a preliminary examination stage also exists when a

[586] ICC, PTC I, *Situation in the Democratic Republic of the Congo*, *Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6*, 17 Jan. 2006, ICC-01/04-101, paras 29-38.

[587] FERNANDEZ DE GURMENDI S.A., *The Role of the Prosecutor*, in POLITI M., NESI G., *The Rome Statute of the International Criminal Court. A challenge to impunity*, Ashgate, 1998, p. 55 at 56.

[588] TURONE G., *Powers and Duties of the Prosecutor*, in CASSESE A., GAETA P., JONES J.R.W.D., *The Rome Statute of the International Criminal Court. A Commentary*, *Vol. 2*, Oxford University Press, 2002, p. 1137 at 1147. This conclusion seems also appropriate in the light of the possible extra-legal reasons leading the States or the UNSC to make the referral. The referral does not rule out the duty to act as impartial organ of justice, with the purpose of establishing the truth investigating both incriminating and exonerating circumstances. *See* AMBOS, K., *Treatise on International Criminal Law, Vol. III: International Criminal Procedure*, Oxford University Press, 2016, pp 336 ff.; RASTAN R., *Comment on Victor's Justice & the Viability of* Ex Ante *Standards*, in *The John Marshall Law Review*, 43, 3, 2010, p. 569 at 581; 594; HEINZE A., FYFE S., *Prosecutorial Ethics and*

situation is referred to the OTP. This also emerges from Rule 104(1) RPE, which states that acting pursuant to Art. 53(1), 'the Prosecutor shall, in evaluating the information made available to him or her, analyse the seriousness of the information received'; and Reg. 25 RegOTP, expressly including in the assessment of the information during the preliminary examination also those entailed in a referral and in the declaration of acceptance of the jurisdiction under Art. 12(3).[589]

The statutory framework does not provide with detailed information on the activity performed by the Prosecutor at this stage. Therefore, in November 2013 the OTP published the *Policy Paper on Preliminary Examination*,[590] in order to clarify the procedure followed and the purposes pursued by the Office in performing its activities. The non-binding nature of the *Paper* and the need to avoid strict definitions prevent it from being a juridical technical instrument. The Office itself clarifies that the *Paper* mirrors its internal policy, subject to revision based on experience and other determination of the Chambers.[591] Moreover, the description of purposes such as prevention, ending impunity, transparency and the objective of 'promoting clarity and predictability regarding manner in which [the Office] applies the legal criteria' makes it sometimes pedagogical and rhetorical.[592]

Preliminary Examinations at the ICC, in BERGSMO M., STAHN C., (ed.), *Quality Control in Preliminary Examination: Volume 2*, Brussels, Torkel Opsahl Academic EPublisher, 2018, p. 45; SCHABAS W.A., *An Introduction to the International Criminal Court*, Cambridge University Press, 2020, p. 252. On the discretionary nature of the Prosecutor's decision to open a preliminary examination also in case of referral *see* STAHN C., *Damned If You Do, Damned If You Don't. Challenges and Critiques of Preliminary Examination at the ICC*, in *Journal of International Criminal Justice*, 15, 2017, p. 413 at 424-425; CHAITIDOU E., *The Judiciary and Enhancement of Classification of Alleged Conduct*, in AGIRRE X., BERGSMO M., DE SMET S., STAHN C., (ed.), *Quality Control in Criminal Investigation*, Torkel Opsahl Academic EPublisher, 2020, p. 943 at 946. On the management of the cases *see* HALL C.K., *The Powers and Role of the Prosecutor of the International Criminal Court in the global Fight Against Impunity*, in *Leiden Journal of International Law*, 17, 1, p. 121 at 133-134. Differently, SAFFERLING C., *International Criminal Procedure*, Oxford University Press, 2012, p. 152 argues that the Prosecutor 'has a duty to initiate the investigations but has discretionary power to conclude, after preliminary examination, that there is no reasonable basis on which to proceed'.

[589] Turone identifies other provisions suggesting that the preliminary examination applies also in case of referral, namely Arts 42(1), 53(3)(a) and 18(1). *See* TURONE G., *Powers and Duties of the Prosecutor*, in CASSESE A., GAETA P., JONES J.R.W.D., *The Rome Statute of the International Criminal Court. A Commentary*, vol. 2, Oxford University Press, 2002, p. 1137 at 1148. *See* also ICC, OTP, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia*, *Final decision of the Prosecution concerning the "Article 53(1) Report" (ICC-01/13-6-AnxA), dated 6 November 2014*, 29 Nov. 2017, ICC-01/13-57, paras 26 ff.; GREY R., WHARTON S., *Lifting the Curtain. Opening a Preliminary Examination at the International Criminal Court*, in *Journal of International Criminal Justice*, 16, 2018, p. 593 at 600, even if they deem that the referral excludes a pre-preliminary examination stage that, in reality is a part of the preliminary examination (*below* fn. 606)

[590] ICC, OTP, *Policy Paper on Preliminary Examinations*, Nov. 2013.

[591] *Ibid.*, paras 19-20.

[592] On the risk for general and meaningless guidelines *see* MARSTON DANNER A., *Enhancing the legitimacy and accountability of prosecutorial discretion at the International Criminal Court*, in

Art. 15 and Rule 104(2) clarify which kind of information is the object of the Prosecutor's assessment. These provisions refer to information received by States, UN organs, intergovernmental and NGOs, i.e. information that can provide a picture of the situation,[593] but usually unsuitable of constituting evidence in trial. In addition, Reg. 25 RegOTP, includes in the assessment any information on crimes and information sent by individuals or groups. The ruling is completed by Rule 46 RPE, which states that the Prosecutor shall protect the confidentiality of the information and testimony and possibly adopt the necessary measures pursuant to her duties under the Statute. While the Prosecutor may *seek* additional information from these sources she can only *receive* written or oral testimony at the seat of the Court. In the latter case, Rule 47 RPE states that the procedure to be followed is the same ruling the collection of evidence during the investigation (Rules 111 and 112 on the recording of questioning apply). Moreover, when the Prosecutor believes that there is a serious risk that it might not be possible to postpone the testimony, she may request the PTC to adopt the necessary measures in order to ensure the efficiency and integrity of the proceedings, in particular to protect the rights of the defence. The testimony can subsequently be presented in the proceedings, but its admissibility is governed by Art. 69(4). Notwithstanding this, the application of this provision is limited, since, as noted by authoritative scholars, the practice of the *ad hoc* Tribunals shows that it is not common for potential witnesses to spontaneously address the Court.[594]

Also the Policy Paper highlights that at this stage the Prosecutor does not possess full investigative powers, but only 'collect[s] all relevant information necessary to reach a fully informed determination on whether there is a reasonable basis to proceed with an

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American Journal of International Law, 97, 3, 2003, p. 510 at 549, who notes that a minimum level of detail is necessary even if they cannot rule the action of the Prosecutor in every circumstance. Similarly, HALL C.K., *Prosecutorial Policy, Strategy and External Relations*, in BERGSMO M., RACKWITZ K., TYANING S. (eds.), *Historical Origin of International Criminal Law: Volume 5*, Torkel Opsahl Academic EPublishers, 2017, p. 293. HEINZE A., FYFE S., *Prosecutorial Ethics and Preliminary Examinations at the ICC*, in BERGSMO M., STAHN C., (ed.), *Quality Control in Preliminary Examination: Volume 2*, Brussels, Torkel Opsahl Academic EPublisher, 2018, pp. 63-64. This does not mean that these instruments are useless. As duly noted, policy and strategy papers are useful working agendas and allow to critically evaluate the Prosecutor's work. Further, their publications fall within the ethical obligations incumbent on the OTP. *Ibid.*, pp. 35-36; AMBOS K., *Introductory Note to Office of the Prosecutor: Policy Paper on Case Selection and Prioritisation (Int'l Crim. Ct.) by Kai Ambos*, in *International Legal Materials*, *Vol. 57*, 15 Sep. 2016, p. 1131.

[593] *See* RALSTON J., *Information, Analysis and Intelligence: the Role of Investigators*, in BERGSMO M., RACKWITZ K., TYANING S. (eds.), *Historical Origin of International Criminal Law: Volume 5*, Torkel Opsahl Academic EPublishers, 2017, p. 143 at 154-155; STAHN C., *From Preliminary Examination to Investigation: Rethinking the Connection*, in AGIRRE X., BERGSMO M., DE SMET S., STAHN C., (ed.), *Quality Control in Criminal Investigation*, Torkel Opsahl Academic EPublisher, 2020, p. 37 at 40.

[594] BERGSMO, M., PEJIĆ J., ZHU D., *Article* 15, in TRIFFTERER O., AMBOS K., *The Rome Statute of the International Criminal Court*, 4th ed., Beck/Hart/Nomos, 2020, mn. 16.

investigation'.[595] The object, or, using the words of the Office, the legal framework[596] of the preliminary examination is provided by Art. 53(1)(a) to (c), whose relevant factors (jurisdiction, admissibility and interest of justice) will be analysed in Chapter II. [597]

3.2.1. The information

The generic nature of the information analysed by the Prosecutor during the preliminary examination has been recalled by PTC II.[598] The object of the analysis is not the individual criminal responsibility, but the legality and appropriateness of investigations aimed at finding out whether crimes within the jurisdiction of the Court have been committed.

With regards to the assessment of Art. 15 information, Reg. 27 RegOTP distinguishes between:

> '(a) information relating to matters which manifestly fall outside the jurisdiction of the Court;
> (b) information which appears to relate to a situation already under examination or investigation or forming the basis of a prosecution, which shall be considered in the context of the ongoing activity; and
> (c) information relating to matters which do not manifestly fall outside the jurisdiction of the Court and are not related to situations already under analysis or investigation or forming the basis of a prosecution, and which therefore warrant further examination in accordance with rule 48.'

According to the PTC II, the Chamber,[599] and therefore the Prosecutor, in assessing the credibility of the information must consider both its inherent qualities and the authoritativeness of the source.[600] The need for this information to be not only corroborated,[601] but also replaced

[595] ICC, OTP, *Policy Paper on Preliminary Examinations*, para. 1. Some critic scholars believe that giving the Prosecutor the authority to intervene without a full investigation into allegations of atrocity is a 'serious problem'. *See* RUBIN A.P., *The International Criminal Court: Possibilities for Prosecutorial Abuse*, in *Law and Contemporary Problems*, 64, 1, 2001, p. 153 at 157 ff.

[596] ICC, OTP, *Policy Paper on Preliminary Examinations*, para. 5.

[597] Therefore, the parameters set forth in Art. 53 represents the limit of the preliminary examination and the watershed with the investigation stage. *See* TURONE G., *Powers and Duties of the Prosecutor*, in CASSESE A., GAETA P., JONES J.R.W.D., *The Rome Statute of the International Criminal Court. A Commentary*, vol. 2, Oxford University Press, 2002, p. 1137 at 1150-1151.

[598] ICC, PTC II, *Situation in the Islamic Republic of Afghanistan*, *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan*, 12 Apr. 2019, ICC-02/17-33, para. 36. On the topic *see* TOCHILOVSKY V., *Objectivity of the ICC Preliminary Examination*, in BERGSMO M., STAHN C., (ed.), *Quality Control in Preliminary Examination: Volume 2*, Torkel Opsahl Academic EPublisher, 2018, p. 395 at 405 ff.

[599] The PTC II gave high relevance to the role of the PTC in the review of the Prosecutor's request for authorisation under Art. 15. Conversely, the AC rejected this approach. *See* below, Chapter III, Section II, 2. The authorisation for the initiation of an investigation under Article 15.

[600] ICC, PTC II, *Situation in the Islamic Republic of Afghanistan*, *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan*, 12 Apr. 2019, ICC-02/17-33, para. 38.

with different and stronger material to be obtained during the investigation, can also be inferred by the (low) quality of evidence sometimes used in subsequent stages of the proceedings where the standard of proof should be stricter and higher and was instead deemed inappropriate by several Chambers. For example, in the *Gbagbo* case, the PTC I, by majority, refused to confirm the charges against the accused and adjourned the hearing in the light of the quality of evidence.[602] It also noted 'with serious concern that […] the Prosecutor relied heavily on NGO reports and press articles' that 'cannot in any way be presented as the fruits of a full and proper investigation'.[603] This kind of warnings to the Prosecutor are quite frequent by the PTCs in various compositions and in various situations, also with regards to the use of hearsay or statements of anonymous witnesses.[604]

3.2.2. The structure and length of the examination

The purpose of the preliminary examination is to determine whether there is reasonable basis to proceed with an investigation according to Art. 53. It is here enough to remember that the assessment includes a determination to the effect that (a) there is reasonable basis that a crime within the jurisdiction of the Court has been committed; (b) the case is or would be admissible; (c) that the investigation is not contrary to the interests of justice.

The Policy Paper introduces a structured preliminary examination distinguishing three different stages. The first step is the initial assessment of the information on alleged crimes

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[601] Critic scholars note that the sources of many information tend to be 'victims' friends or news media'. Going beyond the perfunctory wording, it is true that this information requires attentive scrutiny in order to avoid a partisan assessment. *See* RUBIN A.P., *The International Criminal Court: Possibilities for Prosecutorial Abuse*, in *Law and Contemporary Problems*, 64, 1, 2001, p. 153 at 162.

[602] ICC, PTC I, *The Prosecutor v. Gbagbo*, *Decision adjourning the hearing on the confirmation of charges pursuant to Article 61(7)(c)(i) of the Rome Statute*, 3 Jun. 2013, ICC-02/11-01/11-432.

[603] *Ibid.*, para. 35.

[604] *See*, among others, ICC, PTC I, *The Prosecutor v. Katanga and Ngudjolo Chui*, *Decision on the confirmation of charges*, 30 Sep. 2008, ICC-01/04-01/07-717, para. 160 ('While there is no requirement per se that summaries of the statements of anonymous witnesses are corroborated in order for them to be admissible, the Chamber is of the view that lack of support or corroboration from other evidence in the record of the proceedings could affect the probative value of those summaries or statements.'); ICC, PTC I, *The Prosecutor v. Abu Garda*, *Decision on the Confirmation of Charges*, 8 Feb. 2010, ICC-02/05-02/09-243, para. 52 ('Therefore, statements of anonymous witnesses will be given a lower probative value and will be evaluated on a case-by-case basis, according to whether the information contained therein is corroborated or supported by other evidence tendered into the case file'); ICC, PTC I, *The Prosecutor v. Mbarushimana*, *Decision on the confirmation of charges*, 16 Dec. 2011, ICC-01/04-01/10-465, para. 78 ('The evidentiary weight to be attached to the information contained in documents emanating from Human Rights Watch will be assessed on a case-by-case basis. As a general principle, the Chamber finds that information based on anonymous hearsay must be given a low probative value in view of the inherent difficulties in ascertaining the truthfulness and authenticity of such information. Accordingly, such information will be used only for the purpose of corroborating other evidence').

received under Art. 15. The second step includes the formal commencement of the preliminary examination, focused on determining whether the preconditions for the exercise of jurisdiction under Art. 12 are satisfied. This stage ends with the so called 'Article 5 report'. The third and last stages include the assessment of the admissibility of potential cases in terms of complementarity and gravity under Art. 17– ending with the submission of the so called 'Article 17 report' – and the examination of the interest of justice, leading to the 'Article 53(1) report'. This last report provides 'the basis […] to determine whether to initiate an investigation'.[605]

The OTP has adopted the praxis of formally declaring the opening of the preliminary examinations. Irrespective of the practice adopted by the OTP to publicly declare the opening of a preliminary examination there is no trace in the Statute of such a duty. From a plain reading of the Statute it only emerges that the preliminary examination stage starts with the analysis of the information received by the Office. This remark has been made by PTC I in the preliminary ruling on jurisdiction in the situation in Bangladesh/Myanmar.[606] The Chamber notes that, in order to seek guidance on the jurisdiction of the Court, the Prosecutor has already received and at least partially analysed the information on the alleged crimes committed against the Rohingya people. Therefore, the Chamber expressly argues that these activities do not precede the preliminary examination, but are part of it, even if the Prosecutor has not publicly declared its opening.

One recurring question is whether there is a temporal limitation to the length of this stage. The Statute does not provide for a time period for completion of the examination, not even in case of referral by a State or the UNSC.

The PTC III addressed the problem of the length of preliminary examinations in the Central African Republic situation. Following the Government's request, the Chamber highlighted 'the alleged failure to decide, within a reasonable time' – almost two years –

[605] ICC, OTP, *Policy Paper on Preliminary Examinations*, para. 84.

[606] ICC, PTC I, *Request under Regulation 46(3) of the Regulations of the Court*, *Decision on the 'Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute*, 6 Sep. 2018, ICC-RoC46(3)-01/18-37, para. 82. The identification by the OTP of a 'first phase' of the examination and the practice of formally declaring the opening of the preliminary examinations is misleading. For example, it induced GREY R., WHARTON S., *Lifting the Curtain. Opening a Preliminary Examination at the International Criminal Court*, in *Journal of International Criminal Justice*, 16, 2018, p. 593 at 595-565 ff. to introduce an additional preliminary decision-making process (a pre-preliminary examination stage) in the attempt to identify the criteria leading the Prosecutor to open a preliminary examination (although they later admit that the distinction between the first pre-preliminary examination stage and the stage following the formal opening of the examination is sometimes blurred at 608). According to their view the opening of examinations without a referral would consititue a formal *proprio motu* discretionary decision, while it would be automatic in case of referral (614 ff.).

'whether or not to initiate an investigation' and recalled that the preliminary examinations of the situations in the Democratic Republic of Congo and Uganda were completed within two to six months.[607] Hence, the Chamber requested the Prosecutor to provide for information 'on the […] status of the preliminary examination of the [Central African Republic] situation, including an estimate of when the preliminary examination of the [Central African Republic] situation will be concluded and when a decision pursuant to article 53(1) of the Statute will be taken'.[608] Among other provisions, the Chamber referred to Rule 105(1) RPE, imposing the Prosecutor to 'promptly' inform in writing the referring entity when adopting a decision not to initiate an investigation.

The Prosecutor responded noting that the breadth and scope of an examination under Article 53(1) is 'situation-specific' and depends on the particular features of each situation, including the availability of information, the nature and scale of the crimes and the existence of national criminal proceedings.[609] Therefore, it found useless to compare the length of different preliminary examinations. Most importantly, the Prosecutor highlighted his prerogatives under Art. 53(1), recalling that the 'Pre-Trial Chamber's supervisory role, under Article 53(3), only applies to the review decision under Article 53(1) and (2) by the Prosecutor not to proceed with an investigation or a prosecution'.[610] In addition, the Prosecutor noted that Reg. 46(2) RegC, included among the legal basis referred to by the Chamber and stating that the PTC is responsible for any matter, request or information arising out of the situation, had the limited purpose of determining the internal distribution of competences within the Pre-Trial Division and clarifying the scope of a PTC's competence within a situation. Therefore, it could not be used to expand the scope of a PTC's reviewing power or curtail the Prosecutor's discretionary authority.[611] In conclusion the Prosecutor submitted that his discretion on the duration of preliminary examinations 'should remain undisturbed'. In his view, it was a 'deliberate legislative decision' to leave discretion with regards to the length of the examination, because this activity 'required flexibility to adjust the parameters of the

[607] ICC, PTC III, *Situation in the Central African Republic*, *Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic*, 30 Nov. 2006, ICC-01/05-6.

[608] *Ibid.*

[609] ICC, OTP, *Situation in the Central African Republic*, *Prosecution's Report Pursuant to Pre-Trial Chamber III's 30 Nov. 2006 Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic*, 15 Dec. 2006, ICC-01/05-7.

[610] *Ibid.*

[611] ICC, OTP, *Situation in the Central African Republic*, *Prosecution's Report Pursuant to Pre-Trial Chamber III's 30 Nov. 2006 Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic*, 15 Dec. 2006, ICC-01/05-7, footnote 8. In the same vein *see* EL ZEIDY M.M., *The Gravity Threshold Under the Statute of the International Criminal Court*, in *Criminal Law Forum*, 19, 2008, p. 35 at 53.

assessment or analysis phase to the features of each particular situation'.[612] Premising that no legal obligation pended on his Office and that he was not adopting a precedent to be followed in future cases, the Prosecutor nevertheless shared information on the state of the examination with the Chamber but refused to provide an estimate for the conclusion of the preliminary examination.

Also the PTC I stressed the importance of completing the preliminary examination within a reasonable time regardless of its complexity, focusing on the duty for the Prosecutor to submit a request for authorisation to open an investigation once that she has reached a positive determination according to the reasonable standard provided for in Arts 15(3) and 53(1).[613] It also recalled the negative impact of the passing of time on the efficiency of the investigation, referring to a great amount of judgments of the ECtHR and on the need to grant the respect of the internationally recognised human rights of victims with regard to the conduct and result of the preliminary examination (right to the truth; access to justice; reparation etc.).[614]

Only two months later, the PTC I dealt with the matter again in the Registered Vessels situation, noting that the reassessment following a PTC's request for review of the decision not to initiate an investigation is still part of the preliminary examination, and reproached the Prosecutor for having taken two years for adopting her new decision. In the view of the Chamber, the Prosecutor had violated not only the duty to reconsider her decision 'as soon as possible' as requested by Rule 108(2) RPE but had also affected the rights of the victims maintaining them in a prejudicial state of uncertainty for a long time. Therefore the Chamber gave to the Prosecutor a time limit of 6 months for adopting a new decision on the initiation of the investigation *de facto* imposing a time limit to the stage of the preliminary examination.[615] The importance of these principles further emerges from the PTC's refusal to grant a stay in

[612] ICC, OTP, *Situation in the Central African Republic*, *Prosecution's Report Pursuant to Pre-Trial Chamber III's 30 Nov. 2006 Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic*, 15 Dec. 2006, ICC-01/05-7, para. 10.

[613] ICC, PTC I, *Request under Regulation 46(3) of the Regulations of the Court*, *Decision on the 'Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute*, 6 Sep. 2018, ICC-RoC46(3)-01/18-37, para. 84.

[614] *Ibid*. para. 86-87. On the inconsistency of this practice with the jurisprudence of the ECtHR *see* BITTI G., *Article 53*, in FERNANDEZ J., PACREAU X., *Statut de Rome de la Cour pénale internationale. Commentaire article par article*, Pedone, 2012, p. 1173 at 1190.

[615] ICC, PTC I, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia*, *Decision on the "Application for Judicial Review by the Government of the Union of the Comoros"*, 15 Nov. 2018, ICC-01/13-68 para. 120.

the proceedings when granting leave to appeal the decision;[616] and, indirectly, from the AC's rejection of the Prosecutor's request for the suspensive effect of the appealed decision.[617]

With regards to the flaunted drafter's decision not to limit the length of the preliminary examinations sustained by the Prosecutor, Pues notes that not only this statement is not supported by any allegation, but that there is no trace in the preparatory works of such a will.[618] It seems instead probable that the drafters had no time to discuss these matters into detail as the definition of the powers of the Prosecutor at the investigative stage required a lot of time and even risked compromising the adoption of the Statute. Conversely, Schabaas argues that the Prosecutor's refusal to provide a time limit is 'entirely reasonable to the extent that the issue of complementarity may be changing and evolving, depending upon the conduct of the national justice system'.[619]

Ambos doubts that the principle of the conclusion of the preliminary examination without undue delay applies at the preliminary examination, since this principle presupposes a certain degree of individualisation with regard to the suspect.[620] Moreover, the association between 'undue delay' and 'regardless of the complexity' of the examination is criticised as the complexity of the examination is an element preventing the 'undue' nature of the possible subsequent delay. The supervisory control of the PTC at this stage is further rejected in the light of its similarity with the functions of the investigative judge that was rejected during the preparatory works. The only means available to the Chamber in case of inaction of the Prosecutor demonstrating her intention to prevent the Chamber from exercising its control over a decision not to investigate or prosecute would be convening a status conference under Reg.

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[616] ICC, PTC I, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia*, *Decision on the Prosecutor's request for leave to appeal the "Decision on the 'Application for Judicial Review by the Government of the Union of the Comoros'"* 18 Jan. 2019, ICC-01/13-73, paras 53 ff.

[617] ICC, AC, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia*, *Decision on the Prosecutor's request for suspensive effect*, 31 Jan. 2019, ICC-01/13-81 OA2.

[618] PUES A., *Towards the 'Golden Hour'? A Critical Exploration of the Length of Preliminary Examinations*, in *Journal of International Criminal Justice*, 15, 2017, p. 435 at 443, who refers to *Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Vol.I-III*, United Nations A/CONF.183/13, 2002 and notes that it makes no specific mention of the issue. *See* also GUARIGLIA F., *Investigation and Prosecution*, in LEE R. (ed.), *The International Criminal Court, The Making of the Rome Statute*, Kluwer Law, 1999, p. 227 at 230.

[619] SCHABAS W.A., *An Introduction to the International Criminal Court*, Cambridge University Press, 2020, p. 255.

[620] AMBOS, K., *Treatise on International Criminal Law, Vol. III: International Criminal Procedure*, Oxford University Press, 2016, p. 385.

48 RegC for obtaining information (even if this Reg. is applicable only in limited circumstances).[621]

More generally, there is no agreement among scholars about the possibility to introduce a time limit for the preliminary investigations,[622] even if they agree on the necessity to avoid that their excessive length jeopardises the possible following investigations and the credibility of the Court.[623]

3.2.3. Concluding remarks

Even if the Prosecutor is right when stresses that each situation has its own characteristics and that a certain margin of discretion with regards to the duration of the examination is required, from the reports on preliminary examinations regularly published by

[621] *See* also HEINZE A., FYFE S., *Prosecutorial Ethics and Preliminary Examinations at the ICC*, in BERGSMO M., STAHN C., (ed.), *Quality Control in Preliminary Examination: Volume 2*, Brussels, Torkel Opsahl Academic EPublisher, 2018, p. 63.

[622] For the introduction of a maximum time limit of three years *see* PUES A., *Towards the 'Golden Hour'? A Critical Exploration of the Length of Preliminary Examinations*, in *Journal of International Criminal Justice*, 15, 2017, p. 435 at 451-452. Cautious about the introduction of a fixed limit is STAHN C., *Damned If You Do, Damned If You Don't. Challenges and Critiques of Preliminary Examination at the ICC*, in *Journal of International Criminal Justice*, 15, 2017, p. 413 at 429. Bitti simply notes the imbalance of the Statute in favour of the Prosecutor. BITTI G., *Article 53*, in FERNANDEZ J., PACREAU X., *Statut de Rome de la Cour pénale internationale. Commentaire article par article*, Pedone, 2012, p. 1173 at 1189. Against the introduction of a time limit AMBOS, K., *Treatise on International Criminal Law, Vol. III: International Criminal Procedure*, Oxford University Press, 2016, p. 386, who notes the impracticability even of providing for an estimate regarding the conclusion of the investigation in light of the dynamic nature of the examination. Only the assessment of due diligence of the Prosecutor and the proper care during the investigation may drive the determination on her action. Nevertheless, the attitude of the Prosecutor vis-à-vis some situations is self-evident, and no action has been taken in this regard despite the absence of a formal decision not to investigate. For example, the Prosecutor never formally adopted a decision not to prosecute for the crimes committed in Côte d'Ivoire between 2002 and 2010 (*see* following fn.).

[623] Bitti points out that sometimes what had to be a preliminary control was transformed in a permanent monitoring activity of the national behaviour. He doubts about the effectiveness of this procedure since the threat of the Court's intervention loses credibility with the passing of the years. He further reproaches the Prosecutor for postponing the adoption of political solutions prolonging the lengths of the examination and brings Colombia and Palestine as leading examples. BITTI G., *Article 53*, in FERNANDEZ J., PACREAU X., *Statut de Rome de la Cour pénale internationale. Commentaire article par article*, Pedone, 2012, p. 1173 at 1186-1187. Another example is the situation in Côte d'Ivoire, where the State lodged a declaration under Art. 12 in 2003 in order to allow an investigation into crimes committed in 2002, and the Prosecutor went for the first time on the ground in 2009. Significantly the following investigation only covered the crimes allegedly committed in the crisis of 2010 by those groups that had denounced the crimes committed in 2002. *Ibid.*, at 1190. On the need for completion strategies STAHN C., *From Preliminary Examination to Investigation: Rethinking the Connection*, in AGIRRE X., BERGSMO M., DE SMET S., STAHN C., (ed.), *Quality Control in Criminal Investigation*, Torkel Opsahl Academic EPublisher, 2020, p. 37 at 47 ff; CHAITIDOU E., *The Judiciary and Enhancement of Classification of Alleged Conduct*, in AGIRRE X., BERGSMO M., DE SMET S., STAHN C., (ed.), *Quality Control in Criminal Investigation*, Torkel Opsahl Academic EPublisher, 2020, p. 943 at 946.

the OTP it emerges that the Prosecutor's approach is not homogeneous.[624] For example the preliminary examination in the Libyan situation lasted less than one week: the UNSC adopted the Resolution 1970 (2010) on 26 February 2011 and the Prosecutor opened the investigation on 3 March 2011. In the light of the fact that the UNSC referred the situation for alleged crimes committed since 15 February 2011, it seemed premature at the time to note that 'the Office had not found any genuine national investigation or prosecution of the persons or conduct that would form the subject matter of the cases it would investigate'. This premature conclusion is even more surprising if compared to the sections of the same report dedicated to the situations in Colombia, Georgia and Guinea. With regards to these situations the Prosecutor explains into detail the long and delicate assessment of complementarity made possible throughout the years by contacts with national authorities, including judicial ones, requests for reports by the relevant Governments, conferences, targeted sessions with panellists, site visits and more.[625] As correctly pointed out, even if each situation is different, impartiality requires that all the preliminary examinations are treated in the same way and that different treatments are proportionate to the degree of distinction.[626] However, the different treatment cannot overcome a certain limit without running the risk of being considered as expression of partiality.

The decision to open a preliminary examination, and the decision to postpone the initiation of the investigation, may be useful in order to encourage national prosecution. Preliminary examination has been defined by some scholars 'one of the most powerful policy instruments' of the Office,[627] suggesting that the Prosecutor may adopt two different

[624] *See* also PUES A., *Towards the 'Golden Hour'? A Critical Exploration of the Length of Preliminary Examinations*, in *Journal of International Criminal Justice*, 15, 2017, p. 435, who highlights the tendency of very short preliminary investigations when the situation is referred by the UNSC; relatively short preliminary examinations in case of self-referral (with the abovementioned exception of the Central African Republic situation) and long (and sometimes very long) preliminary examinations when acting *proprio motu*. According to Turone, the referral by the UNSC directly eliminates the stage of the preliminary examination, immediatly leading to the investigation stage. If it were the case, and considering that it is not inappropriate to speed up the process when acting under request of an organ such as the UNSC, it would be more appropriate to explicitly recognise it. TURONE G., *Powers and Duties of the Prosecutor*, in CASSESE A., GAETA P., JONES J.R.W.D., *The Rome Statute of the International Criminal Court. A Commentary, Vol. 2*, Oxford University Press, 2002, p. 1137 at 1148; 1159.

[625] ICC, OTP, *Report on preliminary examinations 2011*.

[626] PUES A., *Towards the 'Golden Hour'? A Critical Exploration of the Length of Preliminary Examinations*, in *Journal of International Criminal Justice*, 15, 2017, p. 435 at 449.

[627] STAHN C., *Damned If You Do, Damned If You Don't. Challenges and Critiques of Preliminary Examination at the ICC*, in *Journal of International Criminal Justice*, 15, 2017, p. 413 at 416; SEILS P., *Putting Complementarity in its Place*, in STAHN C. (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015, p. 305 at 309; GREY R., WHARTON S., *Lifting the Curtain. Opening a Preliminary Examination at the International Criminal Court*, in *Journal of International Criminal Justice*, 16, 2018, p. 593 at 594.

approaches with regards to the preliminary examination: a Court-centric approach where the examination exercises pre-investigative functions; and a 'consequentialist' approach, that may serve different purposes and is not necessarily followed by an investigation. In the first case the preliminary examination is usually very short because it is grounded on the idea that the international investigation and prosecution is the best way of proceeding. In the second case the Prosecutor uses the examination as 'soft power' where the objective is usually encouraging domestic proceedings and stimulate national prosecution (the so called 'positive complementarity'). But the consequentialist approach cannot be used in all the situations[628] and in any event the passing of time without further action may reduce 'soft power' effect.[629] It is worth recalling that if the Office's strategy does not produce the desired effects at the national level, the investigations will be irremediably jeopardised. Therefore, it is appropriate the conclusion that since 'complementarity is not a result, but a process',[630] it would be better to consider national prosecution as a positive effect rather than the objective of the preliminary examination. Once the threshold required for opening an investigation is met, it would be advisable to open the investigation, possibly provide assistance to the State concerned on the basis of the principle of reverse complementarity and, if the State effectively investigate and prosecute the alleged responsible of the crimes, adopt a decision not to prosecute under Art. 53(2) and close the investigation.

Eventually, it is worth mentioning that the reports on preliminary examinations also provides with insight on the amount of information received by the Office. Although the number on information increased during the years, its amount does not seem impossible to manage.[631]

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[628] For example, according to a statement of the Prosecutor, it seems that the consequentialist approach is producing some results at the national level with regards to the alleged crimes committed in Guinea. *See Statement of ICC Prosecutor, Fatou Bensouda, at the conclusion of her Office's mission to Conakry, Guinea*, 11 Nov. 2019.

[629] *See* BITTI G., *Article 53*, in FERNANDEZ J., PACREAU X., *Statut de Rome de la Cour pénale internationale. Commentaire article par article*, Pedone, 2012, p. 1173 at 1190.

[630] STAHN C., *Damned If You Do, Damned If You Don't. Challenges and Critiques of Preliminary Examination at the ICC*, in *Journal of International Criminal Justice*, 15, 2017, p. 413 at 434.

[631] *Contra see* RASTAN R., *Comment on Victor's Justice & the Viability of* Ex Ante *Standards*, in *The John Marshall Law Review*, 43, 3, 2010, p. 569 at 579, who highlights the 'large quantities of data submitted'; GREY R., WHARTON S., *Lifting the Curtain. Opening a Preliminary Examination at the International Criminal Court*, in *Journal of International Criminal Justice*, 16, 2018, p. 593 at 601. According to the Report on Preliminary Examination Activities of 2019, between 1 Nov. 2018 and 31 Oct. 2019, the Office received 795 communications pursuant to article 15 of the Statute: '617 were manifestly outside the Court's jurisdiction; 112 were linked to a situation already under preliminary examination; 25 were linked to an investigation or prosecution; and 41 warranted further analysis' ICC, Office of the Prosecutor, *Report on Preliminary Examination Activities 2019*, para. 23.

Irrespective of the articulated structure established by the Policy Paper[632] and irrespective of the fact that the preliminary examinations are more specific than human rights documentation by NGOs,[633] it is better not to overestimate the length and complexity of this stage of the proceedings. In the light of the generic nature of most of the information received under Art. 15 of the Statute, the Office should not find difficulties in assessing whether the facts described can or cannot integrate the features of the international crimes. Although a proper admissibility assessment requires some time,[634] it is not appropriate to let too much time pass before *initiating* an investigation.[635]

Expediting the assessment does not mean making a superficial assessment. On the contrary, a close scrutiny in the determination of the existence of the required standard provided for in Article 53 is essential, especially when acting *proprio motu* under Art. 15. Indeed, in this case the initiation of the investigation is subject to the authorisation of the PTC.[636] Nevertheless, it must be kept in mind that the threshold remains the lowest described by the Statute:[637] summarising the jurisprudence of the Court on this issue, the preliminary examination does not necessitate any complex or detailed process of analysis and that the information available is not expected to be comprehensive or conclusive.[638]

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[632] Scholars also note that the structure of the preliminary examination drawn by the Policy Paper suggests a sequenced analysis, when it would make sense to adopt 'a more holistic methodology towards the […] situation'. Basically, the sequenced structure and the idea of examinations that pass from a stage to another look quite artificial. STAHN C., *Damned If You Do, Damned If You Don't. Challenges and Critiques of Preliminary Examination at the ICC*, in *Journal of International Criminal Justice*, 15, 2017, p. 413 at 428.

[633] Stahn notes that preliminary examinations 'are part of the justice process and address violations specifically through the lens of individual criminal responsibility. *Ibid.*, p. 416.

[634] GUARIGLIA F., ROGIER E., *The Selection of Situations and Cases by the OTP af the ICC*, in STAHN C. (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015, p. 350 at 356.

[635] *See* below Chapter II, Section III, 2.3. The complementarity test.

[636] *See* below, Chapter III, Section II, 2. The authorisation for the initiation of an investigation under Article 15.

[637] *See* below, Chapter II, Section I, 3. The concept of 'reasonable basis'.

[638] *See* ICC, PTC II, *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 Mar. 2010, ICC-01-09-19, para. 27; ICC, PTC III, *Situation in Côte d'Ivoire*, *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation in the Republic of Côte d'Ivoire*, 3 Oct. 2011, ICC-02/11-14, para. 24; ICC, PTC I, *Situation in Georgia*, *Decision on the Prosecutor's request for authorization of an investigation*, 27 Jan. 2016, 01/15-12, para. 25; ICC, PTC III, *Situation in Burundi*, *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi*, 9 Nov. 2017, ICC-01/17-9, para. 30; ICC, PTC I, *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, *Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation*, 16 Jul. 2015, ICC-01/13-34, para. 13; ICC, PTC I, *Request under Regulation 46(3) of the Regulations of the Court*, *Decision on the 'Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute*, 6 Sep. 2018, ICC-RoC46(3)-01/18-37, para. 85.

CHAPTER II

THE OBJECT OF THE ICC PROSECUTOR'S ASSESSMENT

This Chapter analyses the main constitutive elements governing the three stages of the Prosecutor's assessment on the initiation of an investigation or a prosecution under Art. 53(1) and (2) of the Statute. These three elements are: jurisdiction, admissibility, and interests of justice. Greater attention will be given to admissibility, and in particular to the gravity qualifier and to the interests of justice clause. A preliminary section on the applicable standard for initiating an investigation and a prosecution opens the chapter.

Particular attention will be given to the concepts of gravity and interests of justice because they are usually considered concepts giving the Prosecutor broad discretion.[1] This discretion would come from the absence of a clear definition of these two concepts in the Statute and in the subsidiary statutory law. In this regard, Côté has suggested that the statutory provisions dealing with prosecutorial discretion have been voluntarily left open in order to allow the Court to develop them through practice, avoiding the risk that a pre-established definition could undermine their efficiency.[2] Limitations to discretion would instead be found 'beyond the Statutes and Rules into general principles of law, human rights norms and customary international law'.[3] There is no doubt that, when a subject is granted a certain amount of discretion, general principles and human rights norms limit discretion in a system based on the rule of law. Pues refers to this kind of discretion as 'interpretative discretion' and opposes it to the 'procedural discretion', i.e. the power to decide the most appropriate course of action.[4] Nevertheless, the main question is whether the general concepts of gravity and interests of justice give the Prosecutor a discretionary power at all.

[1] By way of an example, according to Schabas, 'gravity' and 'interest of justice' give the Prosecutor an 'enormous space for highly discretionary determinations'. SCHABAS W.A., *Prosecutorial Discretion v. Judicial Activism at the International Criminal Court*, in *Journal of International Criminal Justice*, 6, 2008, p. 731 at 735. *See* also SCHABAS W.A., *An Introduction to the International Criminal Court*, Cambridge University Press, 2020, p. 254.

[2] CÔTÉ L., *Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law*, in *Journal of International Criminal Justice*, 3, 2005, p. 162 at 172.

[3] *Ibid.*

[4] PUES A., *Discretion and the Gravity of Situations at the International Criminal Court*, in *International Criminal Law Review*, 17, 5, 2017, p. 960. That discretion might have different meanings was highlighted also during the workshop in Freiburg: 'it might refer to what to investigate; or to what should happen to particular suspects as a result of an investigation'. *See* SANDERS A., *Summary of Discussion (28 May 1998)*, in ARBOUR L., ESER A., AMBOS K., SANDERS A. (eds.), *The Prosecutor of a Permanent International Criminal Court, International Workshop in co-operation with the Office of the Prosecutor of the International Criminal Tribunals (ICTY and ICTR), Freiburg im Breisgau, May 1998*, Edition Iuscrim, 2000, p. 121 at 628.

As seen in Chapter I, despite the similarities between discretion and interpretation, the two concepts must remain separated. Assuming that the inclusion of gravity and interests of justice among the requirements of Art. 53 gives the Prosecutor a discretionary power – a conclusion that, at least with regards to the concept of gravity, will be challenged – their interpretation can at best modify the extent of this discretion. But also with regards to the extension of this discretion, it should be recalled that gravity and the interests of justice are legal requirements necessary for the adoption of a judicial decision. Therefore, the necessity to give them a legal content significantly reduces their possible discretionary content. The *ex ante* identification of the content of gravity and interests of justice allows to determine whether the action of the Prosecutor is consistent or whether she exceeded the limits imposed by the law.[5] A determination based on legal and predictable parameters benefits from a stronger legitimacy and is less subject to the accusation of arbitrariness or favouritisms. Moreover, the action of the Court is subject to the complementarity principle, which gives the States the primary role of investigating and prosecuting international crimes. Therefore, the adoption *ex ante* of legal standards to be applied objectively may be crucial to assess the behaviour of the States towards international crimes as well.[6]

The identification of *ex ante* criteria is not the solution to every problem: accordig to Pues, 'pretending exactitude, where there is none, creates false expectations'.[7] Nevertheless, without pretending to reach exactitude, the Statute is a legal text, the founding treaty of a judicial institution gravity and the interests of justice are legal criteria and the Prosecutor is required to perform judicial functions.

Further, only the identification of *ex ante* criteria makes the judicial review of the Prosecutor's decision and more in general the control of the consistency of her action by other subjects possible. As it will be seen in this Chapter and in Chapter III, there is some resistance both among scholars and in the case law as to the possibility to challenge the Prosecutor's

[5] Selection is inherent in the concept of international criminal law. Therefore, the importance of using *ex ante* standards applies to all the activities of the Prosecutor. *See* MARSTON DANNER A., *Enhancing the legitimacy and accountability of prosecutorial discretion at the International Criminal Court*, in *American Journal of International Law*, 97, 3, 2003, p. 510 at 538. RASTAN R., *Comment on Victor's Justice & the Viability of* Ex Ante *Standards*, in *The John Marshall Law Review*, 43, 3, 2010, p. 569 at 588 ff.; LEPARD B.D., *How should the ICC Prosecutor exercise his or her discretion? The role of fundamental ethical principles*, in *John Marshall Law Review*, 43, 3, 2010, p. 553; MURPHY R., *Gravity Issues and International Criminal Court*, in *Criminal Law Forum*, 17, 2006, p. 312 at 314.

[6] In similar vein, *see* RASTAN R., *Comment on Victor's Justice & the Viability of* Ex Ante *Standards*, in *The John Marshall Law Review*, 43, 3, 2010, p. 569 at 600-601.

[7] PUES A., *Discretion and the Gravity of Situations at the International Criminal Court*, in *International Criminal Law Review*, 17, 5, 2017, p. 960.

determination with regards to her gravity and interests of justice determinations, especially within the judicial review. Various authors criticise the restrictions that the Chamber's interpretation draws of the Prosecutor's discretion and denounces that the decisions adopted by some Chambers (e.g. in the situations in the Comoros, Bangladesh and Afghanistan) are slowly eroding it.[8] Nevertheless, it has also been observed that the restrictions to the Prosecutor's discretion and the intrusive powers of the PTC over her activity are justified by the 'volatile political environment in which the Court operates' in addition to ensuring transparency and accountability.[9] Even more importantly, it can be highlighted that the Statute does not grant to the Prosecutor the exclusive power to assess gravity or interests of justice.[10] The Chambers are required to assess admissibility including gravity under Articles 17-19 and to review a Prosecutor's determination of the interests of justice at least under the procedure ruled by Article 53(3). Further, as it will be seen in Chapter III, these criteria shall be reviewed by in the procedure under Article 15. The pre-trial stage is therefore the more appropriate stage for the review. This conclusion is not uncontested. For example, Marston Danner, although affirming the importance of prosecutorial discretion to be led by *ex ante* criteria, argues that the review of these parameters at the pre-trial stage would unnecessarily complicate the procedure.[11] In his view, these criteria would rather be useful in the determination of the Prosecutor's accountability towards the international community (States, the UNSC, NGOs) and the public. Nevertheless, preventing the review at the pre-trial stage would deprive the Judiciary of any power of review: it is apparent that it would be pointless to assess in trial or in appeal whether the PTC correctly assessed the requirements for granting a request under Article 15.

In conclusion, unless the Chambers (and in particular the PTCs) renounce to their prerogatives on defining gravity and interests of justice and decide to leave this task entirely to

[8] LONGOBARDO M., *Everything Is Relative, Evan Gravity*, in *Journal of International Criminal Justice*, 14, 4, 16 Sep. 2016, p. 1011 at 1018; MELONI C., *The ICC preliminary examination of the Flotilla situation: An opportunity to contextualise gravity*, in *Questions of International Law*, 30 Nov. 2016; JACOBS D., *ICC Pre-Trial Chamber rejects OTP request to open an investigation in Afghanistan: some preliminary thoughts on an ultra vires decision*, in *Spreading the Jam*, 12 Apr. 2019; HELLER K.J., *The Pre-Trial Chamber's Dangerous Comoros Review Decision*, in *Opinio Juris*, 17 Jul. 1015.

[9] NSEREKO D.D.N., *Prosecutorial Discretion Before National Courts and International Tribunals*, in *Journal of International Criminal Justice*, 3, 1, 2005, p. 124 at 141.

[10] Differently *of Justice' Policy Paper*, in *Journal of International Criminal Justice*, 15, 2017, p. 455, at 456; *see* also POLTRONERI ROSSETTI L., *The Pre-Trial Chamber's Afghanistan Decision*, in *Journal of International Criminal Justice*, 17, 2019, p. 585 at 598, who argues that 'the institutional subject entrusted with the elaboration and application of the interests of justice is first and foremost the OTP in the exercise of prosecutorial discretion, although in the context of a dynamic institutional dialogue with the judiciary'.

[11] MARSTON DANNER A., *Enhancing the legitimacy and accountability of prosecutorial discretion at the International Criminal Court*, in *American Journal of International Law*, 97, 3, 2003, p. 510 at 548.

the Prosecutor, not only the 'interpretative discretion' belongs to the Chambers and not to the Prosecutor,[12] but the apparent broad discretion that these concepts would grant her may be significantly reduced and even eliminated, transforming them in 'exact' (as far as possible) legal requirements.

[12] In the same vein Judge Ibañez Carranza, referring to both the concepts of 'gravity' and 'interests of justice', in ICC, AC, *Situation in the Islamic Republic of Afghanistan, Separate opinion of Judge Luz del Carmen Ibáñez Carranza to the Judgment on the appeal against the decision of Pre-Trial Chamber II on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan,* annexed to *Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan,* 5 Mar. 2020, ICC-02/17-138-Anx-Corr OA4, para. 61

CHAPTER II

SECTION I

THE REASONABLE BASIS FOR THE INITIATION OF AN INVESTIGATION

Art. 53(1) requires the Prosecutor to be satisfied about the existence of a reasonable basis for the initiation of an investigation.

The reasonable basis standard is the lowest standard provided for by the Statute, followed by the 'reasonable grounds to believe standard' required to issue a warrant of arrest (Art. 58(1)), the 'substantial grounds to believe standard' required at the confirmation of the charges (Art. 61(7)) and the 'beyond reasonable doubt standard' required for conviction (Art. 66(3)).

1. The 'reasonable basis' in the *chapeau* of Article 53 and in para. (1)(a)

The definitive version of Art. 53 of the Statute uses the expression 'reasonable basis' twice, once in the *chapeau* of para. (1) ('the Prosecutor shall [...] initiate an investigation unless he or she determines that there is no *reasonable basis* to proceed under this Statute' – *emphasis added*); and once in para. (1)(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' – *emphasis added*).

This redundancy also appeared in the abovementioned Art. 47 '*Investigation of alleged crimes*' of the Zupthen Draft, where 'reasonable basis' appeared both in the *chapeau* by stating that 'the Prosecutor shall […] initiate an investigation unless the Prosecutor concludes that there is no reasonable basis for a prosecution', and among the factors listed in para. (1 *bis*) to be assessed by the Prosecutor prior to the initiation of an investigation affirming that 'the Prosecutor shall […] (b) determine whether: (i) the complaint provides or is likely to provide a reasonable basis […] for proceedings with a prosecution'. The repetitiveness was caught also by the delegations in Zupthen that suggested using a broader term in the opening clause in order to cover all the criteria listed under para. (1 *bis*).[13]

The discussion in Rome, left the opening clause of Art. 47 Zupthen Draft basically untouched, but significantly amended the criteria listed in para. (1 *bis*) of the same Article: the final version of Art. 53(1)(a) ICC Statute does not require the Prosecutor to assess whether the complaint provides for a reasonable basis for proceedings with a prosecution, rather to assess

[13] *Report of the Inter-Sessional Meeting from 19 to 30 January 1998 held in Zupthen*, The Netherlands, A/AC.249/1998/L.13, 1998, pp. 86-87.

whether the available information provides for a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed.

Despite this amendment, the concept of reasonable basis apparently still refers to two different requirements: in the *chapeau* of Art. 53(1) it refers to the proceedings and in Art. 53(1)(a) it refers to the belief of the commission of a crime falling within the Court's jurisdiction. This problem was solved by the PTC II in the first decision adopted under Art. 15, which pointed out that '"the reasonable basis to believe" test set out in article 53(1)(a) of the Statute is subsumed by the "reasonable basis to proceed" standard referred to in the opening clause of article 53(1) of the Statute, since the former is only one element of the latter'.[14]

2. The concept of 'reasonable basis'

The expression identifying the applicable standard at this stage changed during the drafting of the Statute. Art. 26 of the ILC's 1996 Draft, including the core elements of the actual Art. 53, stated referred to 'possible' rather than 'reasonable' basis, and linked the requirement directly to the prosecution rather than to the investigation. [15] The Preparatory Committee further discussed the need for a minimum threshold in order to initiate an investigation in conjunction with the possible introduction of a 'screening mechanism or a judicial filter to distinguish between well-founded complaints of sufficiently serious crimes and frivolous complaints'.[16] In particular, the Committee discussed whether to introduce a preliminary assessment of the likelihood of the complaint to provide alternatively possible or reasonable basis for proceeding with the prosecution.[17] When the Committee met in Zupthen, only few months before the Rome Conference, it was flagged that the Draft included both the wording 'sufficient' and 'reasonable basis' respectively at Art. 46 'Prosecutor' (former Art. 25 *bis* of the ILC's draft), ruling the initiation of the investigation *proprio motu*, and at Art. 47 'Investigation of alleged crimes' (former Art. 26 of the ILC's draft), applicable irrespective of the mechanism triggering the jurisdiction of the Court. Therefore, the report noted that these

[14] ICC, PTC II, *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 Mar. 2010, ICC-01-09-19, para. 26.

[15] Art. 26, *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. II, (Compilation of Proposals)*, G.A. 51st Sess., Supp. No. 22A, A/51/22, 1996, p. 111.

[16] *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I, (Proceedings of the Preparatory Committee During March-April and August 1996)*, G.A. 51st Sess., Supp. No. A/51/22, 1996, para. (224), p. 49.

[17] Art. 26, *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. II, (Compilation of Proposals)*, G.A. 51st Sess., Supp. No. 22A, A/51/22, 1996, p. 112.

terms, if maintained, had to be harmonised.[18] The drafters provided for a definition of neither sufficiency nor reasonableness.

The wording 'sufficient basis' previously appeared at Art. 18 ICTY Statute and Art. 17 ICTR Statute, whose content was very close to the wording of Art. 46 of the Zupthen Draft. As already analysed,[19] these two provisions ruled the duty of the Prosecutors of the *ad hoc* Tribunals to initiate investigations *ex-officio* or on the basis of information obtained from any source and the duty to assess the information received or obtained and decide whether there was sufficient basis to proceed. Notwithstanding this, whether the concept of 'sufficient basis' in the system of the *ad hoc* Tribunals may be of assistance is debatable. Despite the similar wording, authoritative doctrine notes the different function of the two standards. While Art. 18 ICTY Statute and Art. 17 ICTR Statute refers to an evidentiary standard because the appropriateness of the intervention had already been considered by the UNSC, the reasonable basis standard of Art. 53 of the Rome Statute is an appropriateness standard, because it includes an appropriateness assessment on the initiation of the investigations in a specific situation.[20]

Therefore, rather than referring to these precedents, it is better to look at the Statute's structure. As said, the 'reasonable basis standard' is the lowest standard in the hierarchy of those provided for by the Statute.[21] The one immediately following is the 'reasonable grounds to believe standard' required for issuing a warrant of arrest under Art. 58. Since the latter is more easily identifiable, once the concept of 'reasonable grounds' has been clarified, the 'reasonable basis' standard may be built accordingly.[22]

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[18] *Report of the Inter-Sessional Meeting from 19 to 30 Jan. 1998 held in Zupthen*, The Netherlands, A/AC.249/1998/L.13, 1998, p. 86.

[19] *See* above, Chapter I, Section III, 2. The Prosecutor of the *ad hoc* Tribunals.

[20] BERGSMO M., KRUGER P., BEKOU O., *Article 53*, in AMBOS K., *The Rome Statute of the International Criminal Court*, 4th ed., Beck/Hart/Nomos, 2021, mn. 4.

[21] ICC, PTC II, *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 Mar. 2010, ICC-01-09-19, para. 34; ICC, PTC III, *Situation in Côte d'Ivoire*, *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation in the Republic of Côte d'Ivoire*, 3 Oct. 2011, ICC-02/11-14, para. 24; ICC, PTC III, *Situation in Burundi*, *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi*, 9 Nov. 2017, ICC-01/17-9, para. 30; ICC, PTC I, *Request under Regulation 46(3) of the Regulations of the Court*, *Decision on the 'Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute*, 6 Sep. 2018, ICC-RoC46(3)-01/18-37, para. 85.

[22] Before that the Court had the opportunity to interpret this provision, Turone noted that the wording of Art. 58(1)(a) reproduced that of Rule 47(B) of the RPE of the ICTY. Art. 19 of the ICTY Statute required the Judge to be satisfied that a *prima facie* case had been established by the Prosecutor, therefore suggested to interpret Art. 58(1)(a) accordingly. TURONE G., *Powers and Duties of the Prosecutor*, in CASSESE A., GAETA P., JONES J.R.W.D., *The Rome Statute of the International Criminal Court. A Commentary*, *Vol. II*, Oxford University Press, 2002, p. 1137 at 1173.

In its case-law,[23] the Court has originally stated that the expression 'reasonable grounds to believe' must be interpreted keeping in mind the concept of 'reasonable suspicion' articulated in Art. 5(1)(c) ECHR. Even if the development of the case law has reduced the necessity to refer to the ECtHR standard,[24] it is appropriate to recall the core of standard applied by the Court of Strasbourg. Art. 5(1)(c) ECHR authorises a restriction of liberty, among other grounds, in case of lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence. According to the ECtHR, '[t]he 'reasonableness' of the suspicion on which an arrest must be based forms an essential part of the safeguard against arbitrary arrest and detention which is laid down in Art. 5(1)(c)'. Moreover, for there to be reasonable suspicion, there must be 'facts or information which would satisfy an objective observer that the person concerned may have committed an offence' and 'what may be regarded as "reasonable" will depend upon all the circumstances'.[25] The ECtHR stresses that 'as a general rule, problems concerning the existence of a "reasonable suspicion" arise at the level of the facts', and '[t]he question then is whether the arrest and detention [are] based on sufficient objective elements to justify a "reasonable suspicion" that the facts at issue had actually occurred'.[26] The references cannot be vague and general, but the ECtHR requires specific statements, information or concrete complaints in order to justify the reasonableness of the suspicion.[27] The ECtHR itself, in order to ascertain a possible violation of Art. 5 ECHR is

[23] ICC, PTC I, *The Prosecutor v. Omar Al Bashir*, *Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir*, 4 Mar. 2009, ICC-02/05-01/09-2; ICC, AC, *The Prosecutor v. Omar Al Bashir*, *Judgment on the appeal of the Prosecutor against the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir"*, 3 Feb. 2010, ICC-02/05-01/09-73, para. 31;

[24] Ryngaert notes that the recent case law of the ICC has abandoned the reference to the reasonable suspicion standard probably because of the criticism of scholars. Notwithstanding this, in his opinion, criticism 'is somewhat exaggerated' and apply only to the 'unlikely theoretical scenario' in which the PTC deems that the thershold is met even if the Prosecutor has submitted only one peace of evidence in order to support her determination. RYNGAERT C., *Article 58*, in AMBOS K., *The Rome Statute of the International Criminal Court*, 4th ed., Beck/Hart/Nomos, 2021, mn. 13.

[25] ECtHR, *Fox, Campbell and Hartley v. the United Kingdom*, *Judgment*, 30 Aug. 1990, Application no. 12244/86; 12245/86; 12383/86, para. 32; *see* also ECtHR, *Murray v. the United Kingdom*, *Judgment*, 28 Oct. 1994, Application no. 14310/88, para. 51; ECtHR, *Erdagöz v. Turkey*, *Judgment*, 22 Oct. 1997, Application no. 127/1996/945/746, para.51; ECtHR, *Ilgar Mammadov v. Azerbaijan*, *Judgment*, 22 May 2014, Application no. 15172/13, para.88, 92.

[26] ECtHR, *Włoch v. Poland*, *Judgment*, 19 Oct., 200, Application no. 27785/95, para. 108; ECtHR, *Ilgar Mammadov v. Azerbaijan*, *Judgment*, 22 May 2014, Application no. 15172/13, para. 94.

[27] ECtHR, *Lazoroski v. the former Yugoslav Republic of Macedonia*, *Judgment*, 8 Oct. 2009, Application no. 4922/04, para. 48; ECtHR, *IlgarMammadov v. Azerbaijan*, *Judgment*, 22 May 2014, Application no. 15172/13, para. 97.

allowed to request the States to provide 'facts or information capable of satisfying the Court that the arrested person was reasonably suspected of having committed the alleged offence'.[28]

Further elements for the definition of the 'reasonable grounds to believe standard' were given in the *Al Bashir case*. In that case,[29] the PTC I, Judge Ušaka dissenting, rejected the Prosecutor's application for a warrant of arrest, as it convened that the Prosecutor had not proven that the existence of a *dolus specialis* was the *only* reasonable conclusion from the available information as required by the standard provided for in Art. 58.[30] On the other hand, the dissenting Judge highlighted that requesting that the conclusion to be driven at this stage is *the only* reasonable conclusion rather than *a* reasonable conclusion is tantamount to applying the beyond reasonable doubt standard.[31] The AC agreed with the dissenting Judge Ušaka and concluded that certainty of the commission of the crime is required only at the trial stage.[32]

The 'reasonable basis standard' is therefore lower than the 'reasonable grounds to believe standard' as defined above.

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[28] ECtHR, *Fox, Campbell and Hartley v. the United Kingdom*, *Judgment*, 30 Aug. 1990, Application no. 12244/86; 12245/86; 12383/86, paras 34; ECtHR, *Ilgar Mammadov v. Azerbaijan*, *Judgment*, 22 May 2014, Application no. 15172/13, para. 89. In addition, the ECtHR expressly distinguishes the level of the facts which raise a suspicion and those necessary to justify the bringing of the charges or a conviction (ECtHR, *Murray v. the United Kingdom*, *Judgment*, 28 Oct. 1994, Application no. 14310/88, para. 55; ECtHR, *Ilgar Mammadov v. Azerbaijan*, *Judgment*, 22 May 2014, Application no. 15172/13, para. 87), but highlights that '[t]he persistence of a reasonable suspicion that the person arrested has committed an offence is a *conditio sine qua non* for the lawfulness of the continued detention' (ECtHR, *Stögmüller v. Austria*, *Judgment*, 10 Nov. 1969, Application no. 1602/62, para. 4 (section "As to the Law")). Nevertheless, 'after a certain lapse of time [the persistence of a reasonable suspicion] no longer suffices. In such cases, the ECtHR must establish whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty' (ECtHR, *Goral v. Poland*, *Judgment*, 30 Oct. 2003, Application no. 38654/97, para. 66. *See* also ECtHR, *Stögmüller v. Austria*, *Judgment*, 10 Nov. 1969, Application no. 1602/62). For example, in *Labita v. Italy* the ECtHR stated that hearsay and information received by *pentiti* (an Italian term defining former members of Mafia-type organisations who cooperate with the judicial authorities) while investigating Mafia-crimes 'must be supported by objective evidence' and that 'while a suspect may validly be detained at the beginning of proceedings on the basis of statements by *pentiti*, such statements necessarily become less relevant with the passing of time, especially where no further evidence is uncovered during the course of the investigation' (ECtHR, *Labita v. Italy*, *Judgment*, 6 Apr. 2000, Application no. 26772/95, paras 158-159). In addition, the level of suspicion required may be higher if the person is detained for a long time (ECtHR, *Murray v. the United Kingdom*, *Judgment*, 28 Oct. 1994, Application no. 14310/88, para.56; ECtHR, *IlgarMammadov v. Azerbaijan*, *Judgment*, 22 May 2014, Application no. 15172/13, para.88).

[29] ICC, AC, *The Prosecutor v. Omar Al Bashir*, *Judgment on the appeal of the Prosecutor against the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir"*, 3 Feb. 2010, ICC-02/05-01/09-73.

[30] ICC, PTC I, *The Prosecutor v. Omar Al Bashir*, *Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir*, 4 Mar. 2009, ICC-02/05-01/09-3.

[31] *Ibid.*, *Separate and Partly Dissenting Opinion of Judge Anita Ušacka*, p. 96, para. 31.

[32] ICC, AC, *The Prosecutor v. Omar Al Bashir*, *Judgment on the appeal of the Prosecutor against the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir"*, 3 Feb. 2010, ICC-02/05-01/09-73, para. 33.

In the first request seeking for authorisation to open an investigation, the Prosecutor stated that the 'reasonable basis standard' 'relates to the investigation of crimes of relevance to the situation as a whole and the existence of relevant information that provides a foundation to the request', while 'it is not the opportunity to proceed with the identification of individual criminal liability'.[33] In practice, this standard 'would require the existence of some facts or information which would satisfy an objective observer that crimes within the jurisdiction of the Court appear to have been committed, but without identification of the persons who may have committed such offences'.[34]

In the decision authorising an investigation in the situation in Kenya under Art. 15, the PTC II underlined that in English 'reasonable' means 'fair and sensible', 'within the limits of the reason'.[35] Given that the Chamber exclusively focused on the 'reasonable basis' under Art. 53(1)(a), it recognised that at this stage the applicable standard is low and that the information available to the Prosecutor does not need to point towards one conclusion, since 'the Chamber must be satisfied that there exist a sensible or reasonable justification for a belief that a crime falling within the jurisdiction of the Court "has been or is being committed"'.[36] The subsequent jurisprudence did not depart from this threshold.[37]

Judge Kaul, in his dissenting opinion to the decision authorising an investigation in Kenya, was particularly concerned by the standard required for commencing an investigation, which is relevant both for the Prosecutor and the PTC deciding on the request for

[33] ICC, OTP, *Situation in the Republic of Kenya*, *Request for authorisation of an investigation pursuant to Article 15*, 26 Nov. 2009, ICC-01/09-3, para. 102.

[34] ICC, OTP, *Situation in the Republic of Kenya*, *Request for authorisation of an investigation pursuant to Article 15*, 26 Nov. 2009, ICC-01/09-3, para. 104. This interpretation is consistent with the Prosecutor's understanding of the role of the PTC as a filter distinguishing those situations that should form the object of investigation from those that should not. *Ibid.* para. 111. *See* below, Chapter III, Section II, 2. The authorisation for the initiation of an investigation under Article 15.

[35] ICC, PTC II, *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 Mar. 2010, ICC-01-09-19, para. 30.

[36] *Ibid*., para. 35.

[37] ICC, PTC III, *Situation in Côte d'Ivoire*, *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation in the Republic of Côte d'Ivoire*, 3 Oct. 2011, ICC-02/11-14, para. 24; ICC, PTC I, *Situation in Georgia*, *Decision on the Prosecutor's request for authorization of an investigation*, 27 Jan. 2016, 01/15-12, para. 25; ICC, PTC III, *Situation in Burundi*, *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi*, 9 Nov. 2017, ICC-01/17-9, para. 30; ICC, PTC I, *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, *Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation*, 16 Jul. 2015, ICC-01/13-34, para. 13; ICC, PTC I, *Request under Regulation 46(3) of the Regulations of the Court*, *Decision on the 'Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute*, 6 Sep. 2018, ICC-RoC46(3)-01/18-37, para. 85.

authorisation. He cautioned against the generous or summary evaluation of 'any information, of even fragmentary nature', excluding that they could satisfy the required standard.[38]

One debated question concerned the clarity of the available information and the prospects of positive results from the investigation. This problem was also addressed by the Prosecutor of the ICTY than considered these factors as militating against the initiation of an investigation into the possible crimes committed by the NATO forces.[39] The Prosecutor of the ICC has recognised, on some occasions, that when the information allows two reasonable interpretations the conflict is resolved in favour of an investigation.[40] The same principle has been confirmed by the PTC III,[41] even if authoritative doctrine does not find this conclusion entirely convincing, because the articulated structure of the preliminary examination should allow the Prosecutor to have a clear picture of the situation and of the need for opening an investigation.[42] The Prosecutor, after this initial approach in favour of investigation seems having adopted the opposite one even if when she decided *not to open* an investigation into the *Registered Vessels situation*, obliging the PTC I to reaffirm the need for investigation in case of doubt.[43]

Indeed, in the *Registered Vessels situation*, a different view of the legal standard provided for at Art. 53(1) between the Prosecutor and the Chambers emerged. When the PTC I requested the Prosecutor to reconsider her decision not to initiate an investigation, the Prosecutor reacted accusing the Chamber of oversimplifying the analysis under Art. 53(1). She highlighted that the reasonable basis test implies that the available information 'permits a

[38] ICC, PTC II, *Situation in the Republic of Kenya*, *Dissenting Opinion of Judge Hans-Peter Kaul*, annexed to *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, 31 Mar. 2010, ICC-01-09-19, para. 15.

[39] See also below, Chapter III, Section II, 3. The decision not to investigate or prosecute and the Chamber's power of review.

[40] ICC, OTP, *Situation in Georgia*, *Request for authorisation of an investigation pursuant to article 15*, 13 Oct. 2015, 02/17-4, para. 49.

[41] ICC, PTC III, *Situation in Burundi*, *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi*, 9 Nov. 2017, ICC-01/17-9, para. 30; 138. *See* also PTC I, *Situation in Georgia*, *Separate Opinion of Judge Péter Kovács*, annexed to *Decision on the Prosecutor's request for authorization of an investigation*, 27 Jan. 2016, 01/15-12-Anx1, para. 23. The unlikely results possibly achieving with an investigation is instead one of the arguments used by the PTC II in the decision rejecting the request to open an investigation in Afghanistan.

[42] AMBOS, K., *Treatise on International Criminal Law, Vol. III: International Criminal Procedure*, Oxford University Press, 2016, p. 343.

[43] ICC, PTC I, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia*, *Decision on the Request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation*, 16 Jul. 2015, ICC-01/13-34, para. 13; ICC, PTC I, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia*, *Decision on the 'Application for Judicial Review by the Government of the Comoros'*, 16 Sep. 2020, ICC-01/13-111, para. 16, see also para. 43.

reasonable conclusion that the criteria in article 53(1)(a) to (c) are met'.[44] She further clarified that a reasonable conclusion 'is more than a possible, conceivable, or hypothetical inference. Rather it is a rational or sensible conclusion based on the totality of the available information'.[45] Consequently she refused the PTC's argument that only the information manifestly false must be excluded from the assessment. In her view, this approach transforms the reasonable basis standard in a 'screen standard', while it must be conceived as a 'result standard', where the result is 'proceeding'.[46] In the Prosecutor's opinion, the PTC's approach, *inter alia*, overlooks the distinction between minor and fundamental contradictions or inconsistencies; makes the test under Art. 53(1) of the Statute 'virtually redundant' since any referral supported by not manifestly false information would require investigation; and suggests that the test is lower in case of referral rather than in case of *proprio motu* investigations.[47] Further she refused any presumption in favour of an investigation 'when factual questions decisive to the Prosecutor's analysis' concerning jurisdiction and admissibility remain unclear.[48]

But the Prosecutor's final statement to the effect that the *minimum* standard of analysis corresponds to the analysis made by the PTC in analysing the Prosecutor's request to initiate an investigation[49] makes it apparent the contradictory approach of the Prosecutor. On the one side she admits that the standard to be applied by the PTC is the same in case of review of a request for authorisation to open an investigation and of review of a decision not to investigate, but on the other side she pretends that the PTC applies a different approach in the reviewing process, including a presumption for investigation when she submits a request for investigation (therefore ignoring possible inconsistencies in the available information) and excluding the presumption when she decides not to investigate (therefore giving credit to the inconsistencies highlighted by the Prosecutor).

The Chamber has not directly addressed these issues immediately after. Nevertheless, the recent judgement of the AC on the appeal of the Prosecutor against the decision rejecting the request for opening an investigation in Afghanistan may produce consequences in this

[44] ICC, OTP, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia, Final decision of the Prosecution concerning the "Article 53(1) Report" (ICC-01/13-6-AnxA), dated 6 November 2014*, 29 Nov. 2017, ICC-01/13-57, paras 20-22

[45] *Ibid.*, para. 22.

[46] *Ibid.*, para. 24.

[47] *Ibid*., para. 25.

[48] *Ibid.*, para. 53.

[49] *Ibid*., para. 30.

regard. As it will be seen in Chapter III,[50] the AC distinguishes the subject-matter of the Prosecutor assessment and of the PTC in the procedure under Art. 15. Should this debatable conclusion be followed in the future jurisprudence, the PTC would not be required to assess the information (and therefore their possible inconsistencies) in the authorisation procedure anymore, but rather the Prosecutor's narrative of the facts, making therefore impossible to compare the review of a decision to initiate the investigation with the review of a decision not to investigate. Moreover, as it will be further analysed in Chapter III,[51] in the *Registered Vessels situation* the Majority of the AC stated that the request for review of the PTC of the Prosecutor's decision not to investigate does not bind the Prosecutor as to the outcome of her new determination, significantly reducing its authority: should the Chamber disagree with the Prosecutor as to the inconsistencies of the information, the Prosecutor would be free to disregard the Chamber's conclusion (as happened in the *Registered Vessels situation*[52]). Both these decisions therefore prevent the PTC to effectively review the decision of the Prosecutor in the doubtful situations, i.e. those situations that more than other requires the judicial intervention.

3. The 'reasonable basis' of Article 53(1) and the 'sufficient basis' of Article 53(2)

Art. 53 applies different standards at paras (1)(a) and (2)(a) as the Prosecutor must be satisfied that a 'reasonable basis' for commencing an investigation and a 'sufficient basis' for the commencement of a prosecution exist. The same different wording appears at Art. 53(1)(a), where the Prosecutor must be convinced that the information provides for 'a reasonable basis to believe that a crime within the jurisdiction of the Court has been committed', and at Art. 53(2)(a), asking the Prosecutor to ascertain whether there is 'sufficient legal or factual basis to seek a warrant or summons under article 58'.

The 1994 Draft Statute introduced a distinction between the threshold required for the initiation of an investigation ('possible basis') and the threshold for the initiation of the

[50] *See* below, Chapter III, Section II, 2. The authorisation for the initiation of an investigation under Article 15.

[51] *See* below, Chapter III, Section II, 3. The decision not to investigate or prosecute and the Chamber's power of review.

[52] It is not surprising that when the PTC I deemed that the Prosecutor had not genuinely conducted a second gravity assessment, it decided not to request for a new review as it found unclear whether and to what extent it may request the Prosecutor to correct her errors. ICC, PTC I, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia*, *Decision on the 'Application for Judicial Review by the Government of the Comoros'*, 16 Sep. 2020, ICC-01/13-111, paras. 105-111.

prosecution ('sufficient basis'). The commentary to the Draft did not provide for a definition of 'sufficient basis' but said that it was 'intended to cover a number of different situations where further action under the statute would not be warranted' and included in the list: (i) the absence of indication that a crime within the jurisdiction of the court had been committed; (ii) the indication that a crime had been committed when the evidence available was nevertheless not strong enough to support a conviction; (iii) the existence of a *prima facie* evidence of a crime within the jurisdiction of the court accompanied by the probable inadmissibility of the case.[53]

The reasons for applying a different standard has been identified in a deliberate choice during the Rome Conference for distinguishing the different stages of the proceedings.[54] Thus, the 'sufficient basis standard' appears to be higher than the 'reasonable basis standard'. Scholars describe the 'sufficient basis test' as 'essentially entail[ing] considering whether the evidence collected would provide a basis on which a court can convict the suspect'.[55] This test is what in some jurisdiction is called 'the *prima facie* test'.[56] Basically the difference between the two expressions comes from the different material available to the Prosecutor at the two different stages: before the initiation of the investigation the Prosecutor only has general

[53] Art. 26 Commentary, *Report of the ILC on the work of its forty-sixth session*, *Draft Statute for an International Criminal Court with commentaries*, 2 May – 22 Jul. 1994, G.A. 49th Sess. Supp. No. 10, A/49/10, 1994.

[54] *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, Rome, Italy, 15 Jun.-17 Jul. 1998, *Reports and Other documents*, A/CONF.183/13 (Vol. III), 14 Apr. 1998, p. 292. 'In article 54, the words "reasonable basis" and "sufficient basis" are used intentionally in different paragraphs'. *See* MEESTER K., *Article 53*, in KLAMBERG M. (eds.), *Commentary on the Law of the International Criminal Court*, TOAEP, Brussels, 2017, p. 387 at 395.

[55] BERGSMO M., KRUGER P., BEKOU O., *Article 53*, in AMBOS K., *The Rome Statute of the International Criminal Court*, 4th ed., Beck/Hart/Nomos, 2021, mn. 38. *See* also BRUBACHER M.R., *Prosecutorial Discretion within the International Criminal Court*, in *Journal of International Criminal Justice*, 2, 2004, p. 71 at 77.

[56] RYNGAERT C., *Article 58*, in AMBOS K., *The Rome Statute of the International Criminal Court*, 4th ed., Beck/Hart/Nomos, 2021, mn. 13. *See* also BERGSMO M., KRUGER P., BEKOU O., *Article 53*, in AMBOS K., *The Rome Statute of the International Criminal Court*, 4th ed., Beck/Hart/Nomos, 2021, mn. 4, 11, 38. The expression '*prima facie*' in rarely used in civil-law countries. Also during the preparatory works, some delegations had pointed out the uncertainty of this expression when it appeared among the possible alternatives for the required standard. *See Ad Hoc Committee on the establishment of an International Criminal Court*, 3-13 Apr. 1995, *Comments received pursuant to paragraph 4 of General Assembly Resolution 49/53 on the establishment of an International Criminal Court*, Report of the Secretary-General, 20 Mar. 1995, A/AC.244/1, *Comments of Venezuela*, paras. 11-12, p. 23: 'The Government of Venezuela believes that the use of the term "*prima facie*" in referring to the evidence which may serve as the basis for the commencement of prosecution seems imprecise and even subjective. It therefore proposes that the term should be replaced, in this article and throughout the text, by the word "substantiated", in order to give it the appropriate legal significance. This would, moreover, be in keeping with the terminology used by most legal systems.' The difficult determination of the concept of '*prima facie* case' also emerges from its use in the context of a procedure that possibly takes place later in trial, namely the 'no case to answer procedure'. Even if, as it will be seen in Chapter III, the use of this procedure in ICL is debeatable, using the standard of the '*prima facie* case' both at the initiation of the prosecution and after the submission of all the evidence in trial by the Prosecutor is problematic.

information such as that under Art. 15. Differently, the Prosecutor adopts a decision on whether to prosecute after the investigation and the assessment is grounded on the evidence collected during the investigation.[57]

The structure of Art. 53(2) mirrors that of para. (1), therefore 'sufficient basis' appears both in the *chapeau* and in subpara. (2)(a). The main problem of this repetition is determining the relationship between the 'sufficient basis test' and the reasonable grounds to believe standard required by Art. 58 of the Statute for issuing a warrant of arrest.[58] As to the *chapeau*, the reference to 'sufficient basis' is appropriate because it refers to all the factors listed in para. (2). The 'sufficient basis' would therefore identify the threshold of (un)certainty that the Prosecutor should have on the inadmissibility of the case and of the contrast of prosecution with the interests of justice. As far as subpara. (2) is concerned, rather than criticising the reference to the test for the issuance of a warrant of arrest within Art. 53(2)(a) as done by some scholars,[59] it is the intermediate 'sufficient basis' standard which is questionable. Indeed, the decision to prosecute is substantiated by the submission of a request to the PTC to issue a warrant of arrest. Therefore, the Prosecutor should be sure that the 'reasonable grounds to believe' standard and not the mere 'sufficient basis' test is satisfied when she opts for the prosecution. Since the adoption of a decision to prosecute (which necessarily requires the identification of an individual to prosecute) presumably corresponds to the submission of a request to issue a warrant of arrest, the 'sufficient basis' should be given the same meaning of 'reasonable grounds'. The consequence is that, for consistency within the same para., 'sufficient basis' should be interpreted in the same way both in the *chapeau* of para. (2) and in its subpara. (a), and in both cases the threshold should be the same provided for in Art. 58. The reference to the sufficient basis in Art. 53(2)(a) seems therefore to have only two possible merits: the first one is providing the object of the 'reasonable grounds to believe standard' of Art. 58, which, according to Art. 53(2)(a) must include both legal and factual determinations;

[57] The different wording of Art. 53(1)(a) and (2)(a) with regards to the object of the assessment may be read in the same perspective. In this regard, the absence of the reference to the assessment of jurisdiction at Art. 53(2) may be explained by the fact that a positive assessment of the jurisdiction is the implicit legal basis to seek a warrant of arrest. Moreover, it is hardly imaginable that the Prosecutor concludes that the Court does not have jurisdiction over a situation only after having concluded a full investigation.

[58] BERGSMO M., KRUGER P., BEKOU O., *Article 53*, in AMBOS K., *The Rome Statute of the International Criminal Court*, 4th ed., Beck/Hart/Nomos, 2021, mn. 38.

[59] *See* SAFFERLING C., *International Criminal Procedure*, Oxford University Press, 2012, pp. 240-241 who finds that there is 'no logical reason' for referring to the test for the issuance of a warrant of arrest. Since, once the criteria of Art. 53(2) are met, the Prosecutor shall take a decision on whether to prosecute or not and the decision in favour of the prosecution is published with the request for a warrant of arrest or a summons to appear, it seems more logical to consider the 'sufficient basis test' a superfluous intermediary test.

the second one is establishing the formal transition from the situation to the case stage within the context of Art. 53.[60]

[60] *See* AMBOS, K., *Treatise on International Criminal Law, Vol. III: International Criminal Procedure*, Oxford University Press, 2016, p. 380.

SECTION II

THE JURISDICTION

According to Art. 53(1)(a) of the Statute, the first factor the Prosecutor has to take into consideration when deciding whether to initiate an investigation is the existence of information providing for a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed. This assessment includes the determination of jurisdiction *ratione materiae*, *ratione temporis*, *ratione loci* and *ratione personae*.[61] Jurisdiction has been defined[62] a non-discretionary element in the Prosecutor's assessment, depending upon a rational and objective analysis of the information. In the light of this its objective character, jurisdiction will not be analysed in depth.

It is only worth mentioning that while the dermination of the existence of the jurisdiction *ratione temporis, loci* and *personae* does not usually[63] include articulated legal arguments, the assessment of the jurisdiction *ratione materiae* requires a first-hand qualification of the facts as international crimes. Even if this qualification does not prejudice further submissions by the Prosecutor or findings by the Chamber at a later stage in the proceedings, it nevertheless shapes the main features of the situation. From the requests under Art. 15 of the Statute submitted in these years by the Prosecutor it emerges that the Prosecutor first of all identifies the place and time of the alleged commission of the crimes. This is probably due to their objective nature. Only in second place offers an overview of the persons (or, more frequently, groups) involved in the situation. Eventually she provides a legal characterisation of the crimes, explaining how the information received would fulfil the requirements of the contextual element and the single criminal conducts of international crimes.

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[61] On the limited jurisdiction of the Court, *see* KAUL H.P., *The International Criminal Court: Jurisdiction, Trigger Mechanism and Relationship to National Jurisdiction*, in POLITI M., NESI G., *The Rome Statute of the International Criminal Court. A challenge to impunity*, Ashgate, 1998, p. 59.

[62] TURONE G., *Powers and Duties of the Prosecutor*, in CASSESE A., GAETA P., JONES J.R.W.D., *The Rome Statute of the International Criminal Court. A Commentary*, *Vol. II*, Oxford University Press, 2002, p. 1137 at 1152; WEBB P., *The ICC Prosecutor's Discretion Not to Proceed in the 'Interests of Justice'*, in *Criminal Law Quarterly*, 50, 2005, p. 305 at 319.

[63] Sometimes also the assessment of jurisdiction may require careful consideration. *See*, for example, the *Situation Bangladesh/Myanmar* or in *Palestine* with regards to the spatial jurisdiction. In relation to the jurisdiction *ratione temporis*, some problems may rise as to the crimes committed in an ongoing situation after the date of the referral. As noted among scholars, the deterrent effect of the Court through the reference to the crimes which 'is being committed' under Art. 53(1) supports the idea that they may fall within the jurisdiction of the Court if linked to the referred situation. STEGMILLER I., *The Pre-Investigation Stage of the ICC*, Dunker & Humbolt, 2011, p. 103. As it will be seen, a more careful approach is suggested in case of filing of a request for authorisation to conduct an investigation under Art. 15 of the Statute.

In addition to the limitations *ratione temporis* mentioned in Chapter I,[64] the Statute also includes two limitations *ratione materiae*: (i) the transitional provision of Art. 124 containing an opting out clause for a period of seven years with regards to war crimes;[65]; and (ii) the possible consequences of the amendments adopted under Art. 121(5).[66] Ultimately, the jurisdiction with regards to the crime of aggression is subject to additional significant limitations.[67]

[64] *See* Chapter I, Section IV, 1.The jurisdiction of the Court and the triggering mechanism.

[65] According to Art. 124 'a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to [war crimes] when a crime is alleged to have been committed by its nationals or on its territory'. The ASP has unanimously decided to delete this provision in 2015 (Resolution of the Assembly of States Parties of 26 Nov. 2015, ICC- ASP/ 14/ Res.2), but the procedure under Art. 121(4) for the entry into force of this amendment is not completed yet. *See* WERLE G., JESSBERGER F., *Principles of International Criminal Law*, 4th ed., Oxford University Press, 2020, p. 24.

[66] According to Art. 121(5) '[a]ny amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory'.

[67] These limitations cannot be discussed here in detail in the light of the intense debate on many problematic issues, including: the entry into force of the Kampala amendments; the ruling of the ratification or acceptance of the jurisdiction by thirty States Parties provided for at Arts 15*bis*(2) and 15*ter*(2); the activation of the jurisdiction provided for at Arts 15*bis*(3) and 15*ter*(3); and, now that the last two requirements are satisfied, the complicated interplay between paras (2) and (3) of both Arts 15*bis* and 15*ter*. Paras (2) and (3) of both Arts 15*bis* and 15*ter* state respectively that the Court may exercise jurisdiction only one year after the ratification or acceptance of the amendments by thirty States Parties; and that the Court shall exercise jurisdiction over the crime of aggression subject to a decision to be taken after 1 Jan. 2017 by the same majority of States Parties as is required for the adoption of an amendment of the Statute, the so called 'activation decision'. Both this requirements are met, but some uncertainties with regards to the identification of the States and individuals which may be subject to the Court's jurisdiction is still debated, even if the activation Resolution of the Assembly of the States Parties tries to provide some clarifications (ASP, *Resolution of the activation of the jurisdiction over the Crime of Aggression*, ICC-ASP/16/Res.). In addition, Art. 15*ter*(4) includes an opting-out clause, although, if the jurisdiction on the crime is triggered by the UNSC, the opting out is ineffective (*see* also Second Understanding, Resolution RC/Res.6, 11 Jun. 2010, p. 22). The rationale is the same of the other provisions allowing the Court to exercise jurisdiction over non-party States in case of a UNSC's referral. For an analysis of these problems, *see* AMBOS K., *Treaties on International Criminal Law, Vol. II: The Crimes and Sentencing*, Oxford University Press, 2014, p. 215 ff.; ZIMMERMANN A., FREIBURG-BRAUN E., *Article 15bis* and *Article 15ter*, in AMBOS K., *The Rome Statute of the International Criminal Court*, 4th ed., Beck/Hart/Nomos, 2021. Specifically on the crime of aggression, *see* KREß C., BARRIGA S. (eds.), *The Crime of Aggression: A Commentary, Two Volumes*, Cambridge University Press, 2017.

SECTION III

THE ADMISSIBILITY

The second factor to be taken into consideration by the Prosecutor in deciding whether to initiate an investigation under Art. 53(1) of the Statute is admissibility. More specifically, subpara. (b) states that the Prosecutor shall consider whether '[t]he case is or would be inadmissible under article 17'.

In order to fully appreciate the scope of this provision it is therefore preliminarily necessary to illustrate the concept of complementarity and the content of Art. 17[68] highlighting the most relevant aspects for the issue at stake.

1. The complementarity principle

The principle of complementarity rules the relationship between the Court and the States. Complementarity is pivotal to the philosophy of the Court to the point that scholars even doubt that the States would have adopted the Rome Statute without the introduction of Art. 17.[69] Indeed, since the very early days, it was clear that the relationship between the Court and national sovereignty in criminal law was a sensitive issue and different opinions were expressed in the 1994 Report of the ILC.[70]

[68] For an overview, *see* SCHABAS W.A., EL ZEIDY M.M., *Article 17*, in AMBOS K., *The Rome Statute of the International Criminal Court*, 4th ed., Beck/Hart/Nomos, 2021; MBAYE A.A., SHOAMANESH S.S., *Article 17*, in FERNANDEZ J., PACREAU X., *Statut de Rome de la Cour pénale internationale. Commentaire article par article*, Pedone, 2012, pp. 687 ff.; SCHABAS W.A., *The International Criminal Court: A Commentary on the Rome Statute, Article 17*, Oxford University Press, 2016, p. 446 ff.; EL ZEIDY M.M., *The Principle of Complementarity in International Criminal Law*, Brill, Leiden, 2008; CRYER R., FRIMAN H., ROBINSON D., VASILIEV S. (eds.), *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, 2019, pp 155 ff.; WERLE G., JESSBERGER F., *Principles of International Criminal Law*, 4th ed., Oxford University Press, 2020, pp. 117 ff.; SCHABAS W.A., *An Introduction to the International Criminal Court*, Cambridge University Press, 2020, pp. 181 ff.

[69] SCHABAS W.A., *The International Criminal Court: A Commentary on the Rome Statute, Article 17*, Oxford University Press, 2016, p. 447.

[70] 'Some envisaged the court as a facility for States that would supplement rather than supersede national jurisdiction; others envisaged it as an option for prosecution when the States concerned were unwilling or unable to do so, subject to the necessary safeguards against misuse of the court for political purposes. Still other members suggested that it might be appropriate to provide the court with limited inherent jurisdiction for a core of the most serious crimes'. *Yearbook of the ILC, Report of the Commission to the General Assembly on the work of its forty-sixth session*, 1994, Vol. II, Part Two, para. 50.

The term 'complementarity' was coined following the wording used in the preamble of the 1994 Draft Statute prepared by the ILC.[71] The representatives of New Zealand at the Preparatory Committee noted that 'complementarity' was not an established legal principle and warned the States from the use of this concept to shield their nationals from the jurisdiction of the Court.[72] Complementarity was defined as a 'constant in the arrangements for the ICC' that 'needs to be taken into account at each point at which the respective roles of the ICC and national authorities can or do coincide'.[73] Neither the national nor international criminal jurisdiction were therefore meant to be subservient.

Following this line of reasoning, the UK delegation proposed to delete the link between the complementary nature of the Court and the availability and effectiveness of the national prosecutions that could appear as limiting its compass. The UK underlined the link between complementarity and other provisions of the ILC Draft Statute, as the *ne bis in idem* principle and the 'rule of sociality' (a principle forbidding the prosecution of a person transferred to the Court for any crime other than the crime justifying the transfer). Further, the delegation pointed out that complementarity would have found a better place among the provisions ruling the general duty of the States to co-operate with the Court.[74]

The establishment of an international criminal jurisdiction, although limited to a few crimes, met the opposition of many States, that did not facilitate the discussion about complementarity. The successful strategy was recommended by the representatives of Finland within the Preparatory Committee, raising the need for a 'balanced approach' to complementarity in order to avoid that an overwhelming emphasis on the safeguarding of national jurisdiction (supported by States such as France, US, India, China, Morocco and Israel) would have rendered the Court useless.[75]

Eventually, because of its relevance, a reference to complementarity was introduced in para. (10) of the preamble of the Statute. The Preamble is also the only place where the Statute

[71] *Report of the ILC on the work of its forty-sixth session, Draft Statute for an International Criminal Court with commentaries*, 2 May – 22 Jul. 1994, G.A. 49th Sess. Supp. No. 10, A/49/10, 1994. *See* also *UK Discussion Paper, Complementarity*, 29 Mar. 1996, 1st Preparatory Committee meeting (25 Mar.-12 Apr. 1996).

[72] *Jurisdiction of proposed International Criminal Court discussed in Preparatory Committee on its establishment*, 2 Apr. 1996, 1st Preparatory Committee meeting (25 Mar.-12 Apr. 1996).

[73] *UK Discussion Paper, Complementarity*, 29 Mar. 1996, 1st Preparatory Committee meeting (25 Mar.-12 Apr. 1996).

[74] *UK Discussion Paper, Complementarity*, 29 Mar. 1996, 1st Preparatory Committee meeting (25 Mar.-12 Apr. 1996).

[75] This idea was also supported by States like Austria, Netherlands, Sweden and Italy. *See Preparatory Committee on International Criminal Court discusses complementarity between national, international jurisdiction*, 1 Apr. 1996, 1st Preparatory Committee meeting (25 Mar.-12 Apr. 1996).

uses the word 'complementarity' to suggest the idea of an integrate system, where the Court completes, but does not substitute national authorities in investigating and prosecuting international crimes. The States and the Court complement each other for the purpose of achieving a shared objective. 'Complementarity principle' is a synonym for subsidiarity principle,[76] since the duty to investigate and prosecute people responsible for international crimes falls primarily on the States,[77] while the Court can intervene only when the States are unwilling or unable to genuinely investigate and prosecute the alleged authors of the international crimes.[78]

2. Article 17(1) of the Rome Statute, 'Issues of admissibility'

Even if complementarity is primarily related to the exercise of jurisdiction, it emerges as a matter of admissibility[79] of situations and cases before the Court: Art. 17(1), 'Issues of admissibility', rules the relationship between national proceedings and the exercise of the jurisdiction of the Court. It states that

> '[...] a case is inadmissible where:
>
> (a) The case is being investigated or prosecuted by a state which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
> (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
> (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
> (d) The case is not of sufficient gravity to justify further action by the Court'.

[76] During the preparatory works also the expression 'supplementary relationship' was used. *See Ad Hoc Committee on the establishment of an International Criminal Court*, 3-13 Apr. 1995, *Comments received pursuant to paragraph 4 of General Assembly Resolution 49/53 on the establishment of an International Criminal Court, Report of the Secretary-General*, 20 Mar. 1995, A/AC.244/1, *Comments of China*, para. 15, p. 11.

[77] In this regard *see* RASTAN R., *Comment on Victor's Justice & the Viability of Ex Ante Standards*, in *The John Marshall Law Review*, 43, 3, 2010, p. 569 at 596; SCHABAS W.A., *An Introduction to the International Criminal Court*, Cambridge University Press, 2020, p. 183.

[78] As correctly noted, this assessment has a high political component which may be source of tension between the States and the Court. MARSTON DANNER A., *Enhancing the legitimacy and accountability of prosecutorial discretion at the International Criminal Court*, in *American Journal of International Law*, 97, 3, 2003, p. 510 at 517. According to Stahn, one of the main challenges for the future 'is to ensure that the Court and other jurisdictions positively complement each other's strengths, instead of mirroring each other's weaknesses. STAHN C., *Introduction. More than a Court, Less than a Court, Several Courts in One?*, in STAHN C. (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015, p. LXXXIII at XC.

[79] On the difficult to draw a precise line between jurisdiction and admissibility *see* SCHABAS W.A., *An Introduction to the International Criminal Court*, Cambridge University Press, 2020, p. 182.

The admissibility test is therefore twofold: on the one hand it includes the complementarity test under Art. 17(1)(a), (b) and (c); on the other hand, it requires the gravity test under Art. 17(1)(d). The first assessment includes recognised non-discretional parameters, while the second one has been considered entirely discretionary.[80] The discretionary nature of gravity assessment will be challenged through a detailed analysis of the concept of gravity, but it is preliminary necessary to address the peculiarities of the admissibility assessment at the situation and at the case stage.

2.1. Admissibility and initiation of the investigation

Art. 53(1)(b) expressly introduces admissibility among those factors possibly preventing the Prosecutor to initiate an investigation. The ruling of the relationship between admissibility and the initiation of an investigation was apparent to the drafters. This awareness emerges from one of the proposals for amendment of Art. 26 of the ILC's Draft on the initiation of the investigations aimed at including within this Article a rudimentary version of Art. 17 of the Statute:[81] the proposal forbad the Prosecutor to initiate an investigation into a case that had been investigated and prosecuted by a State unless some circumstances contained in the proposal occurred.

While the proposal was focused on the applicability of an admissibility test at the stage of a situation, the final version of Art. 17 is autonomous from the provision ruling the initiation of the investigation and appears to be 'case-specific'[82] since it rules the inadmissibility/admissibility of a case. The references to 'the person concerned' and to the *ne bis in idem* principle seem to reinforce this conclusion.

Nevertheless, the applicability of Art. 17 at the stage of the initiation of the investigation under Art. 53(1) suggests that also a situation is subject to the admissibility test.[83]

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[80] *See*, among others, TURONE G., *Powers and Duties of the Prosecutor*, in CASSESE A., GAETA P., JONES J.R.W.D., *The Rome Statute of the International Criminal Court. A Commentary*, vol. 2, Oxford University Press, 2002, p. 1137 at 1152.

[81] Article 26, *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. II, (Compilation of Proposals)*, G.A. 51st Sess., Supp. No. 22A, A/51/22, 1996, p. 113.

[82] *See* ROBINSON D., *The inaction controversy. Neglected words and new opportunities*, in STAHN C., EL ZEIDY M.M., *The International Criminal Court and Complementarity. From Theory to Practice, Vol. I*, Cambridge University Press, 2011, p. 464.

[83] *See* OLASOLO H., CARNERO ROJO H., *The application of the principle of complementarity to the decision of where to open an investigation: The admissibility of 'situations'*, in STAHN C., EL ZEIDY M.M., *The International Criminal Court and Complementarity. From Theory to Practice*, *Vol. I*, Cambridge University Press, 2011, p. 393 at 403 ff.; BATROS B., *The evolution of the ICC jurisprudence on admissibility*, in STAHN C., EL ZEIDY M.M., *The International Criminal Court and Complementarity. From Theory to Practice*, Vol. I, Cambridge University Press, 2011, p. 558

The PTC confirmed this interpretation in the decision on the Prosecutor's application for warrant of arrest against Mr Lubanga and Mr Katanga. The PTC, after having recognised the mandatory nature of the admissibility assessment under Art. 17(1)(d) ('the Court *shall* determine that a case is inadmissible'), noted that the gravity threshold must be applied at two different stages: (i) at the stage of initiation of the investigation of a situation and (ii) once a case arises from the investigation of a situation. Since the gravity assessment is a component of the admissibility assessment, it is possible to infer that the same goes for the whole admissibility assessment.[84]

In the *Ruto and Sang* case, the AC reaffirmed that Art. 17 does not only determine the admissibility of a concrete case under Art. 19 but that it is also applicable at the stage of the preliminary admissibility ruling pursuant to Art. 18.[85]

Art. 19 rules the challenging of the Court's jurisdiction or the admissibility of a case,[86] where 'case' is here to be considered in technical sense. The technical use of the word 'case' clearly emerges from para. (2)(a) since the first subject entitled to challenge the admissibility is the accused or the person for whom a warrant of arrest or a summons to appear has been issued under Art. 58. Moreover Art. 19 is applicable 'prior to or at the commencement of the trial'. The applicability of Art. 19 only at the 'case stage' has also been confirmed by the PTC II.[87] Differently, Art. 18[88] states that the Prosecutor shall notify all States Parties and those States which would normally exercise jurisdiction over the crimes concerned 'when a situation has been referred to the Court' or when the Prosecutor 'initiates an investigation' pursuant to Art. 15. According to para. (2) a State may inform the Court within one month 'that it is

[84] ICC, PTC I, *Situation in the Democratic Republic of Congo*, *Decision on the Prosecutor's Application for Warrants of Arrest, Article 58*, 10 Feb. 2006, ICC-01/04-01/06-8 (also ICC-01/04-02/06-20-Anx2). *See* also ICC, PTC II, *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 Mar. 2010, ICC-01-09-19, para. 57.

[85] ICC, AC, *The Prosecutor v. Samoei Ruto and Arap Sang*, *Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute'*, 30 Aug. 2011, ICC-01/09-01/11-307 OA, para. 38.

[86] For an overview *see* SAFFERLING C., *International Criminal Procedure*, Oxford University Press, 2012, pp. 203 ff.

[87] ICC, PTC II, *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen, Decision on the admissibility of the case under article 19(1) of the Statute*, 10 Mar. 2009, ICC-02/02-01-05-377, para. 14, stating that: 'The sole limit entailed by the lean wording of the provision appears to be that the proceedings must have reached the stage of a case (including "specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects"), as opposed to the preceding stage of the situation following the Prosecutor's decision to commence an investigation pursuant to Article 53 of the Statute'.

[88] For an overview *see* SAFFERLING C., *International Criminal Procedure*, Oxford University Press, 2012, pp. 197 ff.

investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in Art. 5 and which relate to the information provided in the notification to States'[89]. Para. (2) further suggests that in case of *proprio motu* investigations the notification precedes the authorisation of the PTC as it states that '[a]t the request of that State, the Prosecutor shall defer to the State's investigation of those persons, unless the PTC, on the application of the Prosecutor, decides to authorise the investigation'. At this stage it is not yet possible to technically identify any 'case'.

Therefore, the reference to Art. 17 in Art. 53(1) and the comparison between Arts 18 and 19 suggest that the admissibility challenge may be raised at the situation stage as well.

An explanation on how to apply the admissibility test at the situation stage despite the wording of Art. 17 has been offered in the proceedings authorising the initiation of the investigation in the situation in Kenya.[90]

In the request for authorisation of an investigation in Kenya, the Prosecutor stated that the admissibility assessment should refer to the cases arising from the situation ('potential cases').[91] Nevertheless, the Prosecutor's request, at least in the part related to the gravity assessment, seemed focused on the situation as a whole, rather than on the potential cases.[92]

The PTC II, addressing the Prosecutor's request in the situation in Kenya, embraced the Prosecutor's proposal and clarified that 'the examination should be examined against the

[89] Late Judge Kaul noted that Art. 18, usually associated with the idea of strengthening complementarity, risks instead to jeopardise the action of the Court in particular when States do not act in *bona fide*. KAUL H.P., *The International Criminal court: Jurisdiction, Trigger Mechanism and Relationship to National Jurisdiction*, in POLITI M., NESI G., *The Rome Statute of the International Criminal Court. A challenge to impunity*, Ashgate, 1998, p. 59 at 60. In the same vein *see* HALL C.K., *The Powers and Role of the Prosecutor of the International Criminal Court in the global Fight Against Impunity*, in *Leiden Journal of International Law*, 17, 1, p. 121 at 127; and TURONE G., *Powers and Duties of the Prosecutor*, in CASSESE A., GAETA P., JONES J.R.W.D., *The Rome Statute of the International Criminal Court. A Commentary*, *Vol. II*, Oxford University Press, 2002, p. 1137 at 1142 who describes the procedure under Arts 18 and 19 as 'complicated and baroque'. Moreover at p. 1163 he finds 'unacceptable' the duty to notify the decision to open an investigation also to the non-party States which would normally exercise jurisdiction. In his view this practice can lead to obstructive conducts only aiming at preventing the Court's intervention.

[90] ICC, PTC II, *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 Mar. 2010, ICC-01-09-19, paras 40-48.

[91] ICC, OTP, *Situation in the Republic of Kenya*, *Request for authorisation of an investigation pursuant to Article 15*, 26 Nov. 2009, ICC-01/09-3, para. 55. *See* also ICC, OTP, *Situation in Georgia*, *Request for authorisation of an investigation pursuant to article 15*, 13 Oct. 2015, 02/17-4, para. 325; ICC, OTP, *Situation in Burundi*, *Request for authorisation of an investigation pursuant to article 15*, 6 Sep. 2017, ICC-01/17-5, para.143; ICC, OTP, *Situation in Afghanistan*, *Request for authorisation of an investigation pursuant to article 15*, 20 Nov. 2017, ICC-02/17-7, para. 262.

[92] ICC, OTP, *Situation in the Republic of Kenya*, *Request for authorisation of an investigation pursuant to Article 15*, 26 Nov. 2009, ICC-01/09-3, paras 56-59.

backdrop of the likely set of cases or "potential case(s)" that would arise from investigating the situation'.[93] Further in the decision, the PTC II partially amended its statement saying that the examination 'must be *also* conducted against the backdrop of a potential case within the context of a situation'[94]. Therefore the Chamber decided to conduct the gravity assessment both with respect to the situation as a whole and the potential cases.[95] The inclusion of 'also' and the decision to conduct (part of) the admissibility assessment with regards to the situation as well is questionable because it would possibly lead to a declaration of inadmissibility of an investigation in the light of the features of the situation as such rather than of those of the potential cases possibly arising out of it.[96]

Despite this ambiguous approach, in all the subsequent requests under Art. 15 the Prosecutor explicitly stated that the admissibility assessment relates to the potential cases and not the situation[97] and the PTCs remained faithful to this approach.[98]

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[93] ICC, PTC II, *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 Mar. 2010, ICC-01-09-19, para. 58. *See* also ICC, PTC III, *Situation in Côte d'Ivoire*, *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation in the Republic of Côte d'Ivoire*, 3 Oct. 2011, ICC-02/11-14, para. 190. ICC, PTC I, *Situation in Georgia*, *Decision on the Prosecutor's request for authorization of an investigation*, 27 Jan. 2016, 01/15-12, para. 36. The Chamber also notes that a possible alternative explanation of the different wording may be found in the analysis of the preparatory works: as the content of Art. 17 had already been approved, during the Conference the delegations preferred not to re-open the discussion on admissibility, leaving to the Court the responsibility to harmonise the provision of the Statute. (ICC, PTC II, *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 Mar. 2010, ICC-01-09-19, paras 46-47).

[94] *Ibid*., para. 188 (*emphasis added*).

[95] *Ibid*., paras 188-200. Some scholars welcomed the changing of perspective from the assessment of the situational gravity to the assessment of potential cases. *See* SEILS P., *Putting Complementarity in its Place*, in STAHN C. (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015, p. 305 at 317.

[96] Against the admissibility assessment with regard to the situation rather than the potential cases also MARINIELLO T., *Judicial Control over Prosecutorial Discretion at the International Criminal Court*, in *International Criminal Law Review*, 19, 2019, p. 979 at 985-986, even if he infers an unconvincing prohibition of assessment of the admissibility of the situation as a whole from the letter of Art. 17, distinguishes the assessment of the parameters under Art. 53 in case of *proprio motu* and referred situations and grounds his conclusion on the broad discretion of the Prosecutor in the assessment of the 'situational gravity'.

[97] ICC, OTP, *Situation in Côte d'Ivoire*, *Request for authorisation of an investigation pursuant to article 15*, 23 Jun. 2011, ICC-02/11-3, para.55; ICC, OTP, *Situation in Afghanistan*, *Request for authorisation of an investigation pursuant to article 15*, 20 Nov. 2017, ICC-02/17-7, para. 336. *See* also ICC, OTP, *Situation in Georgia*, *Request for authorisation of an investigation pursuant to article 15*, 13 Oct. 2015, 02/17-4, para. 275; ICC, OTP, *Situation in Burundi*, *Request for authorisation of an investigation pursuant to article 15*, 6 Sep. 2017, ICC-01/17-5, para. 143; ICC, OTP, *Situation in the People's Republic of Bangladesh/ Republic of the Union Myanmar*, *Request for authorisation of an investigation pursuant to article 15*, 4 Jul. 2019, ICC-01/19-7, para. 225.

[98] ICC, PTC III, *Situation in Côte d'Ivoire*, *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation in the Republic of Côte d'Ivoire*, 3 Oct. 2011, ICC-02/11-14, paras 190; ICC, PTC I, *Situation in Georgia*, *Decision on the Prosecutor's request for authorization of an investigation*, 27 Jan. 2016, 01/15-12, para. 5; ICC, PTC III, *Situation in Burundi*, *Decision Pursuant*

The advantage of assessing admissibility with regards to the potential cases is that the assessment is concreatly linked to the subject of the investigation only. A focused assessment grants the effectiveness of the filtering function of the procedure and render this stage meaningful.[99]

A relevant question is how to assess admissibility with regards to potential cases. In many requests under Art. 15, after having clarified that at the situation stage the evaluation refers to one or more potential cases within the context of the situation, several PTCs highlighted that the assessment necessarily requires a preliminary identification of the groups of persons or incidents likely to shape the future cases, since, in the absence of such information, it would be impossible to compare what the Court intends to do with the national investigations and prosecutions.[100] The PTC II further stressed the preliminary nature of this assessment and noted that, at the situation stage, 'the reference to the groups of persons is mainly to broaden the test, because at the preliminary stage of an investigation into the situation it is unlikely to have an identified suspect'.[101]

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to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi, 9 Nov. 2017, ICC-01/17-9, para. 143; ICC, PTC II, *Situation in Afghanistan, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan*, 12 Apr. 2019, ICC-02/17-33, para. 70; ICC, PTC III, *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, 14 Nov. 2019, ICC-01/19-27, para. 115; ICC, PTC I, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia, Decision on the 'Application for Judicial Review by the Government of the Comoros'*, 16 Sep. 2020, ICC-01/13-111, para. 97.

[99] In the same vein, *see* SEILS P., *Putting Complementarity in its Place*, in STAHN C. (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015, p. 305 at 318, who argues that the Prosecutor should use the preliminary examination in order to develop initial hypothesis that allows for grater focused investigations.

[100] ICC, PTC II, *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 Mar. 2010, ICC-01-09-19, paras 48-49; ICC, PTC III, *Situation in Côte d'Ivoire*, *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation in the Republic of Côte d'Ivoire*, 3 Oct. 2011, ICC-02/11-14, paras 191, 204; ICC, PTC I, *Situation in Georgia*, *Decision on the Prosecutor's request for authorization of an investigation*, 27 Jan. 2016, 01/15-12, para. 37; ICC, PTC III, *Situation in Burundi*, *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi*, 9 Nov. 2017, ICC-01/17-9, para. 143; ICC, OTP, *Situation in Afghanistan, Request for authorisation of an investigation pursuant to article 15*, 20 Nov. 2017, ICC-02/17-7, para. 262.

[101] ICC, PTC II, *The Prosecutor v. Ruto, Kosgey and Sang*, *Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute*, 30 May 2011, ICC-01/09-01/11-101, para. 54. *See* also ICC, PTC II, *The Prosecutor v. Muthaurs, Kenyatta, Ali*, *Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute*, 30 May 2011, ICC-01/09-02/11-96, para. 50.

The AC intervening on the subjectseems having adopted a laxer approach almost confirming the interpretation initially rendered by the Prosecutor to the effect that the reasonable basis standard under Art. 53 of the Statute 'would require the existence of some facts or information which would satisfy an objective observer that crimes within the jurisdiction of the Court appear to have been committed, but without identification of the persons who may have committed such offences' developed by the Court'.[102] According to the AC:

> '[t]he meaning of the words "case is being investigated" in article 17(1)(a) of the Statute must […] be understood in the context of which it is applied. For the purpose of proceedings relating to the initiation of an investigation into a situation (articles 15 and 53(1) of the Statute), the contours of the likely cases will often be relatively vague because the investigations of the Prosecutor are at their initial stages. […] Often no individual suspects will have been identified at this stage, nor will the exact conduct nor its legal classification be clear.'[103]

Despite this judgment of the AC, it is remarkable that the case-law of the Court in the decisions under Art. 15 seems to reduce the vagueness of the object of the assessment requesting it to be sufficiently identifiable for a comparison with national investigations.

In fact, eeven if the object of the admissibility assessment at the situation stage are the potential cases, it is nevertheless necessary to clearly identify their outlines. The 'potential' character of the cases is linked to the likely investigation and prosecution that might follow. It does not equate to a vague identification of the cases. A too broad approach in the admissibility assessment as that suggested by the AC prevents to materially identify the potential cases and risks to jeopardise the filtering function of the procedure. Moreover, in the complementarity perspective, a concrete (potential-) case-specific approach even at the situation stage may allow the Court (the Prosecutor and possibly the Judiciary) to limit the assessment of the State's behaviour to the concrete handling of the cases falling under its jurisdiction, rather than judging the national legal systems in abstract, especially when acting during or immediately after the events possibly representing the object of the investigation. For this reason, the recent practice of some PTCs, despite the recent jurisprudence of the AC[104] and

[102] ICC, OTP, *Situation in the Republic of Kenya, Request for authorisation of an investigation pursuant to Article 15*, 26 Nov. 2009, ICC-01/09-3, para. 104.

[103] ICC, AC, *The Prosecutor v. Ruto and Sang, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute'*, 30 Aug. 2011, ICC-01/09-01/11-307, para. 39.

[104] The AC has recently excluded the control on admissibility by the PTC in the proceedings of authorisation under Article 15.

contrary to the first two requests under Art. 15 taken respectively in Kenya[105] and Côte d'Ivoire,[106] is welcome: the requests seeking authorisation to investigate into the situations in Georgia, Burundi and Afghanistan include better structured analysis of complementarity, distinguishing, where appropriate, the admissible, the partially admissible and the inadmissible potential cases.[107] Nevertheless, and quite unexpectedly,[108] the PTC II in the decision rejecting the request for initiating an investigation in Afghanistan, declared that at this stage of the proceedings 'it is to be expected that no specific information allowing the direct attribution of conducts for the purposes of determining individual criminal responsibility is yet available to the Prosecutor' and therefore that it is 'not necessary to identify at this stage the specific force or group to which those who have allegedly engaged in each of the criminal conducts would have belonged'.[109]

It is worth mentioning that the AC has recently excluded the control on admissibility by the PTC in the proceedings of authorisation under Art. 15, because 'the value of the judicial assessment of admissibility [of potential case(s)] would be limited.[110] Nevertheless, this decision does not affect the way at least the Prosecutor is required to conduct her assessment.[111]

[105] ICC, PTC II, *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 Mar. 2010, ICC-01-09-19, para. 184.

[106] ICC, PTC III, *Situation in Côte d'Ivoire*, *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation in the Republic of Côte d'Ivoire*, 3 Oct. 2011, ICC-02/11-14, para. 194.

[107] ICC, OTP, *Situation in Georgia*, *Request for authorisation of an investigation pursuant to article 15*, 13 Oct. 2015, 02/17-4, paras 274-324; ICC, OTP, *Situation in Burundi*, *Request for authorisation of an investigation pursuant to article 15*, 6 Sep. 2017, ICC-01/17-5, paras147-185; ICC, OTP, *Situation in Afghanistan*, *Request for authorisation of an investigation pursuant to article 15*, 20 Nov. 2017, ICC-02/17-7, paras 267-335.

[108] As it will be seen in Chapter III, the PTC II enhances the supervisory role of the PTC in the release of an authorisation under Art. 15, and requires the Prosecutor to focus her requests on specific incidents, rather than submitting a request covering a broad geographical and temporal area.

[109] ICC, PTC II, *Situation in the Islamic Republic of Afghanistan*, *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan*, 12 Apr. 2019, ICC-02/17-33, para. 57.

[110] ICC, AC, *Situation in the Islamic Republic of Afghanistan*, *Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan*, 5 Mar. 2020, ICC-02/17-138 OA4, para. 40.

[111] *See* below, Chapter III, Section II, 2. The authorisation for the initiation of an investigation under Article 15.

2.2. Admissibility and prosecution

The admissibility assessment under Art. 53(2)(b) does not present the problems of Art. 53(1)(b) as the word 'case' is here used to refer to actual cases. Both scholars[112] and the Court agree that the test is 'more specific': according to the PTC II 'during the "case" stage the admissibility determination must be assessed against national proceedings related to those particular persons that are subject to the Court's proceedings.'[113]

2.3. The complementarity test

It is now possible to turn to the two components of the admissibility test, namely the complementarity test and the gravity test.

The complementarity test is ruled by Art. 17(1)(a), (b) and (c). With regards to these first three grounds for inadmissibility it has been arguably noted[114] that many authors initially focused their attention exclusively on the concept of 'inability' and 'unwillingness' with the intent to support the legality of an intervention of the Court in case of inaction of States.[115] Conversely, the fact that unwillingness and inability are only part of an exception to a general rule (introduced by the conjunction 'unless') was often completely ignored. For this reason, Article 17(1) has been too often summarised as 'the Court has jurisdiction when States are unwilling or unable to investigate and prosecute international crimes'.

On the contrary, as underlined also by the AC,[116] Article 17(1) has a more elaborate structure: the *chapeau* clarifies that the first part of subparas (a), (b) and (c) are conditions of

[112] BERGSMO M., KRUGER P., BEKOU O., *Article 53*, in AMBOS K., *The Rome Statute of the International Criminal Court*, 4th ed., Beck/Hart/Nomos, 2021, mn. 40; MEESTER K., *Article 53*, in KLAMBERG M. (eds.), *Commentary on the Law of the International Criminal Court*, TOAEP, 2017, p. 387 at 395. *See* also EL ZEIDY M., *Some remarks on the question of the admissibility of a case during the arrest warrant proceedings before the International Criminal Court*, in *Leiden Journal of International Law*, 19, 3, 2006, p. 741.

[113] ICC, PTC II, *The Prosecutor v. Ruto, Kosgey and Sang*, *Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute*, 30 May 2011, ICC-01/09-01/11-101, para. 54. *See* also ICC, PTC II, *The Prosecutor v. Muthaurs, Kenyatta, Ali, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute*, 30 May 2011, ICC-01/09-02/11-96, para. 50.

[114] ROBINSON D., *The inaction controversy. Neglected words and new opportunities*, in STAHN C., EL ZEIDY M.M., *The International Criminal Court and Complementarity. From Theory to Practice*, *Vol. I*, Cambridge University Press, 2011, p. 460.

[115] The relevance of the link between unwillingness and inactivity emerged because of the practice of the so called 'self-referral' that characterised the first years of activity of the Court.

[116] ICC, AC, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, *Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case*, 25 Sep. 2009, ICC-01/04-01/07-1497 OA 8. *See* also, ICC, PTC II, *Situation*

inadmissibility, whose presence must be verified by the Court. These conditions are respectively: (a) an ongoing national investigation or prosecution; (b) a national investigation followed by a decision not to prosecute; (c) a trial against the same person and for the same conduct. When one of these circumstances is met, the Court is prevented from exercising its jurisdiction as the case is inadmissible. Each of these conditions is accompanied by exceptions provided for in the second limb of each subparagraph. With regards to subparas (a) and (b) the exception applies when the State is unwilling or unable to genuinely carry out the investigation or the prosecution. Unwillingness and inability are the elements that determine the admissibility of a case that in theory would be inadmissible. As far as subpara. (c) is concerned, the exceptions are not directly provided for in Art. 17, but in Art. 20, ruling the *ne bis in idem* principle. Art. 20, governing the relationship between the Court and any other national (or international) judicial authority, forbids to try a person twice for the same conduct.[117] As for Art. 17, this general rule may nevertheless be disregarded if

> 'the proceedings in the other court:
>
> where for the purpose of shielding the person concerned from criminal responsibility for cries within the jurisdiction of the Court; or
>
> otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.'

Therefore, the admissibility assessment includes a two-step test. In the first place it requires the identification of a ground for inadmissibility, while in the second place it demands the evaluation of the condition exceptionally maintaining the admissibility. Unwillingness and inability on the one side and the partiality of a national trial/investigation/decision not to prosecute on the other side must be taken into consideration only after the recognition of the

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 Mar. 2010, ICC-01-09-19, paras 53 ff.; ICC, PTC III, *Situation in Côte d'Ivoire*, *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation in the Republic of Côte d'Ivoire*, 3 Oct. 2011, ICC-02/11-14, paras 192 ff.; ICC, PTC III, *Situation in Burundi*, *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi*, 9 Nov. 2017, ICC-01/17-9, para. 146.

[117] *See* RASTAN R., *Situation and case: defining the parameters*, in STAHN C., EL ZEIDY M. (eds), *The International Criminal Court and complementarity from theory to practice, Vol. I*, Cambridge University Press, 2011, p.421 at 439 ff.

existence of a ground excluding admissibility. Borrowing the language of the AC their first instance evaluation would be tantamount 'to put the cart before the horse'.[118]

One concluding remark. According to Art. 17, national investigations and prosecutions of people responsible for international crimes in order to exclude the intervention of the Court must be *genuine* and not aiming at excluding the intervention of the Court. The twofold structure of the complementarity test in the admissibility assessment confirms the importance of adopting a strict approach towards the 'potential cases' as suggested above. Further, a clear picture of the potential cases to be investigated may partially facilitate the assessment of the genuine nature of the national proceedings as it would facilitate a comparison between what the action of the Court would be in case of intervention and the efforts of the States. For example, from this comparison the national approach towards the various groups involved in a conflict, or the inclination to charge State officials and political leaders could emerge. Nevertheless, since the non-genuine nature could emerge also later in time, for example at the end of a long but rigged trial, postponing the initiation of the Prosecutor's investigation to this late stage might jeopardise its effectiveness since for a full assessment the Prosecutor would be required to wait for a significant amount of time . For this reason, the test on the genuine nature of the proceedings under Art. 53(1)(b) should not always prevent the initiation of the investigation. The initiation of an investigation which could be closed at any time if the Prosecutor verifies the genuine nature of the national investigations would stimulate (genuine) national proceedings, give substance to the concept of 'reverse cooperation' (i.e. the cooperation given by the Court to the States in achieving the common objectives[119]) and possibly safeguard the integrity of the evidence if the States would use national proceedings with the purpose of shielding individuals.

A final remark can be done with regards to the alternative justice mechanisms. The debate on their relevance (including truth commissions, amnesties and other transitional justice mechanisms) *vis-à-vis* the activity of the Court is vast and articulated.[120] This is not the right

[118] ICC, AC, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, *Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case*, 25 Sep. 2009, ICC-01/04-01/07-1497 OA 8, para. 78.

[119] In this regard *see* GIOIA F., *Complementarity and 'reverse cooperation*, in STAHN C., EL ZEIDY M.M., *The International Criminal Court and Complementarity. From Theory to Practice*, Cambridge University Press, 2011, p. 807.

[120] *See*, among others, BASSIOUNI M.C., *Prost-Conflict Justice*, Transnational Publishers Inc., 2002; CLARK T.H., *The Prosecutor of the International Criminal Court, Amnesties, and the 'Interests of Justice': Striking a Delicate Balance*, in *Washington University Global Studies Law Review*, 4, 2, 2005, p. 389; GAVRON J., *Amnesties in the Light of Developments in International Law and the Establishment of the International Criminal Court*, in *International and Comparative Law Quarterly*, 51, 1, 2002, p. 91; GOLDSTONE R.J., FRITZ N., *In the Interests of Justice and Independent Referral: the ICC*

place to engage in an in-depth analysis on whether these alternative justice mechanisms satisfy the requirements for complementarity but offering a brief overview of the topic may be useful in order to better understand the possible relevance of these mechanisms in the assessment of the interests of justice.[121]

Alternative justice mechanisms, under certain circumstances, may bar the Court from exercising its jurisdiction according to Art. 17, i.e. rendering the potential or actual cases inadmissible. The OTP seems having admitted the utility of alternative justice mechanisms at the national level while stating that '[f]or other offenders, *alternative means for resolving the situation may be necessary*, whether by encouraging and facilitating national prosecutions by strengthening or rebuilding national justice systems, by providing international assistance to those systems or by some other means'.[122] In order to reach this result these mechanisms must satisfy the requirements of Art. 17, conducting some sort of 'investigations' and adopting 'decisions' not to prosecute.[123] Among the possible scenarios, mechanisms leading to targeted prosecution are usually deemed to be an appropriate solution.[124]

Prosecutor' Unprecedent Powers, in *Leiden Journal of International Law*, 13, 3, 2000, p. 655; MINOW M., *Do Alternative Justice Mechanisms Deserve Recognition in International Criminal Law?: Truth Commissions, Amnesties, and Complementarity at the International Criminal Court*, in *Harvard International Law Journal*, 60, 2019, p. 1; PEREZ-LEON-ACEVEDO J.P., *The Control of the Inter-American Court of Human Rights over Amnesty Laws and Other Exemption measures: Legitimacy assessment*, in *Leiden Journal of International Law*, 33, 2020, p. 667 on some recent development in the practice of the IACtHR; RODMAN K.A., *Is Peace in the Interests of Justice? The Case for Broad Prosecutorial Discretion at the International Criminal Court*, in *Leiden Journal of International Law*, 22, 1, 2009, p. 99; SCHABAS W.A., *An Introduction to the International Criminal Court*, Cambridge University Press, 2020, pp. 192-195; SCHARF M.P., *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, in *Cornell International Law Journal*, 32, 3, 1999, p. 507; STAHN C., *Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative guidelines for the International Criminal Court*, in *Journal of International Criminal Justice*, 3, 2005, p. 695; VILLA-VICENCIO C., *Why Perpetrators Should not Always Be Prosecuted: Where the International Criminal Court and Truth Commissions Meet*, in *Emory Law Journal*, 49, 1, 2000, p. 205; WERLE G., JESSBERGER F., *Principles of International Criminal Law*, 4th ed., Oxford University Press, 2020, pp. 107 ff.

[121] *See* below, Section IV.

[122] ICC, OTP, *Paper on some policy issues before the Office of the Prosecutor, September 2003*, p. 7 (*emphasis added*). *See* DUKIĆ D., *Transitional justice and the International Criminal Court – in 'the interests of justice'?*, in *International Review of the Red Cross*, 89, 867, 30 Sep. 2007, p. 691 at 706.

[123] On this topic s*ee* GORDON G.S., *Complementarity and alternative forms of justice*, in STAHN C., EL ZEIDY M.M., *The International Criminal Court and Complementarity. From Theory to Practice*, Vol. I, Cambridge University Press, 2011, p. 745.

[124] ROBINSON D., *Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court*, in *European Journal of International Law*, 14, 3, 2003, p. 481 at 500; STAHN C., *Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative guidelines for the International Criminal Court*, in *Journal of International Criminal Justice*, 3, 2005, p. 695 at 707.

Amnesties are the most challenging scenario. The international tribunals have generally declared the irrelevance of amnesties in the light of the gravity of the international crimes and the responsibility of the individuals prosecuted at the supra-national level. But the ICC is a permanent court and the relevance of amnesties was not excluded *a priori*. Therefore, contrary to the statutes of other tribunals,[125] the Rome Statute does not include any 'anti-amnesty' provision.[126] Further, other international tribunals changed their approach toward amnesties during their life: for example the original text of Art. 40 of the ECCC Law entitled '*Amnesty and pardon'* forbad the Royal Government of Cambodia to request an amnesty or pardon for any person who might have been investigated or convicted for crimes under the jurisdiction of the ECCC. This provision was amended in 2004 and a second sentence stating that '[t]he scope of any amnesty or pardon that may have been granted prior to the enactment of this Law is a matter to be decided by the Extraordinary Chambers' was added.[127] Therefore, scholars traditionally distinguish between blanket and conditional amnesties: the former are irrelevant as they always aim at shielding the perpetrators of crimes from prosecution; the latter may prevent the Court from exercising its jurisdiction if conceded in a way that satisfies the requirements of Art. 17.[128]

2.4. The gravity test under Article 17 of the Statute

Once the complementarity test has been positively concluded, a potential or actual case can still be inadmissible if it does not satisfy the gravity requirement under Art. 17(1)(d).

The drafters of the Statute decided to split the admissibility ruling and the procedure on the initiation of the investigation, maintaining the link between the two provisions thanks to

[125] *See*, for example, Art. 10 SCSL Statute and Art. 6 STL Statute.

[126] *See* DEGUZMAN M.M., *How serious are International Crimes? The Gravity Problem in International Criminal Law*, in *Columbia Journal of Transnational Law*, 51, 2012, p. 18 at 58 ff.; WERLE G., JESSBERGER F., *Principles of International Criminal Law*, 4th ed., Oxford University Press, 2020, pp. 113-114.

[127] *See* ECCC, *Law on amendments to article 2, article 3, article 9, article 10, article 14, article 17, article 18, article 20, article 21, article 22, article 23, article 24, article 27, article 29, article 31, article 33, article 34, article 35, article 36, article 37, article 39, article 40, article 42, article 43, article 44, article 45, article 46 and article 47 of the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea*, 5 Oct. 2004.

[128] *See* CLARK T.H., *The Prosecutor of the International Criminal Court, Amnesties, and the 'Interests of Justice': Striking a Delicate Balance*, in *Washington University Global Studies Law Review*, 4, 2, 2005, p. 389 at 408 ff.; ROBINSON D., *Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court*, in *European Journal of International Law*, 14, 3, 2003, p. 481. STAHN C., *Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative guidelines for the International Criminal Court*, in *Journal of International Criminal Justice*, 3, 2005, p. 695 at 708 ff; WERLE G., JESSBERGER F., *Principles of International Criminal Law*, 4th ed., Oxford University Press, 2020, pp. 112-113.

the reference to Art. 17 in Art. 53. One problematic consequence of creating two different provisions was the doubling of the gravity concept, that appears: (i) in Art. 17(1)(d) (and therefore a reference to this ground for inadmissibility is included in Art. 53(1)(b) and (2)(b)) and (ii) in Art. 53(1)(c) and (2)(c). Under Art. 17(1)(d): '[...] the Court shall determine that a case is inadmissible where: [...] (d) The case is not of sufficient gravity to justify further action by the Court'. The following para. will be focused on this concept of gravity. Gravity under Art. 53(1)(c) and (2)(c) will be developed within the analysis of the interests of justice, even if some references will be necessary.

Gravity has always been invoked to justify the establishment of *ex post facto* international tribunals.[129] References to gravity are included in all the statutes of the international tribunals, including the IMT, whose jurisdiction was limited to the 'major war criminals';[130] the ICTY and ICTR, exercising jurisdiction over 'serious violations of international humanitarian law';[131] the SCSL, whose jurisdiction was limited to 'persons who bear the greatest responsibility for serious violations of international humanitarian law';[132] and the ECCC, responsible for investigating and prosecuting 'those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia'.[133] The UNTAET Reg. no. 2000/15 refers to 'serious criminal offences' including genocide, war crimes, crimes against humanity, murder, sexual offences and torture.[134] The KSC Law refers to 'grave trans-boundary and international crimes' even if the jurisdiction is limited to those crimes included in the Report of the Assembly of the Council of Europe. Basically, gravity was the reason for the inclusion of the crimes in the report.[135] The KSC Law does not limit its jurisdiction to the people most responsible. Conversely, the STL had limited jurisdiction 'over persons responsible for the attack of 14 February 2005 resulting in the death of former Lebanese Prime

[129] *See* DEGUZMAN M.M., *How serious are International Crimes? The Gravity Problem in International Criminal Law*, in *Columbia Journal of Transnational Law*, 51, 2012, p. 18 at 22 ff.

[130] Art. 1 IMT Statute.

[131] Art. 1 ICTY Statute and Art. 1 ICTR Statute. *See* ICTY, AC, *the Prosecutor v. Tadić*, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, IT-94-1-AR72, 2 Oct. 1995 where the Tribunal referred to the seriousness of the violations in the following terms: 'the violation must be "serious", that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim. Thus, for instance, the fact of a combatant simply appropriating a loaf of bread in an occupied village would not amount to a "serious violation of international humanitarian law" although it may be regarded as falling foul of the basic principle laid down in Article 46, paragraph 1, of the Hague Regulations (and the corresponding rule of customary international law) whereby "private property must be respected" by any army occupying an enemy territory'.

[132] Art. 1 SCSL Statute.

[133] Art. 1 ECCC Law.

[134] Art. 1 UNTAET Regulation no. 2000/15.

[135] Art. 1 KSC Law.

Minister Rafiq Hariri and in the death or injury of other persons'[136] without any reference to the gravity of the crimes.

The creation of a permanent ICC required instead the introduction of an admissibility regime including guidance for an *ex ante* assessment of gravity. References to gravity or seriousness emerge in the works of the ILC,[137] but its meaning was unexpectedly never clearly defined and its vagueness and ambiguity were used in the drafting history for mediating conflicts between those States supporting and those opposing the creation of a permanent court.[138] Still in 1994[139] James Crawford, Special Rapporteur of the ILC, stated that one of the problems to be faced in founding an international court was to decide whether the court 'should not have the power to stay a prosecution on specific grounds', including 'the existence of an adequate national tribunal with jurisdiction over the offence or the facts that the acts alleged were not of sufficient gravity to warrant trial at the international level'.[140] Consequently, Art. 35 'Issues of admissibility' of the Commission Draft contained the requirement of sufficient gravity in order to 'justify further action by the Court'.[141] Some members of the Commission believed that the reference to gravity in Art. 35 was superfluous since Art. 20 already recognised the Court's jurisdiction over treaty-based crimes 'which, having regard to the conduct alleged, constitute exceptionally serious crimes of international concern'.[142] In their opinion, the seriousness of the crime would have been a relevant factor in the assessment of the jurisdiction *ratione materiae*. Another option was to include the gravity of the crime as a relevant factor in the assessment of the precondition to the exercise of

[136] Art. 1 STL Statute.

[137] *See*, for example, *Comments and observations received pursuant to General Assembly resolution 36/106*, A/CN.4/358 and Add.1-4, *see*, in particular, the comments of the German Democratic Republic; *Report of the ILC on the Work of Its Thirty-fifth Session*, 3 May-22 Jul. 1983, G.A. 38th Sess. Supp. No. 10, A/38/10, 1983; *Report of the ILC on the Work of Its Thirty-sixth Session*, 7 May-27 Jul. 1984, G.A. 39th Sess. Supp. No. 10, A/39/10, 1984; *Report of the ILC on the Work of Its Forty-third Session*, 24 Apr.-19 Jul. 1991, G.A. 46th Sess. Supp. No. 10, A/46/10, 1991.

[138] According to Schabas the ILC probably introduced the concept of gravity in order to discharge minor crimes and violations rather than minor cases. *See* SCHABAS W.A., *Prosecutorial Discretion v. Judicial Activism at the International Criminal Court*, in *Journal of International Criminal Justice*, 6, 2008, p. 731 at 736.

[139] For an overview of the different positions expressed in the drafting history of the ICC Statute before 1994 *see* DEGUZMAN M.M., *How serious are International Crimes? The Gravity Problem in International Criminal Law*, in *Columbia Journal of Transnational Law*, 51, 2012, p. 18 at 25 ff.; SACOUTO S., CLEARY K., *The Gravity Threshold of the International Criminal Court*, in *American Univeristy International Law Review*, 23, 5, 2007, p. 807 at 817 ff.; EL ZEIDY M.M., *The Gravity Threshold Under the Statute of the International Criminal Court*, in *Criminal Law Forum*, 19, 2008, p. 35 ff.

[140] *Summary Record of the 2330th meeting*, A/CN.4/SR.2330, para. 9. *See* also SCHABAS W.A., *An Introduction to the International Criminal Court*, Cambridge University Press, 2020, p. 196.

[141] *Ibid.*

[142] Art. 35 Commentary, *Report of the ILC on the work of its forty-sixth session, Draft Statute for an International Criminal Court with commentaries*, 2 May – 22 Jul. 1994, G.A. 49th Sess. Supp. No. 10, A/49/10, 1994, par.(3).

jurisdiction under Art. 21 of the ILC's Draft. Conversely, other members of the Commission found that '[…] the circumstances of particular cases could vary widely and could anyway be substantially clarified after the court assumed jurisdiction so that a power such as that contained in article 35 was necessary […]'.[143]

The *Ad Hoc* Committee proposed to exclude treaty-based crimes from the jurisdiction of the Court since they might be 'of lesser magnitude' than the other offences and 'their inclusion within the jurisdiction of the court entitled a risk of trivializing the role of the court, which should focus on the most serious crimes of concern to the international community as a whole'.[144] In the aforementioned paper on complementarity submitted by the UK, the UK delegation highlighted that the Prosecutor should have had 'discretion to refuse to prosecute even though a *prima facie* case against an accused has been established [and] the Court should not be obliged to go ahead with every case over which it has jurisdiction, or which is not admissible'.[145] The Committee made only few comments on Art. 35 of the ILC's Draft, and, excluding the proposal to delete the subparagraph, the only remark connected to subpara. (c) and gravity was whether the accused would have been entitled to raise the question of insufficient gravity.[146]

Neither the Preparatory Committee developed a concept of gravity despite the favour for the inclusion of the treaty based crimes[147] and even if some members deemed it appropriate to exclude the non-gravity of the crime from the grounds of inadmissibility and to better define the crimes under Art. 20 of the Draft pertaining to jurisdiction.[148] It was nevertheless proposed to amend Art. 35 of the Draft requiring the 'exceptional gravity' as threshold for admissibility.[149] During the works of the Preparatory Committee in August in 1997, Italy

[143] *Ibid.*

[144] *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, G.A. 50th Sess. Supp. No. 22, A/50/22, 1995, p. 17. During the works of the *Ad Hoc* Committee, the concept of 'absolute gravity' was also evoked by some delegations in order to limit *proprio motu* investigations, holding that the lack of State referral could be interpreted as the insufficiency of the gravity threshold. *See Report of the* Ad Hoc *Committee on the Establishment of an International Criminal Court*, G.A., 50th Sess. Supp. No. 22, A/50/22, 1995, par. (114), p. 26.

[145] *UK Discussion Paper*, *Complementarity*, 29 Mar. 1996, 1st Preparatory Committee meeting (25 Mar.-12 Apr. 1996).

[146] *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, G.A. 50th Sess. Supp. No. 22, A/50/22, 1995, p. 33.

[147] *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I, (Proceedings of the Preparatory Committee During March-April and August 1996)*, G.A. 51st Sess., Supp. No. A/51/22, 1996, p. 25.

[148] *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I, (Proceedings of the Preparatory Committee During March-April and August 1996)*, G.A. 51st Sess., Supp. No. A/51/22, 1996, p. 39.

[149] *A Compilation of concrete proposals made in the course of discussion for amendment of the ILC draft statute*, A/AC.249/CRP.9/Add.1, 8 Apr. 1996, p. 7.

proposed to exclude gravity from the grounds of inadmissibility,[150] while Japan proposed to amend Article 35(1)(d) in order to declare a case inadmissible when 'the matter in respect of which the complaint is made is not of sufficient gravity to justify further action by the Court in view of the function of the Court to exercise jurisdiction only over the most serious crimes'.[151] In the decision following that working session, 'non-gravity' still appeared among the grounds of inadmissibility, but a footnote highlighted that some delegations preferred to include the reference to the non-gravity of the crime 'elsewhere in the Statute' or alternatively to delete it.[152] Therefore, this wording appeared in the Zupthen Draft[153] and the proposal had to be discussed in Rome in 1998.[154]

During the Rome Conference, 'gravity' was not a sensible topic for discussion but two interventions touched two challenging aspects: the relationship between jurisdiction and admissibility and the definition of the gravity threshold. With regards to the relationship between jurisdiction and admissibility, the representatives of Sweden recalled that the Court had to be satisfied at any stage of the proceedings not only that it has jurisdiction, but also that the case under consideration is of sufficient gravity to justify its intervention.[155] As far as the gravity threshold is concerned, the representatives of Chile highlighted that the expression 'sufficient gravity' was too vague and needed to be better explained.[156]

First, the actual wording of the Statute seems having adopted Sweden's observations. Although gravity was initially introduced for excluding transnational crimes of minor importance from the jurisdiction *ratione materiae* of the Court, it remained in the drafts even when the jurisdiction was limited to the core crimes (genocide, crimes against humanity, war

[150] *Draft proposal by Italy on article 35 (Issue of Admissibility)*, UD/A/AC-249/1997/WG-3/IP-4, 5 Aug. 1997.

[151] *Proposal by Japan on article 35 (based on alternative article 35 of A/AC.249/1)*, UD/A/AC-249/1997/WG-3/IP-2, 5 Aug. 1997.

[152] *Decision taken by the Preparatory Committee at its session held from 4 to 15 August 1997*, A/AC.249/1997/L.8/Rev.1, 14 Aug. 1997, p. 11.

[153] *Report of the Inter-Sessional Meeting from 19 to 30 January 1998 held in Zupthen*, The Netherlands, A/AC.249/1998/L.13, 1998, p. 43.

[154] *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, A/CONF.183/2/Add.2, 14 Apr. 1998, p. 41.

[155] *Summary record of the 10th meeting of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, Italy, 15 June-17 July 1998*, A/CONF.183/C.1/SR.10, p. 4. *See* also *Summary record of the 36th meeting of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, Italy, 15 June-17 July 1998*, A/CONF.183/C.1/SR.36, p. 6, where the representatives of Zimbabwe found that the inclusion of minor breaches among the war crimes would not have undermined the effectiveness of the Court, since the gravity clause would have prevented the Court from trying cases of minor importance

[156] *Summary record of the 11th meeting of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, Italy, 15 June-17 July 1998*, A/CONF.183/C.1/SR.11, p. 7.

crimes and aggression) which are serious by definition.[157] Therefore, gravity under Art. 17 does not pursue a filtering function with regard to jurisdiction *ratione materiae* anymore. It rather aims at declaring inadmissible cases (potential or not depending on the stage of its application) identified (or to be identified) during the investigations that do not meet a certain gravity threshold and that would nevertheless abstractly fall within the jurisdiction of the Court. Thus, gravity is an additional feature.[158] Its additional nature emerges also from the structure of Art. 53(1), since after a positive assessment of the jurisdiction *ratione materiae*, *ratione loci* and *ratione personae* under Art. 53(1)(a), the jurisdiction of the Court is nevertheless excluded in case of insufficient gravity. The problem is whether the case deserves to be handled at the international rather than at the national level. If the case is not serious enough to justify the intervention of the Court, it is duty of the States to investigate and possibly prosecute it.

For this reason, Smith argues that gravity would be functional in the perspective of complementarity.[159] Differently, Batros highlights that gravity does not implement complementarity since it does not reflect the external interest of other actors but an internal interest of the Court.[160] Even if both the States and the accused may challenge admissibility for insufficient gravity, the accused does not really have an interest in this sense, because it would implicitly admit the possibility for a prosecution at the national level,[161] while if a State flagged its intention not to prosecute because of insufficient gravity it would rather refer to Art. 17(1)(b). Accordingly, the assessment of gravity should precede the admissibility

[157] *See* SAFFERLING C., *International Criminal Procedure*, Oxford University Press, 2012, p. 223, who notes that differently from national legal systems – distinguishing, for example, between felonies and misdemeanours, *Verbrechen* and *Vergehen*, *delitti* e *contrvvenzioni* – international crimes are all serious by definition.

[158] *See* SMITH S.E., *Inventing the Laws of Gravity: the ICC's Initial Lubanga Decision and Its Regressive Consequences*, in *International Criminal Law Review*, 8, 2, 2008, p. 331 at 336; MURPHY R., *Gravity Issues and International Criminal Court*, in *Criminal Law Forum*, 17, 2006, p. 312 at 286-288 analyses the preamble of the Statute; MBAYE A.A., SHOAMANESH S.S., *Article 17*, in FERNANDEZ J., PACREAU X., *Statut de Rome de la Cour pénale internationale. Commentaire article par article*, Pedone, 2012, p. 687 at 698; SAFFERLING C., *International Criminal Procedure*, Oxford University Press, 2012, p. 223.

[159] SMITH S.E., *Inventing the Laws of Gravity: the ICC's Initial Lubanga Decision and Its Regressive Consequences*, in *International Criminal Law Review*, 8, 2, 2008, p. 331 at 340-341.

[160] BATROS B., *The evolution of the ICC jurisprudence on admissibility*, in STAHN C., EL ZEIDY M.M., *The International Criminal Court and Complementarity. From Theory to Practice*, *Vol. I*, Cambridge University Press, 2011, p. 558 at 594 ff.

[161] Nevertheless, looking at the practice, various accused opposed the insufficient gravity as ground for inadmissibility, including Mr Blé Goudé, Mr Abu Garda and Mr Al Hassan.

assessment under Art. 17(1)(a), (b) and (c) which would be superfluous if the gravity threshold is not met.[162]

As to the second aspect, contrary to the wishes of the representatives of Chile, the concept of gravity was not defined during the Rome Conference. DeGuzman regrets that the decision to exclude treaty-based crimes from the jurisdiction of the Court was not accompanied by the deletion of the gravity threshold or that the drafters did not clarify the content of this expression. In her opinion the lack of interest in the definition of a substantial threshold on the exercise of the Court's jurisdiction testifies that the drafters intended to use gravity with the sole purpose of excluding 'only the kind of *de minimis* conduct'.[163] The lack of legal and objective factors clarifying the gravity-related admissibility of a situation or a case is certainly regrettable especially in the light of its 'additional' nature.[164] This is even more urgent because the ambiguity of the concept of gravity has often been used both by the prosecutors and the judiciary of many international jurisdictions to justify an expansion of ICL with the paradoxical effect of diluting the gravity of crimes investigated and adjudicated.[165]

In the decision on the Prosecutor's application for Warrant of Arrest against Mr Lubanga and Mr Katanga, the PTC confirmed that 'the gravity threshold is an addition to the drafters' careful selection of the crimes included in Arts 6 to 8, a selection based on gravity and directed at confining the material jurisdiction of the Court to "the most serious crimes of international concern". Hence, the fact that a case addresses one of the most serious crimes for the international community as a whole is not sufficient for it to be admissible before the Court'.[166] Therefore, as this assessment 'is in addition to the gravity-driven selection of the crimes included within the material jurisdiction of the Court […] the relevant conduct must present particular features which render it especially grave'[167]. The PTC insisted on this aspect

[162] BATROS B., *The evolution of the ICC jurisprudence on admissibility*, in STAHN C., EL ZEIDY M.M., *The International Criminal Court and Complementarity. From Theory to Practice*, *Vol. I*, Cambridge University Press, 2011, p. 558 at 594 ff.

[163] DEGUZMAN M.M., *Gravity and Legitimacy of the International Criminal Court*, in *Fordham International Law Journal*, 32, 5, 2008, p. 1400 at 1424. *See* also ROSCINI M., *The Statute of the International Criminal Court and Cyber Conduct that Constitutes, Instigates or Facilitates International Crimes*, in *Criminal Law Forum*, 30, 2019, p. 247 at 255.

[164] *See* MBAYE A.A., SHOAMANESH S.S., *Article 17*, in FERNANDEZ J., PACREAU X., *Statut de Rome de la Cour pénale internationale, Commentaire article par article*, *Vol I*., Pedone, 2012, p. 698.

[165] DEGUZMAN M.M., *How serious are International Crimes? The Gravity Problem in International Criminal Law*, in *Columbia Journal of Transnational Law*, 51, 2012, p. 18 at 36-37.

[166] ICC, PTC I, *Situation in the Democratic Republic of Congo*, *Decision on the Prosecutor's Application for Warrants of Arrest, Article 58*, 10 Feb. 2006, ICC-01/04-01/06-8 (also ICC-01/04-02/06-20-Anx2), para. 42.

[167] *Ibid*., para. 46.

stating that gravity under Art. 17 of the Statute is 'additional' and 'a key tool provided by the drafters to maximise the Court's deterrent effect'.[168]

The AC recently returned on the concept of gravity under Art. 17(1)(d) in the Al Hassan case, where it noted that the wording of the provision 'makes clear that there may be cases in which the specific facts, although technically qualifying as crimes under the jurisdiction of the Court, are not sufficiently grave to require its intervention'.[169] Nevertheless, the AC stressed that 'the crimes subject to the material jurisdiction of the Court, are, in principle, of sufficient gravity to justify further action'[170] and argued that the purpose of the gravity requirement 'is to exclude from the purview of the Court those rather unusual cases when conduct that technically fulfils all the elements of a crime under the Court's jurisdiction is nevertheless of marginal gravity only'.[171] In any event, gravity must be assessed on a case-by-case basis.[172] The jurisprudence of the AC has been subsequently applied by the PTC I in the Registered Vessels situation during the review of the second Prosecutor's decision not to open an investigation, that remarked the 'exclusionary nature' of the gravity requirement noting that its purpose 'is not to oblige the Court to choose only the most serious cases, but merely to oblige it not to prosecute cases of marginal gravity'.[173]The object of the gravity assessment

The gravity assessment may be conducted with regard to different objects: the crime, the alleged perpetrator because of 'the most responsible' formula which is recurrent in ICL, the case and the situation.

[168] *Ibid*., para. 49. *See* also ICC, PTC II, *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 Mar. 2010, ICC-01-09-19, para. 56; ICC, PTC III, *Situation in Côte d'Ivoire, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation in the Republic of Côte d'Ivoire*, 3 Oct. 2011, ICC-02/11-14, para. 201 where the PTC II defines the insufficiency of the gravity as 'an additional safeguard, which prevents the Court from investigating, prosecuting and trying peripheral cases'.

[169] ICC, AC, *The Prosecutor v. Al Hassan, Judgment on the appeal of Mr Al Hassan against the decision of Pre-Trial Chamber I entitled 'Décision relative à l'exception d'irrecevabilité pour insuffisance de gravité de l'affaire soulevée par la défense'*, 19 Feb. 2020, ICC-01/12-01/18-601-Red OA, para. 55.

[170] *Ibid.*

[171] *Ibid.*, para. 53 (*emphasis added*).

[172] *Ibid.*

[173] ICC, PTC I, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia, Decision on the 'Application for Judicial Review by the Government of the Comoros'*, 16 Sep. 2020, ICC-01/13-111, para. 22.

2.4.1.1. The gravity of the crime

The expression 'gravity of the crime' appears at Art. 53(1)(c) and 53(2)(c) as a relevant factor in the assessment of the interests of justice.[174] It also appears in Art. 59 (*Arrest proceedings in the custodial State*); Art. 77 (*Applicable penalties*); and Art. 78 (*Determination of the sentence*).[175] The determination of the gravity of the crime includes both a quantitative and a qualitative assessment. The latter takes into account the nature, scale, manner of commission and impact of the crime. Since the relevant factors in the determination of the gravity of the crime are relatively clear,[176] they will not be analysed in detail.

2.4.1.2. Gravity in relation to the alleged perpetrator

The formula 'people most responsible' traditionally links the gravity assessment to the individual, but can be alternatively interpreted as 'people most responsible for the alleged crimes' – giving therefore importance to the rank and the leadership role of the alleged perpetrators – or 'people who played a major role in the commission of the crimes'.

When it had to decide on the applicability of Rule 11*bis* ICTY RPE the jurisprudence of the ICTY admitted both interpretations. Rule 11*bis* directed the referral of an indictment to a national court and was widely used during the execution of the completion strategy.[177] In this context, the ICTY identified two possible alternatives for determining the content of 'gravity': it could include the gravity of the crimes or the level of responsibility. With regards to the latter in the *Ademi and Norac case* the Referral Bench (i.e. the organ in charge of deciding for the referral of an indictment to a national court) stated that 'in light of the history and purpose of Rule 11*bis*, the level of responsibility should be interpreted so as to include both the *military rank* of the Accused and their *actual role* in the commission of the crimes'.[178]

The SCSL faced some problems in the interpretation of a similar concept. Art. 1 of the Statute of the SCSL stated that the Special Court 'shall [...] have the power to prosecute

[174] *See* below.

[175] Art. 90 (*Competing requests*) refers instead to the 'gravity of the conduct'.

[176] Although the meaning of these factors is straighforward problems may raise in their correct application. *See* ICC, PTC I, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia, Decision on the 'Application for Judicial Review by the Government of the Comoros'*, 16 Sep. 2020, ICC-01/13-111, para. 79, where the PTC I notes that the Prosecutor blurred scale and impact of the crime in her assessment.

[177] *See* DONLON F., *Positive complementarity in practice. ICTY Rule 11*bis *and the use of the tribunal's evidence in the Sebrenica Trials before the Bosnian War Crimes Chamber*, in STAHN C., EL ZEIDY M. (eds), *The International Criminal Court and complementarity from theory to practice*, Vol. II, Cambridge University Press, 2011, p. 921.

[178] ICTY, RB, *The Prosecutor v. Ademi and Norac, Decision for referral to the authorities of the Republic of Croatia pursuant to Rule 11*bis, 14 Sep. 2005, IT-04-78-PT, para. 29.

persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law [...] including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone'. Whether the clause aimed at limiting the jurisdiction of the Special Court or the discretion of the Prosecutor was matter for judicial debate. In *Norman et al.* case the TC adopted a decision stating that the requirement at stake was not solely a matter of prosecutorial discretion, but also a jurisdictional limitation. In its opinion, the decision to use the expression 'persons who bear the greatest responsibility' instead of 'persons most responsible' suggested that the leadership role of the suspect should be of primary consideration rather than the severity of the crime or its massive scale.[179] The Judges' argument was grounded on the different wording of the provision with respect to the ICTY and ICTR Statutes and on the *travaux préparatoires*. In particular they referred to the exchange of correspondence between the Secretary General and the UNSC. The first one hold that:

> 'While those 'most responsible' obviously include the political or military leadership, others in command authority down the chain of command may also be regarded 'most responsible' judging by the severity of the crime or its massive scale. 'Most responsible', therefore, denotes both a leadership or authority position of the accused, and a sense of the gravity, seriousness or massive scale of the crime. It must be seen, however, not as a test criterion or a distinct jurisdictional threshold, but as a guidance to the Prosecutor in the adoption of a prosecution strategy and in making decisions to prosecute in individual cases.'[180]

On the other hand, the UNSC responded that the Special Court 'should have personal jurisdiction over persons who bear the greatest responsibility for the commission of crimes' and that 'by thus limiting the focus of the Special Court to those who played a leadership role, the simpler and more general formulations [persons who bear the greatest responsibility] [...] will be appropriate.'[181] The Secretary General still replied highlighting that:

> '[...] the words 'those leaders who [...] threaten the establishment of and implementation of the peace process' do not describe an element of the crime but rather provide guidance to the prosecutor in determining his or her prosecutorial strategy. Consequently, the commission of any of the statutory crimes without necessarily threatening the establishment and implementation of the peace process

[179] SCSL, TC, *The Prosecutor v. Norman, Fofana and Kondewa*, *Decision on the preliminary defence motion on the lack of personal jurisdiction on behalf of the accused Fofana*, 3 Mar. 2004, SCSL-2004-14-PT, para. 40.

[180] SCSL, TC, *The Prosecutor v. Norman, Fofana and Kondewa*, *Decision on the preliminary defence motion on the lack of personal jurisdiction on behalf of the accused Fofana*, 3 Mar. 2004, SCSL-2004-14-PT, para. 22 citing S/2000/915, 4 Oct. 2000.

[181] SCSL, TC, *The Prosecutor v. Norman, Fofana and Kondewa*, *Decision on the preliminary defence motion on the lack of personal jurisdiction on behalf of the accused Fofana*, 3 Mar. 2004, SCSL-2004-14-PT, para. 23 citing S/2000/1234, 22 Dec. 2000.

> would not detract from the international criminal responsibility otherwise entailed for the accused.[182]

Nevertheless, the Secretary General also added that the suggested formulation (i.e. 'persons who bear the greatest responsibility') did not mean that the personal jurisdiction was limited to the political and military leaders only, and that the determination of its meaning fell initially on the Prosecutor but ultimately on the Special Court. The UNSC final endorsement to the Secretary General's interpretation of 'the persons who bear the greatest responsibility' formula and its following approval led the TC to the conclusion that the issue of personal jurisdiction did not exclusively articulate prosecutorial discretion but was a jurisdictional requirement.[183] Therefore, when the Judge received the indictment for approval, she had to be satisfied that there was sufficient information to establish reasonable grounds to believe that the person committed the crime charged. This assessment included taking into account the personal and temporal jurisdictional requirements and the subject-matter requirements, i.e. that the accused was a person who bore the greatest responsibility for serious violations of IHL and Sierra Leonean law, including those leaders who, through their crimes, had threatened the establishment and implementation of the peace process in Sierra Leone.

The jurisdictional nature of this requirement was articulated also by the Defence in the *Brima et al. case*,[184] arguing that the Prosecutor had not met the evidentiary threshold of greatest responsibility. In its view, while the Prosecutor had the wider discretion in investigating and prosecuting persons who bore the greatest responsibility, the Judges had the power to determine whether the Prosecutor had met this threshold.[185] Conversely, the Prosecutor submitted that 'the determination of who bears the greatest responsibility [fell] within the Prosecutor's discretion that is exercised by the Prosecutor based on investigations and evidence gathered, together with sound professional judgment'.[186] The Judge approving the indictment were not in the position to exercise this discretion as had no access to the evidence available to the Prosecutor, even if in extreme cases – such as abuse of process – the Prosecutor could be asked to review her discretion. Further the Prosecutor highlighted that qualifying this requirement as a jurisdictional one meant that the TC could acquit the accused at the end of a long trial despite the evidence of guilt if the Prosecutor had not provided evidence that the accused was one of the persons bearing greatest responsibility.

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[182] SCSL, TC, *The Prosecutor v. Norman, Fofana and Kondewa, Decision on the preliminary defence motion on the lack of personal jurisdiction on behalf of the accused Fofana*, 3 Mar. 2004, SCSL-2004-14-PT, para. 24 citing S/2001/40, 12 Jan. 2001.

[183] *Ibid*., paras 27-32.

[184] SCSL, TC II, *The Prosecutor v. Brima et al*., *Judgment*, 20 Jun. 2007, SCSL-04-16-T.

[185] *Ibid*., para. 647.

[186] *Ibid*., para. 643.

Starting from the analysis of *travaux préparatoires* also mentioned in the *Norman et al.* case, the Judges of TC II, explicitly departing from the colleagues' interpretation, reached the opposite conclusion that '"[t]he greatest responsibility requirement" [...] solely purport[ed] to streamline the focus of prosecutorial strategy'.[187] If the greatest responsibility requirement were a jurisdictional requirement, the TC should have dismissed the case without considering the merit. Falling on the Prosecutor the responsibility to investigate and prosecute the people meeting this requirement and in light of the principle of prosecutorial independence, the TC was 'not called upon to review the prosecutorial discretion in bringing a case against the Accused, nor would [have been] in a position to do so'.[188]

Eventually the AC of the SCSL fully endorsed the interpretation given by the Prosecutor and the TC II, recognising that the greatest responsibility requirement fell within prosecutorial discretion.[189] After a didactic analysis of the provision of the SCSL Statute[190] the AC concluded that the Prosecutor had 'the responsibility and competence to determine who [were] to be prosecuted as a result of investigation undertaken by him' while the Chambers had 'the competence to try such persons who the Prosecutor has consequently brought before it as persons who bear the greatest responsibility'.[191] Therefore the Prosecutor's determination was not subject to judicial review.

The practice of the ICC, and of the OTP in particular, is not homogeneous. In September 2003, the OTP issued a paper stating that '[i]n some cases the focus of an investigation by the OTP may go wider than high-ranking officers, if investigation of certain type of crimes or those officers lower down the chain of command is necessary for the whole case'.[192] Moreover, it added that '[t]he concept of gravity should not be exclusively attached to the act that constituted the crime but also to the degree of participation in its commission'.[193] Therefore, the Office seemed ready not only to extend the investigations[194] to lower-ranking

[187] *Ibid*., paras 653.
[188] *Ibid*., para. 654.
[189] SCSL, AC, *The Prosecutor v. Brima et al*., *Judgment*, 22 Feb. 2008, SCSL-04-16-A, paras 282-283.
[190] *Ibid*., paras 277-280.
[191] *Ibid*., para. 281.
[192] ICC, OTP, *Paper on some policy issues before the Office of the Prosecutor, September 2003*.
[193] *Ibid.*
[194] O'BRIEN M., *Prosecutorial Discretion as an Obstacle to Prosecution of United Nations Peacekeepers by the International Criminal Court*, in *Journal of International Criminal Justice*, 10, 2012, p. 525 at 529 notes that the paper only refers to investigating, but not prosecuting lower-ranking officials.

officials, but also to include the role of the suspect in the commission of the crime among the relevant factors in the gravity assessment.[195]

Conversely, adopting the decision not to initiate an investigation into the *Registered Vessels situation*, the Prosecutor justified the decision with the impossibility to investigate and prosecute senior IDF commanders and Israeli leaders.[196]

With regards to the Judiciary, the PTC initially proposed to limit the jurisdiction of the Court over 'the most senior leaders suspected of being the most responsible for the crimes'[197] and declared that Mr Ntaganda did not fall within the category of the most senior leaders in light of the military organisational structure of the group he belonged to.[198] The AC rejected the narrow interpretation of gravity given by the PTC stating that '[t]he imposition of rigid standards primarily based on top seniority may result in neither retribution nor prevention being achieved'[199] and that 'the particular role of a person [...] may vary considerably depending on the circumstances of the case and should not be exclusively assessed or predetermined on excessively formalistic grounds'.[200] Moreover '[a]lso, individuals who are not at the very top of an organization may still carry considerable influence and commit, or generate the widespread commission of, very serious crimes. In other words, predetermination

[195] This is corroborated by the fact that, according to Reg. 34(1) Reg OTP, the role of the suspect in the commission of the crime is one of the factors taken into account by the Prosecutor for selecting the case to prosecute. *See* also ICC, OTP, *Policy Paper on case selection and prioritisation*, 15 Sep. 2016, paras 42-44.

[196] ICC, OTP, *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, *Prosecution Response to the Application for Review of its Determination under article 53(1)(b) of the Rome Statute*, 30 Mar. 2015, ICC-01/13-14, para. 62.

[197] According to the PTC I, the useful criteria for determining whether the accused is one of the most senior leaders suspected of being the most responsible are: (a) the position of the person in the State entity, organization or armed group to which he belongs (the most senior leaders); (b) the role the person played in the commission of systematic or wide-scale crimes (those persons suspected of being most responsible); and (c) the role played by the State entity, organization or armed group to which the person belongs in the overall commission of ICC crimes (those groups suspected of being most responsible). ICC, PTC I, *Situation in the Democratic Republic of Congo*, *Decision on the Prosecutor's Application for Warrants of Arrest, Article 58*, 10 Feb. 2006, ICC-01/04-01/06-8 (also ICC-01/04-02/06-20-Anx2), paras 51-52.

[198] For a comment to this decision *see*, EL ZEIDY M.M., *The Gravity Threshold Under the Statute of the International Criminal Court*, in *Criminal Law Forum*, 19, 2008, p. 35; SMITH S.E., *Inventing the Laws of Gravity: the ICC's Initial Lubanga Decision and Its Regressive Consequences*, in *International Criminal Law Review*, 8, 2, 2008, p. 331. *See* also MURPHY R., *Gravity Issues and International Criminal Court*, in *Criminal Law Forum*, 17, 2006, p. 312 at 291, who notes that the policy of identifying and pursuing the most senior leaders 'has a certain appeal and logic' but adds that the Statute does not refer to 'the most senior leaders' rather to 'the perpetrators of the most serious crimes'.

[199] ICC, AC, *Situation in the Democratic Republic of the Congo*, *Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58'*, 13 Jul. 2006, ICC-01/04-169 OA, para. 74.

[200] *Ibid*., para. 76.

of inadmissibility on the above grounds could easily lead to the automatic exclusion of perpetrators of most serious crimes in the future'.[201] This approach has been recently reaffirmed by the PTC I in the *Al Hassan case*.[202] Moreover, when it decided on the request for reviewing the mentioned decision not to initiate an investigation into the *Registered Vessels situation*, the PTC I found that the Prosecutor erred in not considering that an investigation could lead to the prosecution of those persons who may bear the greatest responsibility for the identified crimes. It therefore explicitly rejected the Prosecutor's approach limiting the jurisdiction of the Court to high ranking officials.[203]

Nevertheless, some considerations made by the AC in the *Al Hassan case* seem to reverse this trend limiting the relevance of the gravity assessment concerning the alleged perpetrator on the basis of his role in the commission of the crime. The AC notes that in the confirmation procedure the PTC 'did not consider abstract notions and labels regarding the conduct and role of Mr Al Hassan', but rather 'it considered the factual allegations presented by the Prosecutor in support of her submissions concerning the contribution of Mr Al Hassan to the alleged crimes'.[204] Although the AC criticises the decision of the PTC to refer to the Document Containing the Charges submitted by the Prosecutor rather than elaborating 'on the specific factual allegations supporting the Prosecutor's significant role attributed to Mr Al Hassan' it finds that the references are clear.[205] Then, rejecting the argument of the Defence to the effect that the Chamber had not confirmed the charges under modes of liability requiring an essential contribution, the AC correctly states that Art. 25 includes a range of possible modes of liability and that only those under para. (3)(a) requires an essential contribution. Therefore, the absence of an essential contribution does not make the case insufficiently serious otherwise modes liability other than those under para. (3)(a) could never be applied.[206] In this way the AC states that any mode of liability alleged by the Prosecutor (and not

[201] *Ibid*., para. 77.

[202] ICC, PTC I, *The Prosecutor v. Al Hassan*, *'Décision relative à l'exception d'irrecevabilité pour insuffisance de gravité de l'affaire soulevée par la défense'*, 19 Feb. 2020, ICC-01/12-01/18-459, para. 50.

[203] ICC, PTC I, *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, *Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation*, 16 Jul. 2015, ICC-01/13-34, para. 23 ff.. *See* also *Partly dissenting opinion of Judge Péter Kovács*, 16 Jul. 2015, ICC-01/13-34-Anx, paras 27-28; ICC, PTC I, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia*, *Decision on the 'Application for Judicial Review by the Government of the Comoros'*, 16 Sep. 2020, ICC-01/13-111, para. 19.

[204] ICC, AC, *The Prosecutor v. Al Hassan*, *Judgment on the appeal of Mr Al Hassan against the decision of Pre-Trial Chamber I entitled 'Décision relative à l'exception d'irrecevabilité pour insuffisance de gravité de l'affaire soulevée par la défense'*, 19 Feb. 2020, ICC-01/12-01/18-601-Red, para. 110.

[205] *Ibid.*, para. 111.

[206] *Ibid.*

necessarily verified by the PTC in order not to blurred the distinction between the admissibility procedure and the merit of the case) satisfies the gravity threshold. In conclusion, with the exclusion of the rank of the suspect – that had already been deemed irrelevant in the *Ntaganda case* – even the role of the suspect in the commission of the crime is in practice deprived of significance.

Scholars are divided whether gravity in relation to the suspect must be interpreted in connection to her official position[207] or to her material role in the commission of the crime. [208] Some scholars admit both these interpretations.[209]

Longobardo argues that only the first interpretation is consistent with the role of gravity in the statutory system.[210] The starting point is the assumption that gravity is an additional feature as expressly stated by PTC I in the *Lubanga case* and as seen above. Even if this statement only appears in one decision it has not been challenged neither by the Prosecutor nor by the AC.[211] Thus, gravity is 'not a constituent element of the crime', but rather a feature of a case (actual or potential) based on those crimes. Accordingly, the elements of the crimes [*actus reus*, *mens rea* and absence of justification] are unsuitable for evaluation in the gravity

[207] *See* SCHABAS W.A., EL ZEIDY M.M., *Article 17*, in AMBOS K., *The Rome Statute of the International Criminal Court*, 4th ed., Beck/Hart/Nomos, 2021, mn. 63, who give great importance to the rank of the suspects in the determination of gravity by stating that '[t]he seriousness of a particular case certainly involves the role and the position played by the suspect in relation to the commission of the crimes, because based on that position and role the suspect enjoys the power to direct or orchestrate when, how and whether a crime will be committed'. Only marginally they admit that 'the decision to focus on a low-level perpetrator also falls within the prosecutorial strategy'. *See* also O'BRIEN M., *Prosecutorial Discretion as an Obstacle to Prosecution of United Nations Peacekeepers by the International Criminal Court*, in *Journal of International Criminal Justice*, 10, 2012, p. 525 at 537, who finds that the status of peacekeeping personnel 'is an excellent criterion to apply to gravity'.

[208] MELONI C., *The ICC preliminary examination of the Flotilla situation: An opportunity to contextualise gravity*, in *Questions of International Law*, 30 Nov. 2016, who underlines that 'there is no statutory requirement that the ICC's personal jurisdiction shall be limited to any particular "level" of persons'. *See* also JORDA C. *The Major Hurdles and Accomplishments of the ICTY – What the ICC Can Learn from them*, in *Journal of International Criminal Justice*, 2, 2004, p. 572; TEKAMURA H., *Big Fish and Small Fish Debate – An Examination of the Prosecutorial Discretion*, in *International Criminal Law Review*, 7, 2007, p. 677; ROSCINI M., *The Statute of the International Criminal Court and Cyber Conduct that Constitutes, Instigates or Facilitates International Crimes*, in *Criminal Law Forum*, 30, 2019, p. 247 at 257, 269 ff.

[209] DEGUZMAN M.M., *Gravity and Legitimacy of the International Criminal Court*, in *Fordham International Law Journal*, 32, 5, 2008, p. 1400 at 1454-1455; apparently HEINZE A., FYFE S., *Prosecutorial Ethics and Preliminary Examinations at the ICC*, in BERGSMO M., STAHN C., (ed.), *Quality Control in Preliminary Examination: Volume 2*, Brussels, Torkel Opsahl Academic EPublisher, 2018, p. 48 with fn. 222.

[210] LONGOBARDO M., *Factors relevant for assessment of sufficient gravity in the ICC. Proceedings and the elements of international crimes*, in *Questions of International Law*, 30 Nov. 2016.

[211] As seen above, the AC reaffirmed the same principle in the *Al Hassan case*. ICC, AC, *The Prosecutor v. Al Hassan, Judgment on the appeal of Mr Al Hassan against the decision of Pre-Trial Chamber I entitled 'Décision relative à l'exception d'irrecevabilité pour insuffisance de gravité de l'affaire soulevée par la défense'*, 19 Feb. 2020, ICC-01/12-01/18-601-Red OA, paras 53-55.

assessment since all conduct that constitutes an international crime has an inherent degree of gravity that is not relevant *per se* for the admissibility of the case'.[212] This conclusion is supported by adequate arguments: (i) the statement of the PTC I to the effect that '*the relevant conduct* must present particular features which render it especially grave'; (ii) the references in the *Abu Garda* and *Ali cases* only to some of the factors listed in Rule 145(1)(c) and (2)(b)(iv) RPE, namely the scale, nature and manner of commission of the alleged crimes, their impact on victims, and the existence of any aggravating circumstances; (iii) the Prosecutor's tendency to give relevance to these objective factors that are also enshrined in the Reg. 29(2) RegOTP. Since the assessment of the role in the commission of the crime is included in the *actus reus*, giving gravity this meaning would not bring any additional feature to the crime.[213] For this reason, the interpretation of 'person most responsible' as 'people who played a major role in the commission of the crime' should be rejected.[214] Also Heller seems to support the interpretation of gravity as entailing the official position of the accused. In his view, stating otherwise – as done by the PTC I in the *Registered Vessel situation* – would oblige the Prosecutor to open an investigation in 'dozens of situations (including all of the current situations [under preliminary examinations])'.[215] Thus, he notes that the PTC I interpretation of gravity hinderns any selective function of the admissibility assessment.[216]

Conversely, as gravity is an admissibility requirement and not a mere selective means, one may argue that limiting the relevance of gravity to the official position of the author does not serve the purposes of international criminal justice. Accordingly, it has been noted that Art. 33 of the Statute (*Superior orders and prescription of law*), stating that '[t]he fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility' unless specific circumstances exist, implies that also (at least some type of) subordinates can be tried in front of the ICC.[217] A second argument is favour of an

[212] *Ibid.*

[213] As it will be seen below, the AC has instead implicitly confirmed the possibility to refer to the conduct and the degree of intent in order to determine the gravity of the case even if the relevance of this conclusion is questionable.

[214] *Ibid.*

[215] HELLER K.J., *The Pre-Trial Chamber's Dangerous Comoros Review Decision*, in *Opinio Juris*, 17 Jul. 1015.

[216] *Ibid.*

[217] O'BRIEN M., *Prosecutorial Discretion as an Obstacle to Prosecution of United Nations Peacekeepers by the International Criminal Court*, in *Journal of International Criminal Justice*, 10, 2012, p. 525 at 529. *See* TRIFFTERER O., BOCK S., *Article 33*, in AMBOS K., *The Rome Statute of the International Criminal Court*, 4th ed., Beck/Hart/Nomos, 2021, mn. 13. Furthermore, differently from other international tribunals, such as the SCSL and the ECCC, the Rome Statute does not entail any limitation to personal jurisdiction to particular category of individuals. Nevertheless, the problem at stake is not a matter of jurisdiction, rather of admissibility. *See* also SACOUTO S., CLEARY K., *The*

interpretation of gravity including the role of the suspect is the possibility for the Prosecutor to apply a 'pyramidal' prosecutorial strategy as done at the ICTY and ICTR.[218] In the practice, the Prosecutor of the ICC does not seem having applied this strategy, even if the recent failures in the *Bemba* and in the *Gbagbo and Blé Goudé cases* and the failures in the situations in Kenya and Sudan as well may induce her to reconsider its advantages. Third, despite the mentioned preference of the Prosecutor[219] for the interpretation of this component gravity enhancing the official position of the accused, it is worth recalling that she adopted it in order to justify a decision *not to investigate*. Nevertheless, since the interpretation should be the same irrespective of the outcome of the decision, in case of adoption of a decision to investigate or prosecute this one raises significantly the bar of the Prosecutor's performance. Indeed, following the Prosecutor's statement, the Chambers should declare inadmissible the cases against 'people who played a major role in the commission of the crimes' but not covering high ranking positions. And the abovementioned practice shows that in cases against people covering high ranking positions evidence does not easily satisfy the burden of proof.

Be as it may, it is apparent that assessing the gravity vis-à-vis the alleged perpetrator pose significant challenges.

2.4.1.3. The 'gravity of the situation' and the 'gravity of the case'

Depending on the stage of the proceedings, the Prosecutor is required to assess the gravity of the situation and the gravity of the case. In the first request under Art. 15 of the Statute the Prosecutor proposed an assessment of gravity of the situation following the principles enshrined in Reg. 29(2) RegOTP, adopted in April 2009. Reg. 29(2) states that: '[i]n order to assess the gravity of the crimes allegedly committed in the situation, the Office shall consider various factors including their scale, nature, manner of commission, and impact'. The PTC II, in charge of the decision, stated that at the situation stage the gravity assessment of the 'potential cases' 'should be general in nature and compatible with the pre-investigative stage into a situation' with regards to the groups of people likely to be the object of the investigation.

Gravity Threshold of the International Criminal Court, in *American Univeristy International Law Review*, 23, 5, 2007, p. 807 at 845.

[218] SMITH S.E., *Inventing the Laws of Gravity: The ICC's Initial Lubanga Decision and Its Regressive Consequences*, in *International Criminal Law Review*, 8, 2008, p. 331 at 343 ff. He further refers to the statements of former ICTY and ICTR Prosecutor Louise Arbour, noting that only the prosecution of middle or lower ranking officials allowed the Tribunals to prosecute individuals for gender-based crimes, which is one of the priorities of the OTP of the Court. *See* also AMBOS K., *Introductory Note to Office of the Prosecutor: Policy Paper on Case Selection and Prioritisation (Int'l Crim. Ct.) by Kai Ambos*, in *International Legal Materials, Vol. 57*, 15 Sep. 2016, p. 1132.

[219] As it will be seen in the next paragraph, also the AC might in substance adhere to this interpretation.

and should be focused on the gravity of the crimes keeping in mind the interplay between the crimes and the context in which they are committed.[220]

The first remarkable consideration is that the gravity of a situation is always looked at through the lenses of the gravity of its (potential) cases.[221] The second consideration is that the gravity assessment is twofold, including a reference not only to the crimes but also to the persons or groups of persons involved. This twofold approach shaped all the subsequent requests for authorisation submitted by the Prosecutor,[222] inducing her to better structure the attachments to the requests prescribed by Reg. 49 RegC, and in particular two confidential annexes respectively containing a preliminary list of persons or groups appearing to bear the greatest responsibility for the most serious crimes and an indicative list of crimes allegedly committed during the most serious incidents within the situation.[223] In fact, Reg. 49 clearly requires to include in the request at least the places and time of the alleged commission of the crimes and the persons involved, if identified, or a description of the persons or groups of persons involved. However, with regards to the attachments it only requests the chronology of relevant events and an explanatory glossary of relevant names of persons, locations and institutions.

[220] ICC, PTC II, *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 Mar. 2010, ICC-01-09-19, paras 60-61. *See* also ICC, PTC I, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia*, *Partly Dissenting Opinion of Judge Peter Kovács*, annex to *Decision on the Request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation*, 16 Jul. 2015, ICC-01/13-34-Anx, paras 25-28.

[221] Recently, the PTC I has stated that 'if a situation gives rise to at least one potential case that is not of marginal gravity, the requirements of articles 53(1)(b) and 17(1)(d) of the Statute are met. The fact that a situation may give rise to only one case does not detract from this conclusion.' In order to support her determination of the gravity of the *Registered Vessels situation* it further recalls that the dimension of the overall situation is immaterial, as the *CAR I situation* has, so far, given rise to only one case but has not for this reason deemed of insufficient gravity. ICC, PTC I, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia*, *Decision on the 'Application for Judicial Review by the Government of the Comoros'*, 16 Sep. 2020, ICC-01/13-111, para. 97.

[222] This concept of gravity at the situation stage has not been challenged by the subsequent case law either. For a recent reference *see* ICC, PTC I, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia*, *Decision on the 'Application for Judicial Review by the Government of the Comoros'*, 16 Sep. 2020, ICC-01/13-111, para. 18.

[223] ICC, OTP, *Situation in Côte d'Ivoire*, *Request for authorisation of an investigation pursuant to article 15*, 23 Jun. 2011, ICC-02/11-3, paras 45-46; ICC, OTP, *Situation in Georgia*, *Request for authorisation of an investigation pursuant to article 15*, 13 Oct. 2015, 02/17-4, paras 275-276; ICC, OTP, *Situation in Burundi*, *Request for authorisation of an investigation pursuant to article 15*, 6 Sep. 2017, ICC-01/17-5, para. 145; ICC, OTP, *Situation in Afghanistan*, *Request for authorisation of an investigation pursuant to article 15*, 20 Nov. 2017, ICC-02/17-7, paras 264-265.

The need to assess the gravity of the situation with regards to the potential cases and the following analysis of the gravity of the case require to recall the difference between 'case' and 'crime' as developed by the Court.

In the decision authorising an investigation in Kenya, the PTC II traced a line between 'case' and 'crime' by stating that 'the former encompasses both crimes and one or several persons suspected to have committed those crimes in the course of specific incidents'.[224] That the 'case' includes not only the crime but also reference to the suspected persons appears correct and emerges also from the name of the cases, always including the name of the suspected person.[225] Therefore, as far as gravity is concerned, if a case entails both the crime and the suspect, it would be logical for the gravity of the case to entail both the gravity of the crime and gravity in connection to the suspect. In the recent case law, the AC seems having confirmed the assumption that the gravity of the case includes a twofold assessment of gravity. In the *Al Hassan case* the AC returned on the parameters of the case precisely for assessing the gravity under Art. 17(1)(a) and recalling its jurisprudence on 'case' developed in the *Gaddafi and Al-Senussi case*[226] it concluded that the same considerations apply when interpreting the parameters of the case for the purpose of admissibility under Art. 17(1)(d).[227]

A statutory basis suggesting that the gravity of the case includes both the gravity of the crime and the factors related to the alleged perpetrator is Rule 145 RPE listing the relevant factors in the determination of sentence and used as reference by the PTC I in the *Abu Garda case*.[228] Rule 145(1)(c) offers useful hints in the gravity assessment and juxtaposes and mixes

[224] ICC, PTC II, *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 Mar. 2010, ICC-01-09-19, para. 65.

[225] In the *Abd-Al-Rahman case* Judge Aitala, acting as Single Judge on behalf of PTC II, has recently stated that '[t]he name of a case is per se a neutral tool, providing an objective way of identifying the cases pending before the various Chambers of the Court and aimed at facilitating the correct and efficient management of the proceedings by ensuring that all relevant documents are filed in the record of the case to which they pertain; as such, it does not have any impact or role on determinations relating to the merits of the case' (ICC, PTC II, *The Prosecutor v. Abd-Al-Rahman*, *Decision on the Defence request to amend the name of the case*, 26 June 2020, ICC-02/05-01/20-8, para. 16). Nevertheless, since the issue at stake was the inclusion of a 'nickname' – not recognised by the accused – in the name of the case, the Single Judge's considerations do not contradict the conclusions reached above.

[226] *See* above, Chapter I, Section IV, 2.2 'Situation' and 'case' in the statutory framework.

[227] ICC, AC, *The Prosecutor v. Al Hassan*, *Judgment on the appeal of Mr Al Hassan against the decision of Pre-Trial Chamber I entitled 'Décision relative à l'exception d'irrecevabilité pour insuffisance de gravité de l'affaire soulevée par la défense'*, 19 Feb. 2020, ICC-01/12-01/18-601-Red OA, paras 65-66.

[228] *See* KHAN K.A.A., *Article 78*, in AMBOS K., *The Rome Statute of the International Criminal Court*, 4th ed., Beck/Hart/Nomos, 2021, mn. 22 stating that '[t]he list of factors in Rule 145(1)(c) is not exhaustive, leaving it open to the Court to identify other factors which may be relevant in a particular case'. *See* also WEBB P., *The ICC Prosecutor's Discretion Not to Proceed in the 'Interests of Justice'*, in

factors related to the crime (the extent of the damage caused, in particular the harm caused to the victims and their families, the means employed to execute the crime, the circumstances of manner, time and location) and factors related to the person involved (the degree of participation of the convicted person; the degree of intent; the age, education, social and economic condition). The absence of a rigid structure makes it sometimes difficult to ascertain whether a factor should be referred to the crime or the person (for example, 'the nature of the unlawful behaviour' may be referred alternatively to the crime as such or may be linked to the specific conduct of the perpetrator). Besides, Rule 145(3) puts 'the gravity of the crime' and the 'individual circumstances of the convicted persons' side by side as relevant elements to justify life imprisonment. These 'individual circumstances' at the sentencing stage allows the individualisation of sentencing, but the same circumstances may play a role at pre-trial stage (keeping in mind its preliminary nature in terms of proof and without prejudice for the presumption of innocence) and concur with the gravity of the crime in determining the gravity of the case.

The AC's judgement in the *Al Hassan case* is the last step of an evolving jurisprudence concerning the assessment of the gravity of the case that has not always been consistent with the opposition between 'case' and 'crime'. Indeed, in many decisions, the gravity of the case has been exclusively linked to the gravity of the crime, with few or any consideration for the individual allegedly responsible.

At first, the PTC I stated that, in the light of its interpretation of Art. 7(1)(d) providing for an 'additional gravity threshold', factors other than the gravity of the relevant conduct had to be considered, including the systematic or large scale of the conduct which is the subject of a case, the social alarm caused by the conduct in the international community; the role of the perpetrators.[229] Moreover, in the view of the PTC, these factors were a core component of the gravity threshold provided for in Art. 17(1)(d), therefore their adoption by the Prosecutor was mandatory and not discretionary.[230]

Criminal Law Quarterly, 1 Jan. 2005, p. 305 at 328, who suggests that in the gravity assessment 'whatever would aggravate the sentence would tend to increase the gravity of the offence; whatever would mitigate the sentence would speak against prosecution' (she only refers to the gravity of the crime).

[229] ICC, PTC I, *Situation in the Democratic Republic of Congo*, *Decision on the Prosecutor's Application for Warrants of Arrest, Article 58*, 10 Feb. 2006, ICC-01/04-01/06-8 (also ICC-01/04-02/06-20-Anx2), paras 41; 47; 51.

[230] ICC, PTC I, *Situation in the Democratic Republic of Congo*, *Decision on the Prosecutor's Application for Warrants of Arrest, Article 58*, 10 Feb. 2006, ICC-01/04-01/06-8 (also ICC-01/04-02/06-20-Anx2), para. 63.

The Prosecutor, even though she shared the PTC's interpretation of Art. 17(1)(d) as an additional threshold of gravity and supporting its view on the desirability of focused case selection as a matter of policy, appealed the decision submitting that the PTC erred in law by injecting exceptionally rigid requirements into the legal standard of 'sufficient gravity' in Art. 17(1)(d).[231] According to the Prosecutor:

> '[…] Article 17 (1) (d) is intended to establish a basic standard for gravity, excluding minor offenders and minor crimes that clearly do not warrant the exercise of jurisdiction. Among those cases that satisfy the gravity threshold, the Prosecution must, like other Offices of the Prosecutor, apply selection criteria in order to prioritize a limited number of cases for presentation before the Court'[232]

In the view of the Prosecutor, the test required by the PTC was not only too restrictive (she considered a 'basic test' was enough, taking into account the gravity of the crimes and the extent of responsibility of the person[233]), but also incorrectly focused as it transformed only possibly relevant considerations into legal requirements. Moreover the appealed decision transformed Art. 17(1)(d) into a means of directing the policy of case selection among grave cases, 'eclips[ing] any scope for case selection' and 'hardening a restrictive case selection policy into a legal requirement'.[234] Eventually, 'the Decision circumscribe[d] the universe of admissible cases so narrowly as to preclude any discretion by the Prosecution or future Chambers, and to prevent the Court from acting with respect to very serious cases'.[235]

The AC followed the Prosecutor's reasoning and rejected the PTC's approach criticising the three additional factors.[236] First of all the requirement that the conduct must be either systematic or large-scale blurred the distinction between the jurisdictional requirements for war crimes and crimes against humanity. Secondly, the PTC had not clarified from where it had derived the requirement of social alarm and shared the Prosecutor's view that 'the criterion of "social alarm" depends upon subjective and contingent reactions to crimes' rather than upon their objective gravity. Thirdly, it was questionable that the deterrent effect is maximised only

[231] ICC, OTP, *Situation in the Democratic Republic of the Congo*, *Prosecutor's Document in Support of the Appeal*, 28 Jan. 2011, ICC-01/04-120-Red, paras 21-22.

[232] *Ibid*., para. 23.

[233] *Ibid*., paras 53-54. The Prosecutor submits that the assessment of (a) the gravity of the crimes includes the nature or severity of the crimes; their scale and impact; the degree of systematicity; and any particularly aggravating aspects; (b) the extent of responsibility includes the alleged status or hierarchical level of the accused or implication in particularly serious or notorious crimes; the significance of the role of the accused in the overall commission of the crimes; and the degree of involvement.

[234] *Ibid*., paras 26.

[235] *Ibid*., para. 27.

[236] ICC, AC, *Situation in the Democratic Republic of the Congo*, *Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58'*, 13 Jul. 2006, ICC-01/04-169, paras 68-79.

by prosecuting high-ranking officials. Moreover, the AC found that the request for an additional gravity threshold was in contrast with the decision rejecting the 'exceptional gravity' proposed during the works of the Preparatory Committee.[237] In the same vein, Judge Pikis in his separate and partly dissenting opinion provided for his own understanding of Art. 17(1)(d) and explained that the cases unworthy of consideration by the ICC are the 'cases insignificant in themselves, where the criminality on the part of the culprit is wholly marginal'.[238]

Many scholars approved the AC's decision that was deemed consistent with the idea that the gravity threshold aims at excluding only *de minimis* conduct and that the PTC's high threshold could jeopardise the Court's main objectives.[239] But the AC was also criticised because it missed the opportunity for defining the concept of gravity.[240] The binding authority of the AC's decision has been even doubted in the light of a subsequent decision adopted by the PTC I[241] defining the ruling of the AC as '*obiter dictum*'.[242]

The PTC I returned on the concept of gravity in the *Abu Garda case*.[243] Taking as paradigm some of the factors relevant at the sentencing stage under Rule 145(1)(c) and (2)(b)(iv) RPE,[244] the PTC I referred only to 'the nature, the manner and impact of the [alleged] attack' as relevant factors in the gravity assessment. Consequently, it left aside other factors included in Rule 145(1)(c) such as the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location; and the age, education, social and economic condition of the convicted person.

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[237] *Ibid*., paras 81-82.

[238] *Ibid*., *Separate and partly dissenting opinion of Judge Georghios M. Pikis*, para. 40.

[239] DEGUZMAN M.M., *Gravity and Legitimacy of the International Criminal Court*, in *Fordham International Law Journal*, 32, 5, 2008, p. 1400 at 1428, 1440; *See* also SACOUTO S., CLEARY K., *The Gravity Threshold of the International Criminal Court*, in *American University International Law Review*, 23, 5, 2007, p. 807 at 837 ff.; SMITH S.E., *Inventing the Laws of Gravity: The ICC's Initial Lubanga Decision and Its Regressive Consequences*, in *International Criminal Law Review*, 8, 2008, p. 331; MURPHY R., *Gravity Issues and International Criminal Court*, in *Criminal Law Forum*, 17, 2006, p. 312 who, before the intervention of the AC, had flagged the possible problems rising out a too narrow interpretation of gravity.

[240] SCHABAS W.A., EL ZEIDY M.M., *Article 17*, in AMBOS K., *The Rome Statute of the International Criminal Court*, 4th ed., Beck/Hart/Nomos, 2021, mn. 63:; SCHABAS W.A., *An Introduction to the International Criminal Court*, Cambridge University Press, 2020, p. 198.

[241] ICC, PTC I, *The Prosecutor v. Omar Al Bashir*, *Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir*, 4 Mar. 2009, ICC-02/05-01/09-3, fn. 51.

[242] W.A. SCHABAS, *Article 17*, in *Commentary on the Rome Statute*,2nd ed., 2016; SCHABAS W.A., *An Introduction to the International Criminal Court*, Cambridge University Press, 2020, p. 198.

[243] ICC, PTC I, *The Prosecutor v. Abu Garda*, *Decision on the Confirmation of Charges*, 8 Feb. 2010, ICC-02/05-02/09-243, paras 31-32.

[244] These factors include the scale of the crimes; the nature of the unlawful behaviour; the means of execution and the impact of the crimes.

A similar approach was adopted in the decision on the confirmation of charges against Mr Muthaura, Mr Kenyatta and Mr Ali,[245] where the PTC II referred only to 'the scale, nature and manner of commission of the alleged crimes, their impact on victims, and the existence of any aggravating circumstances'. Nevertheless, it is worth mentioning that the Defence for Mr. Ali had challenged the admissibility of the case for insufficient gravity requesting the Chamber to declare its inadmissibility because the Prosecutor had proposed to charge him for crimes concerning omissions under Art. 25(3)(d) of the Statute (a mode of liability punishing the person who in any other way contributes to the commission or attempted crime). Even if the PTC rejected the idea that omission and a specific mode of liability may render the case insufficiently serious and only focused on the crimes charged, it noted that Mr. Ali acted 'in his official capacity as Commissioner of Police',[246] reinforcing the inclusion of the individual-related factors in the gravity assessment at the case stage that, until this decision, had played a marginal role.

Indeed, the tendency to give precedence to the gravity of the crime rather than to the gravity vis-à-vis the alleged perpetrator seems less stringent when the PTC is asked to decide on a request for inadmissibility for insufficient gravity and therefore the Chamber responds to the submission of the Defence. In the *Al Hassan case* the PTC I refers to the criteria listed in Rule 145(1)(c) RPE and adds a reference to the aggravating circumstances listed in Rule 145(2)(b) RPE as relevant factors in the determination of the gravity of the case, with particular attention to the 'commission of the crime where a victim is particularly defenceless', the 'commission of the crime with particular cruelty or whether there were multiple victims' and the 'commission of a crime for any motive involving discrimination'.[247] Most of the gravity assessment of the case is focused on the inclusion of the contextual element in the assessment of the gravity of the case[248] and on the features of the crimes (nature and scale, temporal and spatial extent, repercussions of the crime, number of victims).[249] Nevertheless, the PTC does not ignore the gravity vis-à-vis the alleged perpetrator. Challenging the argument of the Defence on the alleged minor role of the accused in the light of its low-ranking status that would prevent the case from reaching the sufficient gravity threshold, the PTC I recalls the AC's jurisprudence on the irrelevance of the rank for the determination of the gravity. Further,

[245] ICC, PTC II, *The Prosecutor v. Muthaura, Kenyatta and Ali*, *Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute*, 23 Jan. 2012, ICC-01/09-02/11-382, paras 38 ff.

[246] *Ibid.*, para. 49.

[247] ICC, PTC I, *The Prosecutor v. Al Hassan*, *'Décision relative à l'exception d'irrecevabilité pour insuffisance de gravité de l'affaire soulevée par la défense'*, 19 Feb. 2020, ICC-01/12-01/18-459, para. 48.

[248] *Ibid.*, para. 53.

[249] *Ibid.*, paras 54 ff.

responding to the Defence's accusation of lack of evidence supporting the Prosecutor's allegation on the role of the accused, the PTC further notes that the admissibility procedure must be kept separated from the merit of the case[250] eventually noting 'the significant role that the Prosecutor attributes to Mr Al Hassan in the execution of said crimes' and his 'degree of intent and degree of participation' in the crimes.[251]

When the decision of PTC I was appealed, the AC did not find any error in the decision. Through the analysis of the factors used by the PTC, the AC implicitly confirmed the the correctness of the first-instance determination and the relevance of all the factors taken into account by the PTC I, including those concerning the role of the suspect in the commission of the crimes. Further, as seen above, it stressed the difference between 'case' and 'crime' even with regards to the gravity assessment.

Nevertheless, it has been seen in the previous paragraph that the assessment of gravity with regards to the alleged perpetrator, irrespective whether it is interpreted taking into account his rank or his role in the commission of the crime, is particularly challenging. Moreover, the case-law of the Court refuses to look exclusively at the rank and basically refuses to declare inadmissible cases where the contribute of the alleged perpetrator is of secondary importance. At this stage the question is therefore whether it is reasonable to consider gravity vis-à-vis the alleged perpetrators (irrespective of the interpretation of the expression 'people most responsible') at the situation stage in the light of the case-law of the Court concerning the case stage.[252]

One may oppose to the deletion of the perpetrator-based elements in the gravity assessment that the level of responsibility both under the perspective of the military rank and the actual role of the suspect was part of the gravity assessment also in the case-law of the *ad hoc* Tribunals. Nevertheless, the AC has noted[253] that this practice is immaterial because the Tribunals developed this jurisprudence with the objective of implementing the completion strategy. Moreover, the ICTY started its activities by trying lower-ranking perpetrators[254] and

[250] *Ibid.*, paras 50-51.
[251] *Ibid.*, para. 57.
[252] *See* PUES A., *Discretion and the Gravity of Situations at the International Criminal Court*, in *International Criminal Law Review*, 17, 5, 2017, p. 690.
[253] ICC, AC, *Situation in the Democratic Republic of the Congo, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58'*, 13 Jul. 2006, ICC-01/04-169 OA, para. 80.
[254] The first indictment was issued against Mr. Nicolić, that despite the gravity of his crimes was a low-level member of the Bosnian Serb forces. For a detailed chronology of the initiation of the activity of the ICTY and for an overview over the circumstances forcing the first Prosecutor to issue the first warrant of arrest against a lower-ranking official *see* M.M. DEGUZMAN, W.A. SCHABAS, *Initiation*

the accused of some of the most important cases were not high-ranking officials.[255] Moreover, borrowing the language of the ICC, the *ad hoc* Tribunals dealt with 'one situation' only.[256] A gravity assessment in that scenario involved a comparison with crimes committed within the same 'situation' and by people belonging to the same groups of other accused. The assessment was therefore more similar to an assessment of gravity with selective purposes,[257] although the outcome of the decision determined the referral of the case to the national authority (and therefore, borrowing agains the language of the ICC, a sort of declaration of inadmissibility of the case).

A better argument militating against the exclusion of the component related to the alleged perpetrator in the assessment of the gravity of the case (irrespective of whether in the rank or in the participation dimension) is that the only component of the gravity of the case would be the gravity of the crime and there would be no difference between them. However, the case-law of the Court (especially the AC) on the assessment of the gravity of the (actual) cases does not really take into account perpetrator-related gravity and the possible coincidence between gravity of the case and gravity of the crime has not been considered an obstacle by the Court. Thus, there is no reason for engaging in a theoretical and problematic assessment at the situation stage only because of the use of the word 'case' as opposed to 'crime' in Art. 17(1)(d).[258] Stegmiller reaches the same conclusion focusing on other inconsistencies that interpreting the word 'case' in technical sense at Art. 17 would causes with regards to the gravity assessment[259] and concludes that the assessment of gravity for admissibility purposes is far less stringent than the assessment of the gravity of the crime as part of the determination of the interests of justice clause.[260] Since assessing the 'gravity of the case' at the situation stage

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of investigations and Selection of Cases, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV, S. ZAPPALÀ (eds), *International Criminal Procedure*, Oxford University Press, 2013. *See* also JORDA C. *The Major Hurdles and Accomplishments of the ICTY – What the ICC Can Learn from them*, in *Journal of International Criminal Justice*, 2, 2004, p. 572 at 576.

[255] O'BRIEN M., *Prosecutorial Discretion as an Obstacle to Prosecution of United Nations Peacekeepers by the International Criminal Court*, in *Journal of International Criminal Justice*, 10, 2012, p. 525 at 530 takes the Furundžija case and the Tadić case as meaningful examples. *See* also CÔTÉ L., *Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law*, in *Journal of International Criminal Justice*, 3, 2005, p. 162 at 169 referring to Mr. Tadić and Mr. Akayesu.

[256] *See* RASTAN R., *Comment on Victor's Justice & the Viability of Ex Ante Standards*, in *The John Marshall Law Review*, 43, 3, 2010, p. 569 at 570.

[257] See below.

[258] In similar vein *see* PUES A., *Discretion and the Gravity of Situations at the International Criminal Court*, in *International Criminal Law Review*, 17, 5, 2017, p. 960, who sustains that an evaluation of the persons who bear the greatest responsibility is not required by the Rome Statute and must possibly be considered at a later stage as a matter of prosecutorial policy.

[259] STEGMILLER I., *The Pre-Investigation Stage of the ICC*, Dunker & Humbolt, Berlin, 2011, pp 353 ff.

[260] *Ibid*. According to Stegmiller, the gravity assessment with regards to admissibility entails primarily a quantitative factor and the threshold to be applied is low, while the assessment of the gravity

is an abstract operation as it relates to 'potential cases', there is a high level of uncertainty in the identification of 'the people who bears the greatest responsibility' at the preliminary examination stage. Especially if perpetrator-related gravity is interpreted with regards to the degree of responsibility of the alleged perpetrators rather than with regards to their rank, the identification of individuals possibly bearing the greatest responsibility at this stage is a theoretical exercise. As the section dedicated to the interests of justice will show, Article 53(1)(c) on the assessment of the interests of justice at the situation stage does not include 'the age or infirmity of the alleged perpetrator and his or her role in the crime' among the relevant factors in the assessment, elements which are instead included in the assessment of the interests of justice at the case stage under Article 53(2)(c). If these factors are not encompessed in the interests of justice assessment, including analogous elements in the assessment of gravity is debatable. If any relevance is given to the factors related to the alleged responsible in the gravity assessment, it will be in the admissibility of the case under Art. 53(2)(b) in the adoption of a decision (not) to prosecute as an extreme means for cases which clearly do not reach a *de minimis* threshold for the irrelevance of the suspect vis-à-vis the crime.

One concluding remark. Denying the relevance of the perpetrator-related gravity at the situation stage is not unproblematic. As seen above, the Prosecutor shall attach to the request for authorisation to open an investigation under Art. 15 a list with the names of the people who may bear the greatest responsibility for the crimes (in case of referred situation this problem does not emerge since the Prosecutor is free to identify the suspects without publishing their name until the request for a warrant of arrest, which marks the initiation of the case stage). One may wonder what is the nature of this list: if it is a binding document, should the Prosecutor discover during the investigation that the 'people bearing the greatest responsibility' are different from those identified at the preliminary stage, she would be prevented from their prosecution. Conversely, if the list is superfluous, should the Prosecutor charge individuals not mentioned in the list, the PTC would be prevented from exercising an effective control over the activity of the Prosecutor. As it will be seen in Chapter III[261] an effective supervisory role of the PTC on the request for authorisation is advisable, and ignoring this duty of the Prosecutor in the light of the secondary nature of the statutory provision is inconsistent with this conclusion. Rather than requesting the Prosecutor to file a list of the people who may bear the greatest responsibility she should submit information as to the *groups* she intends to

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of the crime in the determination of the interests of justice is much more articulated and includes a quantitative as well as qualitative assessment and a comparison *vis-à-vis* other situations. Moreover, the applicable threshold is higher.

[261] *See* below, Chapter III, Section II, 2. The authorisation for the initiation of an investigation under Article 15.

investigate. Consequently, even if her investigation should be bind by the document attached to the request, she should not be obliged to engage in an assessment of the individuals who bear the greatest responsibility for the crimes she intends to investigate before requesting the authorisation.

2.4.1.4. Gravity: the 'selective approach' and the 'threshold approach'

It is now necessary to determine whether gravity in the admissibility procedure is to be interpreted as threshold or whether it drives the Prosecutor in the selection of the cases.

It is debated among scholars whether there is a gravity threshold barring the Prosecutor from investigating into situations or cases beneath it ('threshold approach'), or whether the Prosecutor is allowed to choose among all potential situations and cases those she considers most serious ('selective approach').[262] In the first case the Prosecutor's action is driven by objective requirements and her discretionary power would only emerge in prioritising the allocation of resources. In the second case, the Prosecutor is granted more discretionary power. The question is particularly problematic with regards to the situation stage.

The selective approach attributes gravity a selective purpose. According to Mariniello, situational gravity 'assumes a central role in the Prosecutor's discretionary selection of situations to investigate'.[263] Similarly Schabas states that gravity enables the Prosecutor to 'pick and choose among potential situations yet at the same time [defending] the claim that her decisions have a degree of objectivity'.[264] De Guzman opposes gravity with selective purposes – that she calls 'relative gravity' – to the gravity pursuant to Art. 53(1)(b), 53(2)(b) and 17(1)(d) of the Statute – which she calls 'absolute gravity'[265] ('legal gravity' according to

[262] *See*, among others, DEGUZMAN M.M., SCHABAS W.A., *Initiation of investigations and Selection of Cases*, in SLUITER G., FRIMAN H., LINTON S., VASILIEV S., ZAPPALÀ S. (eds), *International Criminal Procedure*, Oxford University Press, 2013, p. 144; PUES A., *Discretion and the Gravity of Situations at the International Criminal Court*, in *International Criminal Law Review*, 17, 5, 2017, p. 960; MELONI C., *The ICC preliminary examination of the Flotilla situation: An opportunity to contextualise gravity*, in *Questions of International Law*, 30 Nov. 2016; CRYER R., FRIMAN H., ROBINSON D., VASILIEV S. (eds.), *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, 2019, p. 161 highlight the threshold function; WERLE G., JESSBERGER F., *Principles of International Criminal Law*, 4th ed., Oxford University Press, 2020, p. 129-130, who seem to refer exclusively to its 'threshold function'.

[263] MARINIELLO T., *Judicial Control over Prosecutorial Discretion at the International Criminal Court*, in *International Criminal Law Review*, 19, 2019, p. 979 at 986. *See* also at 1005.

[264] SCHABAS W.A., *An Introduction to the International Criminal Court*, Cambridge University Press, 2020, p. 254.

[265] DEGUZMAN M.M., *Gravity and Legitimacy of the International Criminal Court*, in *Fordham International Law Journal*, 32, 5, 2008, p. 1400 at 1403. This distinction is followed by ROSCINI M.,

Stegmiller[266]). Leaving aside this debatable dichotomy, attributing gravity a selective purpose necessarily requires a comparison, which, at the stage of Art. 53(1), is between situations. The case-law of international tribunals[267] and some scholars[268] support the comparative approach, highlighting that the very concept of gravity has a 'relative nature' and is fully meaning in relation to something else. Also the ICC Prosecutor seems having applied the selective approach in the situation in Iraq and UK: in 2006 the former Prosecutor declined to investigate the crimes allegedly committed by British soldiers in Iraq in the light of the limited number of victims if compared to other situations under the Court's scrutiny.[269] Only additional information reporting 'a higher number of cases of ill-treatment of detainees' and providing 'further details on the factual circumstances and the geographical and temporal scope of the alleged crimes' induced the Prosecutor to re-open the preliminary examination in 2014.

There are two main arguments against the selective function of gravity at the situation stage. First, giving gravity a selective purpose increases the risk of criticism of various nature. Criticism such as those moved against the first Prosecutor's decision not to open an investigation in Iraq,[270] irrespective whether they are well reasoned or specious,[271] could be

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The Statute of the International Criminal Court and Cyber Conduct that Constitutes, Instigates or Facilitates International Crimes, in *Criminal Law Forum*, 30, 2019, p. 247 at 254-257.

[266] STEGMILLER I., *The Pre-Investigation Stage of the ICC*, Dunker & Humbolt, Berlin, 2011, p. 332; STEGMILLER I., *Interpretative gravity under the Rome Statute. Identifying common gravity criteria*, in STAHN C., EL ZEIDY M.M., *The International Criminal Court and Complementarity. From Theory to Practice, Vol. I*, Cambridge University Press, 2011, p. 603 at 618. Stegmiller expressly refuses DeGuzman classification of gravity and uses the expression 'relative gravity' referring to concept of gravity pursuant to Article 53(1)(c) and 53(2)(c).

[267] *See*, for example, the already mentioned ICTY, RB, *The Prosecutor v. Ademi and Norac*, *Decision for referral to the authorities of the Republic of Croatia pursuant to Rule 11*bis, 14 Sep. 2005, IT-04-78-PT, para. 28, where the Referral Bench recalls that 'it is impossible to measure the gravity of any crime in isolation. Whether or not the gravity of these particular crimes is so serious as to demand trial before the Tribunal, however, depends on the circumstances and context in which the crimes were committed and must also be viewed in the context of the other cases tried by this Tribunal'.

[268] LONGOBARDO M., *Everything Is Relative, Even Gravity*, in *Journal of International Criminal Justice*, 14, 4, 16 Sep. 2016, p. 1011 at 1027; EL ZEIDY M.M., *The Gravity Threshold Under the Statute of the International Criminal Court*, in *Criminal Law Forum*, 19, 2008, p. 35 seems to include a selective attitude not only with regards to the cases but also with regards to situations.

[269] "The number of potential victims of crimes within the jurisdiction of the Court in this situation – 4 to 12 victims of wilful killing and a limited number of victims of inhuman treatment – was of different order than the number of victims found in other situations under investigation or analysis by the Office". It is worth bearing in mind that the OTP is currently investigating three situations involving long-running conflicts in Northern Uganda, the Democratic Republic of the Congo and Darfur. Each of the three situations under investigation involves thousands of wilful killings as well as intentional large-scale sexual violence and abductions. Collectively they have resulted in the displacement of more than 5 million people. Other situations under analysis also feature hundreds or thousands of such crimes". ICC, *OTP response to communications received concerning Iraq*, 9 Feb. 2006.

[270] *See*, for example, SCHABAS W.A., *Prosecutorial Discretion v. Judicial Activism at the International Criminal Court*, in *Journal of International Criminal Justice*, 6, 2008, p. 731 at 741 ff. Schabas argues that the Prosecutor initially refused to open an investigation because of the relatively limited number of deaths *vis-à-vis* other situations at that time under scrutiny (Uganda and Democratic

avoided excluding the selective purpose of the gravity factor.[272] Also in the light of the differences between situations, the comparison of their gravity is inappropriate. Further a selective approach jeopardises the direct deterrent effect of the Court. Both the selective function of gravity and the criticism to the Prosecutor's selection seem to be associated with the recognition of a broad discretionary power of the Prosecutor to initiate investigations and prosecution. Interpreting Art. 53 in the light of the mandatory principle as suggested in Chapter I[273] and depriving gravity of any selective purposes, would prevent the risk of politically motivated decisions by the Prosecutor and would reduce her exposure to criticism. This approach seems having been followed also in the recent case law of the Court: as seen above, following the jurisprudence of the AC, the PTC I has declared that gravity does not pursue selective purposes, rather excludes cases of marginal gravity.[274] In order to reach this result, the Prosecutor and the Court should clearly identify the parameters which may affect the gravity of a situation and verify whether they are met or not. Borrowing the language of the

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Republic of the Congo), but then charged Mr Lubanga 'only' for recruitment and enlistment of children and not for crimes including the killing of people. Therefore, the refusal to open an investigation in a situation in light of the number of deaths was not consistent with the prosecutorial choices made in the situations where the number of deaths satisfied the gravity threshold. Moreover, in his opinion, the Prosecutor's approach towards gravity is even less comprehensible in light of the fact that Mr Lubanga was accused of more serious crimes in the Democratic Republic of the Congo (genocide and crimes against humanity), but that the Court maintained its jurisdiction because the crimes contained in the charges of the ICC Prosecutor were of different nature from those charged at the national level. He also notes that even if gravity includes both a qualitative and quantitative assessment, with regards to the situation in Iraq the Prosecutor missed to consider elements such as the aggressive nature of the war as a qualitative aggravating factor which would have allowed the initiation of the investigation, or that in the situation in Uganda the Prosecutor decided not to investigate crimes committed by State actors whose status might increase the gravity of their alleged crimes. *See* also SCHABAS W.A., *First Prosecutions at the International Criminal Court*, in *Human Rights Law Journal*, 25, 2006, p. 25; SCHABAS W.A., *An Introduction to the International Criminal Court*, Cambridge University Press, 2020, pp. 254 ff.

[271] For a documented reply against the accuse of arbitrariness moved by Schabas against the decision not to open an investigation in Iraq *see* RASTAN R., *Comment on Victor's Justice & the Viability of* Ex Ante *Standards*, in *The John Marshall Law Review*, 43, 3, 2010, p. 569 at 579 footnote 35. *See* also SAFFERLING C., *International Criminal Procedure*, Oxford University Press, 2012, p. 224, who criticises the argument that the aggressive nature of the war may render a war crime more serious in light of the need to keep distinguished *ius ad bello* and *ius in bellum*; STEGMILLER I., *Interpretative gravity under the Rome Statute. Identifying common gravity criteria*, in STAHN C., EL ZEIDY M.M., *The International Criminal Court and Complementarity. From Theory to Practice*, *Vol. I*, Cambridge University Press, 2011, p. 603 at 608 ff.

[272] SCHABAS W.A., *Prosecutorial Discretion v. Judicial Activism at the International Criminal Court*, in *Journal of International Criminal Justice*, 6, 2008, p. 731 at 747-748.

[273] *See* above Chapter I, 3.3 The initiation of the investigations: discretionary or mandatory? Article 53 of the Statute: an overview.The initiation of the investigations: discretionary or mandatory? Article 53 of the Statute: an overview

[274] ICC, PTC I, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia*, *Decision on the 'Application for Judicial Review by the Government of the Comoros'*, 16 Sep. 2020, ICC-01/13-111, para. 22. Even more explicit at para. 96 when it states that 'gravity under article 17(1)(d) of the Statute is not a criterion for the *selection* of the most serious situations and cases, as argued by the Prosecutor, but a requirement for the *exclusion* of (potential) cases of *marginal gravity*.'

PTC I, gravity – and more in general all the parameters set forth in Art. 53(1)(a) and (b) – are 'exacting legal requirements' and if they are met the Prosecutor 'is duty bound to open an investigation' (unless the interests of justice clause applies).[275] If the Prosecutor deems that these parameters are not met, despite the absence of an expressed legal obligation, she should reason her decision in detail, demonstrating its legal foundation.[276] Although the AC has recently argued against it in a questionable judgement in the *Afghanistan situation*,[277] a reasoned decision not to initiate an investigation demonstrating the correctness of her assessment is required also in case of preliminary examinations opened *proprio motu*, where there is no referring entity which may challenge the decision. The Prosecutor seems having followed this practice in her reports declaring the closing of the preliminary examinations. Nevertheless, the decision to close the preliminary examination in Iraq is the only example concerning an examination opened on the basis of information received under Art. 15 of the Statute and closed for insufficient gravity and is not well reasoned.[278]

The second valid argument militating against the selective use of gravity, is linked to the unjustified different treatment that it causes between referred and *proprio motu* situations. This argument has been raised by DeGuzman, who notes that the Prosecutor could hardly reject a referred situation on the basis of an assessment of selective gravity and would be granted more discretion in deciding whether not to proceed with an investigation under Art.

[275] ICC, PTC I, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia*, *Decision on the 'Application for Judicial Review by the Government of the Comoros'*, 16 Sep. 2020, ICC-01/13-111, para. 15. *See* also ICC, PTC I, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia*, *Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation*, 16 July 2015, ICC-01/13-34, para. 14. On the objective function of gravity and reducing the interests of justice as only requirements admitting a discretionary assessment *see* MARINIELLO T., *Judicial Control over Prosecutorial Discretion at the International Criminal Court*, in *International Criminal Law Review*, 19, 2019, p. 979 at 1002; CHAITIDOU E., *The Judiciary and Enhancement of Classification of Alleged Conduct*, in AGIRRE X., BERGSMO M., DE SMET S., STAHN C., (ed.), *Quality Control in Criminal Investigation*, Torkel Opsahl Academic EPublisher, 2020, p. 943 at 948..

[276] MURPHY R., *Gravity Issues and International Criminal Court*, in *Criminal Law Forum*, 17, 2006, p. 312 at 311. *See* also EL ZEIDY M.M., *The Gravity Threshold Under the Statute of the International Criminal Court*, in *Criminal Law Forum*, 19, 2008, p. 35 at 51-53.

[277] ICC, AC, *Situation in the Islamic Republic of Afghanistan*, *Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan*, 5 Mar. 2020, ICC-02/17-138 OA4. *See* below Chapter III, Section II, 2. The authorisation for the initiation of an investigation under Article 15.

[278] The *Registered Vessels situation*, that the Prosecutor deemed inadmissible for insufficient gravity was referred to the Office by the Comoros Islands, while all the other examinations opened on the basis of Art. 15 information have been closed because not serious enough to be qualified as international crimes. The decisions were therefore on the (absence of) jurisdiction of the Court and not on (in)admissibility. the gravity threshold for qualifying them as crimes falling within the jurisdiction of the Court (therefore they were not international crimes at all).

15.[279] This distinction between referred and *proprio motu* situations has already been criticised on the basis of the appropriate observation that neither the Statute nor the RPE establish a different regime of gravity depending on the mechanism triggering the jurisdiction of the Court.[280] It must be noted that the validity of this argument clearly depends on the rejection of the AC's recent statement according to which Art. 53 applies exclusively in case of referral, while in case of *proprio motu* investigations Art. 15 provides a procedure including additional discretionary powers.[281]

The exclusion of the selective function of gravity does not preclude its use in prioritising some situations rather than others, even if it seems a difficult and unnecessary work. It is not surprising that, as opposed to the cases – where gravity is a relevant instrument in the activity of both selection and prioritisation as acknowledged by the correspondent Policy Paper[282] – there is no Policy Paper for situation selection and prioritisation.

Indeed, the 'threshold approach' to gravity is the correct one. Gravity should be seen as a threshold determining the admissibility of both potential and actual cases (and therefore of situations and cases).[283] If the threshold is satisfied and the other requirements of Art. 53(1) or (2) of the Statute are met[284] the Prosecutor, on the basis of the mandatory principle, is obliged

[279] DEGUZMAN M.M., *Gravity and Legitimacy of the International Criminal Court*, in *Fordham International Law Jou rnal*, 32, 5, 2008, p. 1400 at 1410. *See* also MELONI C., *The ICC preliminary examination of the Flotilla situation: An opportunity to contextualise gravity*, in *Questions of International Law*, 30 Nov. 2016, even if she refers to gravity under Art. 17 of the Statute. With regards to the absence of any discretion of the Prosecutor in case of referral by the UNSC, *see* also OHLIN J.D., *Peace, Security, and Prosecutorial Discretion*, in STAHN C., SLUITER G. (eds.), *The Emerging Practice of the International Criminal Court*, Nijhoff, 2009, p. 189.

[280] STEGMILLER I., *The Pre-Investigation Stage of the ICC*, Dunker & Humbolt, 2011, p. 332.

[281] ICC, AC, *Situation in the Islamic Republic of Afghanistan*, *Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan*, 5 Mar. 2020, ICC-02/17-138 OA4. *See* above Chapter I, Section IV, 1.3.2. The relationship between Article 15 and Article 53 of the Statute; and below Chapter III, Section II, 2. The authorisation for the initiation of an investigation under Article 15.

[282] ICC, OTP, *Policy Paper on case selection and prioritisation*, 15 Sep. 2016, para. 35.

[283] In the same vein, *see* STEGMILLER I., *The Pre-Investigation Stage of the ICC*, Dunker & Humbolt, Berlin, 2011, p. 335. According to Longobardo, the gravity threshold would be higher when the Prosecutor adopts a decision not to Prosecute in the light of the different wording of Art. 53(1)(a) and (2)(a), respectively requiring 'reasonable' and 'sufficient' basis. In his opinion, this conclusion would be consistent with the hypothetical nature of the judgment at the investigation stage, where the assessment is to be done with regards to potential cases, and with the concrete judgment at the case stage, when the Prosecutor has completed her investigation. (LONGOBARDO M., *Everything Is Relative, Even Gravity*, in *Journal of International Criminal Justice*, 14, 4, 16 Sep. 2016, p. 1011 at 1022). This assumption should be rejected because the threshold of certainty of the Prosecutor with regards to the gravity of a potential or actual case does not affect the required gravity threshold for the case (actual or potential) to be admissible.

[284] This includes the fact that the Prosecutor does not adopt a decision under Art. 53(1)(c) or (2)(c) on the basis of the interests of justice clause. *See* ICC, PTC I, *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, *Decision on the*

to initiate an investigation or a prosecution. The expression 'sufficient gravity' itself suggests that the assessment must be focused on a legal and objective concept of gravity and on the achievement of a certain threshold rather than on a comparative assessment.[285] The identification of the gravity threshold should therefore lead to the exclusion of those situations and *de minimis* conducts which do not satisfy the objective requirements for the Court's intervention.[286]

The investigation stage is the most problematic and in order to identify a balanced threshold for admissibility it is necessary to keep in mind that a too narrow gravity threshold would prevent the Court from achieving its objective of deterrence and prevention through the stimulation of national investigations; and that a too broad threshold of gravity (more probable at the time being) may render the relationship with national sovereignty and the respect the principle of complementarity problematic.[287]

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request of the Union of Comoros to review the Prosecutor's decision not to initiate an investigation, 16 Jul. 2015, ICC-01/13-34, para. 14.

[285] DEGUZMAN M.M., *Gravity and Legitimacy of the International Criminal Court*, in *Fordham International Law Journal*, 32, 5, 2008, p. 1400 at 1432-1433, 1440; MURPHY R., *Gravity Issues and International Criminal Court*, in *Criminal Law Forum*, 17, 2006, p. 312 at 294.

[286] *See* DEGUZMAN M.M., *Gravity and Legitimacy of the International Criminal Court*, in *Fordham International Law Journal*, 32, 5, 2008, p. 1400 at 1458.

[287] DEGUZMAN M.M., *How serious are International Crimes? The Gravity Problem in International Criminal Law*, in *Columbia Journal of Transnational Law*, 51, 2012, p. 18 at 54 ff. De Guzman recalls that the application of a too broad gravity threshold may also lead to perpetuating dangerous practices without even the balance of a proper threshold of gravity. Her fears seem confirmed also by the most recent practice of the ICC. For example, with regards to the use of gravity for justifying departure from legal rules related to arrest of defendants *see* ICC, *The Prosecutor v. Gbagbo and Blé Goudé, Demande d'autorisation d'intervenir comme Amicus Curiae dans l'affaire Le Procureur c. Laurent Gbagbo et Charles Blé Goudé, en vertu de la règle 103 du Règlement de procédure et de preuve de la Cour attached to the Transmission of a Request for Leave to Submit Amicus Curiae Observations*, 5 Jan. 2018, ICC'02/11-01/15-1093. The Chamber rejected the request and therefore did not entered in the merit of the issue. With regards to the relaxing of fundamental principles such as the principle of legality or the rights of the defence including those related to pre-trial detention *see*, for example, ICC, AC, *The Prosecutor v. Laurent Gbagbo, Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled 'Decision on the "Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo"*, 26 Oct. 2012, ICC-02/11-01/11-278 OA, paras 54, 59; ICC, AC, *The Prosecutor v. Laurent Gbagbo, Judgment on the appeal of Mr Laurent Gbagbo against the decision of Pre-Trial Chamber I of 11 July 2013 entitled "Third Decision on the review of Laurent Gbagbo's detention pursuant to article 60(3) of the Rome Statute"*, 29 Oct. 2013, ICC-02/11-01/11-548 OA4, para. 54; ICC, AC, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé, Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I of 8 July 2015 entitled 'Ninth decision on the review of Mr Laurent Gbagbo's detention pursuant to Article 60(3) of the Statute'*, 8 Sep. 2015, ICC-02/11-01/15-208 OA 6, paras 74, 77; ICC, AC, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé, Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I of 10 March 2017 entitled "Decision on Mr Gbagbo's Detention"*, 19 Jul. 2017, ICC-02/11- 01/15-992 OA10, paras 43, 54, 66-69, where both the TC by majority and the AC have repeatedly rejected Mr Gbagbo's requests for provisional release despite the age and the health conditions of the accused and the overall duration of imprisonment. This approach is not unanimous: Judge Tarfusser, in his dissenting opinions to the decisions on Mr Gbagbo's release (*Dissenting opinion of Judge Cuno Tarfusser*, 10 Mar. 2017, ICC-02/11-01/15-846-Anx, *annexed to*

In the *Registered Vessels situation* the Prosecutor seems having mainly applied a 'threshold approach' in the assessment of gravity at the investigation stage. In the report under Art. 53 she explains the reasons governing her choice not to initiate an investigation into the situation referred to her Office by the Comoros Islands for lack of sufficient gravity. She notes that Art. 8(1) of the Statute states that 'the Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes', and that this threshold 'provide[s] statutory guidance indicating that the Court should focus on war crimes meeting these requirements'.[288] The decision to focus on the threshold approach is probably due to the qualification of the crimes as war crimes. Actually, Art. 8 poses a significant challenge with regards to the assessment of (the threshold of) gravity because the expression 'in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes' may serve for determining the admissibility[289] of war crimes, marking the line between 'serious' (admissible) and 'less-serious' (inadmissible) war crimes.[290] Nevertheless, the wording 'in particular' rather than 'exclusively' recommends a suggestive rather than mandatory gravity-based use of gravity

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Decision on Mr Gbagbo's Detention; *Dissenting opinion of Judge Cuno Tarfusser*, 25 Sep. 2017, ICC-02/11-01/15-1038-Anx, *annexed to Decision on Mr Gbagbo's Detention*; *Dissenting opinion of Judge Cuno Tarfusser*, 20 Apr. 2018, ICC-02/11-01/15- 1156-Anx, *annexed to Decision on Mr Gbagbo's request for interim release*) and in his opinion attached to the *Reasons for oral decision of 15 January 2019 on the Requête de la Défense de Laurent Gbagbo afin qu'un jugement d'acquittement portant sur toutes les charges soit prononcé en faveur de Laurent Gbagbo et que sa mise en liberté immédiate soit ordonnée, and on the Blé Goudé Defence no case to answer motion*, 16 Jul. 2019, ICC-02/11-01/15-1263) repeatedly refers to the case-law of the European Court of Human Rights and to the need for any limitation to the personal liberty to be 'exceptional and require[ing] justification, in particular by showing the existence of "clear indications of a genuine public interest which outweigh the individual's right to freedom of movement"'.

[288] ICC, OTP, *Situation on Registered Vessels of Comoros, Greece and Cambodia, Article 53(1) Report*, 6 Nov. 2014, para. 137.

[289] It is apparent that the expression cannot be used for excluding those crimes that do not fit the requiremenets from the jurisdiction *ratione materiae* of the Court. Art. 8(2) of the Statute already identifies a gravity threshold for war crimes relevant in the assessment of the jurisdiction *ratione materiae* – Art. 8 states that '[f]or the purpose of this Statute "war crimes" means: (a) *grave breaches* of the Geneva Conventions [...] (b) [o]ther *serious violations* of the law and customs [...] (c) [...] *serious violations* of article 3 common to the four Geneva Conventions [...] (e) [o]ther *serious violations* of the law and costumes [...]' (*emphasis added*) – and provides for a list of 'grave breaches', namely 'acts committed in the context of an international armed conflict, including occupation, against persons or property protected under the relevant provisions of the Geneva Conventions' (DÖRMANN K., *Article 8,* in TRIFFTERER O., AMBOS K. (eds.), *The Rome Statute of the International Criminal Court*, 4th ed., Beck/Hart/Nomos, 2016, mn 65). On the role of this expression in relation to the gravity assessment *see* DEGUZMAN M.M., *Gravity and Legitimacy of the International Criminal Court,* in *Fordham International Law Journal*, 32, 5, 2008, p. 1400 at 1407-1408, 1457-1458.

[290] While genocide and crimes against humanity would (tendentially) always satisfy the gravity threshold since they require a contextual element whose gravity allows to distinguish them from ordinary crimes, war crimes may or may not reach the required threshold depending on the circumstances. The commission of the crimes 'as part of a plan or policy or as part of a large-scale commission of such crimes' may therefore be the relevant factor. *See* DEGUZMAN M.M., *Gravity and Legitimacy of the International Criminal Cou*rt, in *Fordham International Law Journal*, 32, 5, 2008, p. 1400 at 1407-1408, 1457-1458.

with selective admissibility purposes:[291] while the commission of the crimes 'as part of a plan or policy or as part of a large-scale commission of such crimes' may be a useful guideline for the Court (as stated by the Prosecutor) it seems inappropriate to exploit its absence as a ground for inadmissibility (as suggested by the Prosecutor). Be as it may, in her report under Art. 53 the Prosecutor considers different factors and concludes that the situation does not reach the required threshold. Among these factors she identifies: the lack of information suggesting that the alleged crimes were systematic or resulted from a deliberate plan or policy to attack, kill or injure civilians; the information to the effect that the incident does not appear to have had a significant impact on the civilian population in Gaza; the territorial jurisdiction of the Court limited to events occurring on only three of the seven vessels in the flotilla; the limited number of crimes that appear to have been committed; the limited territorial jurisdiction of Court that does not extend to the events occurred after individuals were taken off the vessels.[292]

Regretfully, in this occasion as well the Prosecutor completes the assessment with a comparison, noting that 'the total number of victims of the flotilla incident reached relatively limited proportions as compared to other cases investigated by the Office'.[293] She underlines that the limited nature of the referred situation affects the gravity of the potential cases that could arise from it but clarifies that investigations in situations with limited number of victims are still possible if other factors increase the gravity threshold. Therefore, she compares the impact of the flotilla incident with the impact of the Haskanita raid in the *Abu Garda* case,[294] where, despite the death of only twelve people, the fact that the victims belonged to a peacekeeping mission increased the gravity of the attack.

The PTC I did not offer clear objective indications as to the way of identifying a minimum gravity threshold, as it made its own assessment on the basis of the available information.[295] It relied on the traditional criteria identified in the Kenya decision for authorisation, namely (i) on whether the groups of persons likely to form the object of the investigation capture those who may bear the greatest responsibility for the alleged crimes committed; and (ii) nature, scale, manner of commission and impact of the crimes in order to

[291] The references to gravity – including at Art. 8(1) – are historically linked to the attempt to discourage sceptical States during the drafting of the Statute. COTTIER M., KOLB R., *Article 8*, in AMBOS K., *The Rome Statute of the International Criminal Court*, 4th ed., Beck/Hart/Nomos, 2021, 55.

[292] ICC, OTP, *Situation on Registered Vessels of Comoros, Greece and Cambodia, Article 53(1) Report*, 6 Nov. 2014, paras 140-143.

[293] *Ibid*., para. 138.

[294] *Ibid*., para. 145.

[295] ICC, PTC I, *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, *Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation*, 16 Jul. 2015, ICC-01/13-34.

determine their gravity. In addition, it stated that the limited jurisdiction does not preclude the Prosecutor (and the Chamber) from considering facts occurred outside the Court's jurisdiction that may be relevant in the gravity assessment.[296] On the contrary, Judge Kovács in his partly dissenting opinion[297] stated that the gravity assessment in the situation under scrutiny had to be limited to the crimes allegedly committed on board of the vessels. Despite to focus on the necessary gravity threshold, even the Majority[298] and the partly dissenting Judge[299] used the comparative approach without deepening the appropriateness (and reaching the opposite conclusion of the Prosecutor).[300]

Ultimately, the PTC III authorising the initiation of an investigation in Burundi missed the opportunity of excluding the comparative approach as well and included a brief reference to other investigations. After a concise collage of the most relevant precedents on gravity, it concluded by stating that the cases encompassing a limited number of casualties or dealing with the destructions of building have been deemed admissible in front of the Court for prosecution.[301] This statement, intended to strengthen the release of the authorisation, ends up diminishing the relevance of other situations and cases and getting the gravity threshold of admissibility down.

2.4.1.5. Conclusions

In conclusion, it has been seen that gravity appears in two different contexts in Art. 53 of the Statute: once at Art. 53(1)(b) and (2)(b) (through the reference to Art. 17(1)(d)) and once at Art. 53(1)(c) and (2)(c). In the first case it is a legal requirement in the admissibility assessment, while in the second case it is a relevant component in the interests of justice assessment which will be further analysed in the next Section. In neither case the Statute provides for a definition of gravity.

[296] *Ibid*., para. 17.

[297] *Ibid*., *Partly dissenting opinion of Judge Péter Kovács*, ICC-01/13-34-Anx.

[298] ICC, PTC I, *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, *Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation*, 16 Jul. 2015, ICC-01/13-34, paras 25-26.

[299] *Ibid*., *Partly dissenting opinion of Judge Péter Kovács*, ICC-01/13-34-Anx, paras 19-20.

[300] Despite the express refusal of a selective approach to gravity (ICC, PTC I, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia*, *Decision on the 'Application for Judicial Review by the Government of the Comoros'*, 16 Sep. 2020, ICC-01/13-111, para. 96) a marginal comparative reference to other cases has been done also in the third decision on the request for review in order to highlight the inconsistent approach of the Prosecutor towards gravity (paras 99-101).

[301] ICC, PTC III, *Situation in Burundi*, *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi*, 9 Nov. 2017, ICC-01/17-9, para. 184.

Gravity as admissibility requirement is a quality which goes beyond the inherent gravity of the international crimes. It is therefore necessary to engage in an assessment which involves both quantitative and qualitative criteria.[302] The case-law of the Court has not developed a coherent approach as to the relevant factors in the gravity assessment at the situation and at the case stage. In order to verify the admissibility at the situation stage, i.e. in order to adopt a decision on the initiation of an investigation, the jurisprudence of the Court requires an assessment of the gravity *vis-à-vis* the potential cases. The object of the assessment are both the crimes and the groups of persons involved in their commission. With regards to the gravity of the actual cases, the case-law of the Court has enhanced the assessment of the gravity of the crime. In fact, even if apparently the gravity of the case should entail both the gravity of the crime and the gravity related to the role of the subject (alternatively interpreted as the leadership position or the actual role in the commission of the crime), the rank of the perpetrator has been repeatedly deemed immaterial by various PTCs and the AC and the AC has recently compromised the use of the role of the suspect in the commission of the crime as a filtering factor in the admissibility assessment. If this applies to actual cases – and in order to consistently apply the same factors in the determination of both actual and potential cases – it seems even odder to engage in an abstract assessment of gravity related to the role of the subject at the situation stage, when the cases are only potential.

Ultimately, it seems appropriate to interpret the concept of gravity as a threshold. All the situations reaching the threshold deserve the opening of an investigation. As pointed out by the AC with regards to the cases, even though the same applies to the situation stage in the light of the 'potential cases' approach, the inadmissibility for insufficient gravity is essentially an exception (the AC refers to 'those rather unusual cases when conduct that technically fulfils

[302] *See*, in particular, ICC, PTC I, *The Prosecutor v. Abu Garda*, *Decision on the Confirmation of Charges*, 8 Feb. 2010, ICC-02/05-02/09-243, para. 31. *See* also ICC, PTC II, *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 Mar. 2010, ICC-01-09-19, para. 62; ICC, PTC III, *Situation in Côte d'Ivoire*, *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation in the Republic of Côte d'Ivoire*, 3 Oct. 2011, ICC-02/11-14, para. 203; ICC, PTC I, *Situation in Georgia*, *Decision on the Prosecutor's request for authorization of an investigation*, 27 Jan. 2016, 01/15-12, para. 51; ICC, PTC III, *Situation in Burundi*, *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi*, 9 Nov. 2017, ICC-01/17-9, para. 184; ICC, PTC I, *The Prosecutor v. Al Hassan*, *'Décision relative à l'exception d'irrecevabilité pour insuffisance de gravité de l'affaire soulevée par la défense'*, 19 Feb. 2020, ICC-01/12-01/18-459, para. 47; ICC, AC, *The Prosecutor v. Al Hassan*, *Judgment on the appeal of Mr Al Hassan against the decision of Pre-Trial Chamber I entitled 'Décision relative à l'exception d'irrecevabilité pour insuffisance de gravité de l'affaire soulevée par la défense'*, 19 Feb. 2020, ICC-01/12-01/18-601-Red, para. 89-90. Bitti criticises the introduction of the qualitative approach, noting the risks of abuses by the Prosecutor, who, not being satisfied by the quantitative factor, could always find a way for justifying the qualitative gravity of a situation. BITTI G., *Article 53*, in FERNANDEZ J., PACREAU X., *Statut de Rome de la Cour pénale internationale. Commentaire article par article*, Pedone, Paris, 2012, p. 1173 at 1195.

all the elements of a crime under the Court's jurisdiction is nevertheless of marginal gravity only').[303] As a consequence, the function of gravity cannot pursue selective purposes. In addition, rejecting the use of gravity as a selective means reduces the risk of criticisms. Clearly, in the impossibility of obtaining the necessary resources, in order to prevent the proliferation of the situations the Prosecutor (and more generally the Court) should adopt a strict approach with regards to qualification of the facts as international crimes as suggested by Judge Kaul in his dissents in the situation in Kenya. In this way, the identification of the clear boundaries of the jurisdiction would be entirely in the hands of the Judiciary and would be applied in all situations equally. In this way it would not be necessary to select admissible and inadmissible situations after a positive assessment of the jurisdiction *ratione materiae*.

3. The prosecutorial strategies: case selection and prioritisation

The prosecutorial strategies and the criteria leading the Prosecutor in the selection of cases are crucial because of the limited resources, the number and the extent of the situations under investigation and the subsidiary role of the Court.[304] Vice-versa, selection significantly affects the relationship between victims and international criminal justice.[305] Selection includes: (i) the selection of the entities falling within the limits of the Court's jurisdiction, (ii) the selection of the individual targets of the investigation, (iii) the selection of the specific factual allegations, and (iv) the decision of the legal characterisation of the offences. In this context, identifying selective criteria or priorities is the first step in order to avoid (or reduce) criticisms. Even if the selective action of the Prosecutor requires judgment and not science, establishing selective criteria may ensure transparency.[306] It has often been recalled that the

[303] ICC, AC, *The Prosecutor v. Al Hassan*, *Judgment on the appeal of Mr Al Hassan against the decision of Pre-Trial Chamber I entitled 'Décision relative à l'exception d'irrecevabilité pour insuffisance de gravité de l'affaire soulevée par la défense'*, 19 Feb. 2020, ICC-01/12-01/18-601-Red OA, para. 53.

[304] *See* SCHABAS W.A., *Selecting Situations and Cases*, in STAHN C. (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015, p. 365 at 377, who notes that if with regards to situations 'there is a claim that all the situations that meet the tests in the Statute will be investigated, there is no pretence that all cases will be prosecuted';

[305] APTEL C., *Prosecutorial Discretion at the ICC and Victims' Right to Remedy*, in *Journal of International Criminal Justice*, 10, 2012, p. 1357 ff; BITTI G., *Article 53*, in FERNANDEZ J., PACREAU X., *Statut de Rome de la Cour pénale internationale. Commentaire article par article*, Pedone, 2012, p. 1173 at 1200. Notwithstanding this, prosecutorial selection at the international level does not *necessarily* means impunity for other perpetrators since complementarity still applies. Since the IMT, all the international tribunals have been accompanied by national trials, proceedings against other perpetrators. On the prosecution's selectivity from the point ov view of the affected communities, *see* KOTECHA B., *The International Criminal Court's Selectivity and Procedural Justice*, in *Journal of International Criminal Justice*, 18, 2020, pp. 107 ff.

[306] *See* GOLDSTONE J.A., *More Candour about Criteria, in Journal of International Criminal Justice*, 8, 2010, p. 383 at 403, who recalls that sometimes it is not possible to make public the reasons leading to a decision because it is based on confidential information. MARSTON DANNER A., *Enhancing*

decisions adopted by international prosecutors always have a political dimension,[307] therefore they must not to be influenced by political pressure. Prioritisation must be carefully planned as well[308] especially considering that the practice shows that prioritisation often has a definitive selective effect.[309]

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the legitimacy and accountability of prosecutorial discretion at the International Criminal Court, in *American Journal of International Law*, 97, 3, 2003, p. 510 at 538; RASTAN R., *Comment on Victor's Justice & the Viability of* Ex Ante *Standards*, in *The John Marshall Law Review*, 43, 3, 2010, p. 569 at 588 ff.; LEPARD B.D., *How should the ICC Prosecutor exercise his or her discretion? The role of fundamental ethical principles*, in *John Marshall Law Review*, 43, 3, 2010, p. 553. Even if sociological analysis is not included in this analysis, they cannot be completely ignored. According to DeGuzman, the need for the Prosecutor to identify selective criteria may be linked to the attempt of obtaining 'sociological legitimacy', since discretionary decisions appear connected to a legal requirement provided for by the Statute. DEGUZMAN M.M., *Gravity and Legitimacy of the International Criminal Court*, in *Fordham International Law Journal*, 32, 5, 2008, p. 1400 at 1434, 1442. On the same issue see GOLDSTONE J.A., *More Candour about Criteria*, in *Journal of International Criminal Justice*, 8, 2010, p. 383 at 399-400.

[307] CÔTÉ L., *Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law*, in *Journal of International Criminal Justice*, 3, 2005, p. 162 at 171. Moreover, '[t]he Prosecutor's ability to make individualized considerations based on law and justice, rather than self-interest or sheer power of any particular state, transforms the Court from a political body fest on with the trapping of law to a legal institution with strong political undertones' (MARSTON DANNER A., *Enhancing the legitimacy and accountability of prosecutorial discretion at the International Criminal Court*, in *American Journal of International Law*, 97, 3, 2003, p. 510 at 515). *See* also HEINZE A., FYFE S., *Prosecutorial Ethics and Preliminary Examinations at the ICC*, in BERGSMO M., STAHN C., (ed.), *Quality Control in Preliminary Examination: Volume 2*, Brussels, Torkel Opsahl Academic EPublisher, 2018, pp. 57-58 noting that '[t]he Prosecutor must always 'judicialize the politics' without being a political actor herself'; TURONE G., *Powers and Duties of the Prosecutor*, in CASSESE A., GAETA P., JONES J.R.W.D., *The Rome Statute of the International Criminal Court. A Commentary, Vol. II*, Oxford University Press, 2002, p. 1137 at 1142-1143. Rastan recalls that 'the fact that an issue has political implications does not affect the legal quality of a determination or cast doubt on the judicial process itself'. In support of his allegation he refers to ICJ, *Advisory Opinion of the International Court of Justice on 'Accordance of with International Law of the Unilateral Declaration of Independence in Respect of Kosovo'*, 22 Jul. 2010, para. 27 (RASTAN R., *Comment on Victor's Justice & the Viability of* Ex Ante *Standards*, in *The John Marshall Law Review*, 43, 3, 2010, p. 569 at 599). *See* also MÉGRET F., *La Cour Pénale Internationale comme un objet politique*, in FERNANDEZ J., PACREAU X., *Statut de Rome de la Cour pénale internationale. Commentaire article par article*, Pedone, 2012, p. 119 at 128 who refers to the discretionary power of the Prosecutor as *intrinsèquement politique*.

[308] As demonstrated by the criticisms raised with regards to the decisions adopted in the situations in Uganda and Iraq/UK, the risk of appearing partial may derive from choices related to assessments of admissibility/inadmissibility. But decisions on selection and prioritisation may be suspicious and raise doubts that the prosecutor is favouring one side of the parties involved in a conflict as well. *See*, for example, the situation in Côte d'Ivoire, where the Prosecutor seems having adopted a 'sequenced approach' (*see* ROSENBERG S.T., *The International Criminal Court in Côte d'Ivoire. Impartiality at Stake?*, in *Journal of International Criminal Justice*, 15, 2017, p. 471 at 472). She started investigating alleged crimes committed by the pro-Gbagbo forces, temporarily leaving aside the alleged crimes committed by the pro-Ouattara forces. Nevertheless, differently to the situation in Uganda, she repeatedly announced her intention to investigate and prosecute in both directions (ICC, *Transcript of the hearing*, 28 Jan. 2016, ICC-02/11-01/15-T-9-ENG, p. 42 line 1 to 18. *See* also ICC, OTP, *Situation in the Republic of Côte d'Ivoire, Request for authorisation of an investigation pursuant to article 15*, 23 Jun. 2011, ICC-02/11-3; ICC, TC I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé, Decision on Prosecution application for non-standard redactions to material related to another and ongoing investigation in the Côte d'Ivoire situation*, 23 Jan. 2018, ICC-02/11-01/15-1109-Red (the public redacted version was filed on 1 Feb. 2018). On the sequential and simultaneous approaches *see* AMBOS K., *Introductory Note to Office of the Prosecutor: Policy Paper on Case Selection and*

Once the Prosecutor has decided to investigate into a situation, the Rome Statute does not include guidelines on case selection. Nevertheless, the RegOTP includes some relevant provisions. Moreover, differently from the *ad hoc* Tribunals, which never published official criteria for the selection of cases and were criticised[310] for lack of transparency,[311] the OTP of the ICC in 2016 released the *Policy Paper on Case Selection and Prioritisation* offering some guidelines in this delicate activity.[312] As the Policy Paper on the Preliminary Examination, it is a non-binding document, subject to revision based on experience Whose objective is to offer guidelines with regards to the selection of cases for prosecution once the Prosecutor has already opened an investigation into a situation. The purpose is 'ensur[ing] that the exercise of such discretion in all instances is guided by sound, fair and transparent principles and criteria'.[313]

First, it is necessary to identify the principles which should guide case selection and prioritisation.[314] The Policy Paper reaffirms some of them: independence, impartiality and

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Prioritisation (Int'l Crim. Ct.) by Kai Ambos, in *International Legal Materials, Vol. 57*, 15 Sep. 2016, p. 1132.

[309] PUES A., *Towards the 'Golden Hour'? A Critical Exploration of the Length of Preliminary Examinations*, in *Journal of International Criminal Justice*, 15, 2017, p. 435 at 451, who refers to the prioritisation among preliminary examinations, but the same applies to the cases.

[310] CÔTÉ L., *Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law*, in *Journal of International Criminal Justice*, 3, 2005, p. 162 at 171, who moves from the fact that according to Rule 37(A) RPE of both the ICTY and ICTR the Prosecutor was entitled to adopt internal regulations.

[311] That the Prosecutor of ICTY and ICTR had internal policies on case selection and prioritisation since 1995 emerges from BERGSMO M. *et al*., *The Backlog of Core International Crimes Case Files in Bosnia and Herzegovina*, TorkelOpsahl Academic EPublisher, 2010, p. 99, fn. 42. It appears that the criteria were divided into five groups: (a) the person to be targeted for prosecution; (b) the serious nature of the crime; (c) policy considerations; (d) practical considerations; and (e) other relevant considerations. Criticisms on case selection and prioritisation moved by political considerations include, among others, the choice not to prosecute members of the Rwandan Patriotic Front in front of the ICTR and the alleged responsible for the crimes committed by the NATO forces in front of the ICTY. On the importance of the identification of *ex ante* criteria that allow to review the correctness of the Prosecutor's activity *see* MARSTON DANNER A., *Enhancing the legitimacy and accountability of prosecutorial discretion at the International Criminal Court*, in *American Journal of International Law*, 97, 3, 2003, p. 510 at 541; SCHABAS W.A., *Victor's Justice: Selecting Situations at the International Criminal Court*, in *John Marshall Law Review*, 43, 3, 2010, p. 535; SCHABAS W.A., *An Introduction to the International Criminal Court*, Cambridge University Press, 2020, p. 394; HALL C.K., *Prosecutorial Policy, Strategy and External Relations*, in BERGSMO M., RACKWITZ K., TYANING S. (eds.), *Historical Origin of International Criminal Law: Volume 5*, Torkel Opsahl Academic EPublishers, Brussels, 2017, p. 293.

[312] Before the ICC OTP, also the OTP of the Court BiH faced the problem of developing official criteria for case selection and prioritisation. *See* BERGSMO M. *et al*., *The Backlog of Core International Crimes Case Files in Bosnia and Herzegovina*, TorkelOpsahl Academic EPublisher, 2010, pp. 79 ff.

[313] ICC, OTP, *Policy Paper on case selection and prioritisation*, 15 Sep. 2016, para. 5.

[314] BAIS D., *Prioritisation of Suspected Conduct and Cases: From Idea to Practice*, in AGIRRE X., BERGSMO M., DE SMET S., STAHN C., (ed.), *Quality Control in Criminal Investigation*, Torkel Opsahl Academic EPublisher, 2020, p. 37 at 563.

objectivity. Independence is not limited to not acting under instruction but also includes not being influenced by external factors. For example, the Prosecutor is not bound to select incidents and individuals referred to in the information received by her Office or contained in the referrals.[315] With regards to objectivity the Policy Paper states that the case selection 'is an information and evidence-driven process' and refers to the content of Article 54(1)(a), namely the duty of the Prosecutor to establish the truth and to investigate incriminating and exonerating circumstances equally.[316]

Impartiality is the factor that most exposes the OTP to criticism, mainly because the Prosecutor is required to act impartially but is a party in trial as well.[317] Impartiality means applying the same criteria irrespective of the States or subjects involved, but the Policy Paper also highlights that 'impartiality does not mean "equivalence of blame" within a situation'. The applicability of the same criteria to different groups or individuals may therefore have different outcomes also within a situation.[318]

Rosenberg distinguishes between the 'legalist vision of impartiality' and the 'political vision of impartiality'.[319] According to the first ones, the same criteria in the assessment should be applied equally irrespective of the affiliation of the suspects, leaving to the possible conclusion that only those belonging to one of the parties deserve prosecution at the

[315] *Ibid*., para. 18.

[316] *Ibid*., paras 21-23. According to some scholars, the duty to investigate both incriminating and exonerating circumstances would prejudice the Prosecutor's possibility to investigate 'all potential cases', *de facto* imposing a selection to the Prosecutor. *See* WEBB P., *The ICC Prosecutor's Discretion Not to Proceed in the 'Interests of Justice'*, in *Criminal Law Quarterly*, 1 Jan. 2005, p. 305 at 310; NSEREKO D.D.N., *Prosecutorial Discretion Before National Courts and International Tribunals*, in *Journal of International Criminal Justice*, 3, 1, 2005, p. 124 at 125, fn. 2.

[317] *See* AMBOS K., *Confidential Investigations (Article 54(3)(e) ICC Statute) vs. Disclosure Obligations. The Lubanga Case and National Law*, in *New Criminal Law Review*, 12, 2009, p. 543 at 566-567; CÔTÉ L., *Independence and impartiality*, in REYDAMS L., WOUTERS J., RYNGAERT C. (eds.), *International Prosecutors*, Oxford University Press, 2012; DAMAŠKA M., *Problematic Features of International Criminal Procedure*, in CASSESE A., (ed.) *The Oxford Companion to International Criminal Justice, Oxford University Press*, 2009, p. 176; RASTAN R., *Comment on Victor's Justice & the Viability of Ex Ante Standards*, in *John Marshall Law Review*, 43, 2010. *See* also MIRAGLIA M., *The First Decision of the ICC Pre-Trial Chamber*, in *Journal of International Criminal Justice*, 4, 2006, p. 188 at 194 noting that it is better to refer to the Prosecutor as an organ of justice rather than a *super partes* organ.

[318] ICC, OTP, *Policy Paper on case selection and prioritisation*, 15 Sep. 2016, paras 19-20. *See* RASTAN R., *Comment on Victor's Justice & the Viability of Ex Ante Standards*, in *The John Marshall Law Review*, 43, 3, 2010, p. 569 at 583-584; WILLIAMSON C., *On Charging Criteria and Other Policy Concerns*, in BERGSMO M., RACKWITZ K., TYANING S. (eds.), *Historical Origin of International Criminal Law: Volume 5*, Torkel Opsahl Academic EPublishers, Brussels, 2017, p. 405 at 412; HEINZE A., FYFE S., *Prosecutorial Ethics and Preliminary Examinations at the ICC*, in BERGSMO M., STAHN C., (ed.), *Quality Control in Preliminary Examination: Volume 2*, Brussels, Torkel Opsahl Academic EPublisher, 2018, pp. 10-11.

[319] ROSENBERG S.T., *The International Criminal Court in Côte d'Ivoire. Impartiality at Stake?*, in *Journal of International Criminal Justice*, 15, 2017, p. 471.

international level. According to the second one, the Prosecutor should not give the impression to favour one of the parties[320] and should therefore investigate and prosecute *simultaneously* all the parties involved in the conflicts that possibly accompany the commission of international crimes. From the abovementioned passage of the Policy Paper it seems that the OTP adopted a legalist vision of impartiality.

Assuming that all the parties involved in a conflict appear to be responsible for international crimes, their simultaneous investigation and prosecution is surely advisable, but the functioning of the Court and its reliance on State cooperation may make it hard. As pointed out by an insider to the OTP,[321] 'any prosecutorial guidelines for the selection of cases will be dependent also on a number of practical considerations aimed at ensuring effective investigations and prosecution'. In the impossibility to change this situation, it is understandable that the Prosecutor might focus her investigations and prosecutions or give priority to the crimes committed by one party (often the anti-government forces) in order to obtain the State cooperation. The duty of the Prosecutor to investigate both *à charge et à décharge* should allow the Prosecutor to have a full picture of the situation even if the circumstances may prevent her from prosecuting all the parties or even to fully investigate some alleged crimes. What the Prosecutor should not do is hiding the reasons for her (forced) choices and creating partial narratives that do not take into account all the factors within a situation.[322] If the limited State cooperation with regards to the prosecution of a party in the conflict should not allow her to prosecute them, the Prosecutor should not justify this failure under fake legal standards that expose her Office to criticisms and risk to affect the subsequent

[320] On the importance of not 'appearing' partial *see* also AMBOS, K., *Treatise on International Criminal Law, Vol. III: International Criminal Procedure*, Oxford University Press, 2016, p. 377; MERON T., *Judicial Independence and Impartiality in International Criminal Tribunals*, in *American Journal of International Law*, 99, 2005, p. 359. *See* also SACOUTO S., CLEARY K., *The Gravity Threshold of the International Criminal Court*, in *American Univeristy International Law Review*, 23, 5, 2007, p. 807 at 850 ff. noting that applying selective criteria but investigating only crimes committed by one of the parties involved in a conflict may lead to a loss of confidence in the impartiality of the Court.

[321] RASTAN R., *Comment on Victor's Justice & the Viability of Ex Ante Standards*, in *The John Marshall Law Review*, 43, 3, 2010, p. 569 at 595.

[322] In this regard *see* the criticisms of both Judge Tarfusser and Judge Henderson for the partial narrative adopted by the OTP in the *Gbagbo and Blé Goudé case*, which, for example, did not give the due importance to the presence in the neighbourhood of Abobo of an organised group (the Commando Invisible) and seemed to undermine the role of the pro-Ouattara forces in the conflict. ICC, TC I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé, Reasons for oral decision of 15 January 2019 on the Requête de la Défense de Laurent Gbagbo afin qu'un jugement d'acquittement portant sur toutes les charges soit prononcé en faveur de Laurent Gbagbo et que sa mise en liberté immédiate soit ordonnée, and on the Blé Goudé Defence no case to answer motion*, 16 Jul. 2019, ICC-02/11-01/15-1263, *Opinion of Judge Cuno Tarfusser* (Annex A) and *Public Redacted Version of Reasons of Judge Geoffrey Henderson* (Annex B). *See* also TOCHILOVSKY V., *Objectivity of the ICC Preliminary Examination*, in BERGSMO M., STAHN C., (ed.), *Quality Control in Preliminary Examination: Volume 2*, Torkel Opsahl Academic EPublisher, 2018, p. 395

application of those standards. A similar behaviour may prejudice the credibility of the Office and may even cause inconsistencies with future cases if the political climate changes and the Prosecutor will be able to prosecute all the parties involved.

Once the guiding principles have been mentioned, it is possible to turn towards the most relevant provisions. Reg. 33 RegOTP is entitled 'Selection of cases within a situation' and requires the Prosecutor to identify the most serious crimes committed within the situation. Since each situation is likely to include many cases meeting the criteria it is easy to understand why a policy paper may be useful in order not only to select but also to prioritise some cases within a situation.[323]

The first relevant means for reaching a determination is the review of the information analysed during the preliminary examination and the collection of the necessary information and evidence. Furthermore, the Reg. also refers to the factors set out in Art. 53(1)(a), (b) and (c) in order to assess issues of jurisdiction, admissibility (including gravity) and the interests of justice. The Policy Paper clarifies that the assessment of these factor at this stage is more focused than the assessment at the initiation of the investigation. The Policy Paper clarifies that the Office prepares a confidential 'case selection document' based on the conclusions of the preliminary examination stage and containing provisional case hypothesis. The document is reviewed at least once a year.[324] According to Reg. 34 RegOTP, the case hypothesis includes the identification of 'the incidents to be investigated and the person or persons who appear the most responsible', the tentative indication of possible charges, the forms of individual criminal responsibility and the potentially exonerating circumstances. The selection of the incidents aims at representing 'the most serious crimes and the main types of victimisation – including sexual and gender violence and violence against children – and which are the most representative of the scale and impacts of the crimes'.

The Policy Paper identifies three case selection criteria: the gravity of the crime, the degree of responsibility of the alleged perpetrators and the charges. According to the OTP, gravity is the most relevant criterion in case selection[325] and includes both quantitative and qualitative considerations. Scale, nature, manner of commission and impact of the crimes are the factors guiding the Prosecutor's assessment.[326] Once it has been determined that the gravity

[323] ICC, OTP, *Policy Paper on case selection and prioritisation*, 15 Sep. 2016, para. 11.
[324] *Ibid*., paras 13-15.
[325] *Ibid*., para. 6. Even before 2016 scholars identified in gravity 'one of the key criteria for case selection'. *See* DEGUZMAN M.M., *Gravity and Legitimacy of the International Criminal Court*, in *Fordham International Law Journal*, 32, 5, 2008, p. 1400 at 1415.
[326] ICC, OTP, *Policy Paper on case selection and prioritisation*, 15 Sep. 2016, para. 36.

of the cases is sufficient for the purposes of admissibility, the Prosecutor still has to select the cases she intends to bring to trial first (or exclusively). Therefore, an assessment of gravity with regards to selection and prioritisation presupposes the positive assessment of gravity as admissibility requirement.[327] Once again, the problematic selective function of gravity emerges, but at this stage the consequences of selection are not as serious as in case of declaration of inadmissibility, epecially if the Court benefits of the cooperation of the States through national investigations and prosecutions. The extent and damage caused, including the harm caused to the victims and their families, the means employed to execute the crime, the circumstances of manner, time and location may be useful criteria in the selection activity. It has been noted that sometimes the Prosecutor's decision may be driven by the importance of some specific crimes or specific incidents in the overall structure of the situation.[328] As to the degree of responsibility of alleged perpetrators, the Policy Paper, referring to the already mentioned Reg. 34(1) RegOTP, stresses the need to focus on 'the persons who appear to be the most responsible for the identified crimes'. It also specifies that it does not necessarily equate with the hierarchical status of the individual within the structure but must be assessed on a case-by-case basis.[329] Further, the selection of charges is not to underestimate. The relevance of this criterion, that emerges from Reg. 34(2) RegOTP as well, is linked to the objective of representing 'as much as possible the true extent of the criminality which has occurred within a given situation'.[330] The Paper explicitly identifies some crimes 'that have been traditionally under-prosecuted such as crimes against or affecting children as well as rape and other sexual and gender-based crimes. It will also pay particular attention to attacks against cultural, religious, historical and other protected objects as well as against humanitarian and peacekeeping personnel'.[331] In June 2014 the Office has also published a Policy Paper on

[327] *See*, for example, ICC, OTP, *Report on Prosecutorial Strategy*, 14 Sep. 2006, stating that: 'The Office also adopted a "sequenced" approach to selection, whereby cases inside the situation are selected according to their gravity'. Some commentators sustain that nothing in the Statute suggests that the gravity test leading prosecutorial choices should be stricter than the gravity test required for the admissibility. *See* LONGOBARDO M., *Factors relevant for assessment of sufficient gravity in the ICC. Proceedings and the elements of international crimes*, in *Questions of International Law*, 30 Nov. 2016.

[328] CÔTÉ L., *Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law*, in *Journal of International Criminal Justice*, 3, 2005, p. 162 at 169. Côté refers to the case of the Omarska camp at the ICTY (*The Prosecutor v. Kvočka et al*.) since that in Omarska was the first camp in Bosnia where journalists were allowed to film; and the so called *Media case* in at the ICTR, aiming at stressing the role of media in the commission of the genocide (*The Prosecutor v. Nahimana et al.*). In the same vein, *see* MARSTON DANNER A., *Enhancing the legitimacy and accountability of prosecutorial discretion at the International Criminal Court*, in *American Journal of International Law*, 97, 3, 2003, p. 510 at 543.

[329] ICC, OTP, *Policy Paper on case selection and prioritisation*, 15 Sep. 2016, paras 42-44.

[330] *Ibid*., para. 45.

[331] *Ibid*., paras 45-46. The decision of the Prosecutor to prosecute Mr Al Mahdi for destruction of cultural property as a war crime stimulate the discussion on the criteria determining the gravity of the various crimes. For an overview of this particular case, *see* CASALY P., *Al Mahdi before the ICC.*

Sexual and Gender-Based Crimes, testifying its commitment in the prosecution of this kind of crimes.[332] In addition to these criteria, other factors may affect the selection of cases. Two of them are also mentioned by the Policy Paper: the constraints of resources,[333] and the availability of evidence.[334] An additional not expressly mentioned criterion used at the ICTR in the Completion Strategy that may be useful also in case selection at the ICC is the need for geographical spread with regards to target and incidents. As suggested by the former Chief Prosecutor of the ICTR this criterion may avoid 'impressions of bias, favouritism or discrimination' and may favour reconciliation.[335]

Eventually the Policy Paper refers to the prioritisation of those cases that the Prosecutor has decided to investigate and prosecute and provides for a list of possible criteria to be considered.[336] The Paper also identifies some external factors that may influence the prioritisation, including: a) the quantity and quality of the incriminating and exonerating evidence already in the possession of the Office, as well as the availability of additional evidence and any risks to its degradation; b) international cooperation and judicial assistance to support the Office's activities; c) the Office's capacity to effectively conduct the necessary investigations within a reasonable period of time, including the security situation in the area where the Office is planning to operate or where persons cooperating with the Office reside, and the Court's ability to protect persons from risks that might arise from their interaction with the Office; and d) the potential to secure the appearance of suspects before the Court, either by arrest and surrender or pursuant to a summons.

Cultural Property and World Heritage in International Criminal Law, in *Journal of International Criminal Justice*, 14, 2016, p. 1199.

[332] On this topic, *see* HAYES N., *La Lutte Continue. Investigating and Prosecuting Sexual Violence at the ICC*, in STAHN C. (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015, p. 801, who analyses the development of the Prosecutor's praxis in targeting gender-based crimes.

[333] ICC, OTP, *Policy Paper on case selection and prioritisation*, 15 Sep. 2016, para. 12.

[334] *Ibid*., para. 13. *See* also CÔTÉ L., *Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law*, in *Journal of International Criminal Justice*, 3, 2005, p. 162 at 168; GOLDSTONE J.A., *More Candour about Criteria*, in *Journal of International Criminal Justice*, 8, 2010, p. 383 at 394. *See* also WITHOPF E., *Effective Case Preparation*, in BERGSMO M., RACKWITZ K., TYANING S. (eds.), *Historical Origin of International Criminal Law: Volume 5*, Torkel Opsahl Academic EPublishers, Brussels, 2017, p. 225.

[335] JALLOW H.B., *Prosecutorial Discretion and International Criminal Justice*, in *Journal of International Criminal Justice*, 3, 1, 2005, p. 145 at 153.

[336] These criteria include: a) a comparative assessment across the selected cases, based on the same factors that guide the case selection; b) whether a person, or members of the same group, have already been subject to investigation or prosecution either by the Office or by a State for another serious crime; c) the impact of investigations and prosecutions on the victims of the crimes and affected communities; d) the impact of investigations and prosecutions on ongoing criminality and/or their contribution to the prevention of crimes; and e) the impact and the ability of the Office to pursue cases involving opposing parties to a conflict in parallel or on a sequential basis.

Some of these 'external' *prioritisation* criteria had been included by Côté among the *selection* criteria within the activity of other international tribunals, such as the prospect of arrest.[337] The reason for the inclusion of these factors at the ICC only among the prioritisation criteria rather than in the case selection ones may be traced back to the difference between the *ad hoc* Tribunals and the ICC. While the *ad hoc* Tribunals had jurisdiction only over one situation, the ICC deals with many situations. Therefore, since the ICTY and ICTR could investigate and prosecute many individuals within those 'situations' only and factors such as the likelihood of the arrest may be useful also in order to select among the many possible accused, the more limited number of cases that the Court is capable of dealing with suggests to reassess the importance of these factors.

[337] *See* CÔTÉ L., *Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law*, in *Journal of International Criminal Justice*, 3, 2005, p. 162 at 169, referring to the fact that responding to the request for assistance for prosecuting Mr. Akayesu presented by Zambia may have encouraged other States to cooperate with the Tribunal. But a similar approach might have been used also at the ICC, *see* GOLDSTONE J.A., *More Candour about Criteria*, in *Journal of International Criminal Justice*, 8, 2010, p. 383 at 394 referring to the *Lubanga case*, where the risk for the suspect imminent release by the authorities of the Democratic Republic of the Congo seems having played a role in his transfer to the Court. It is also worth recalling that, especially in ICL, the likelihood of arrest may be lower when the degree of responsibility is higher. On the *Lubanga case see* also SCHABAS W.A., *An Introduction to the International Criminal Court*, Cambridge University Press, 2020, p. 293.

CHAPTER II

SECTION IV

THE INTERESTS OF JUSTICE

The third and last factor that the Prosecutor has to consider when she adopts a decision on the initiation of the investigation or prosecution is the interests of justice. More correctly, the Prosecutor is required to assess whether the interests of justice demand for *not* initiating an investigation or a prosecution.[338]

The wording of Art. 53(1)(c) and 53(2)(c), devoted respectively to the initiation of the investigation and the prosecution, is different: Art. 53(1)(c) states that '[i]n deciding whether to initiate an investigation, the Prosecutor shall consider whether: [...] (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'; while Art. 53(2)(c) states that '[i]f, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because [...] (c) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime; the Prosecutor shall inform the Pre-Trial Chamber [...]'.

The scope of this section is providing with an overview of the 'nebulous'[339] concept of 'interests of justice' common to both Art. 53(1)(c) and 53(2)(c). A clear picture of the applicability of this clause, which some authors qualify as entirely discretionary,[340] will show that, although granting the Prosecutor a margin for discretion, this discretion is not as broad as it may seem at first sight.

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[338] According to Schabas, the interests of justice criterion gives the prosecutor 'some discretion in refusing to act on a referral', but '[i]t would make little sense' for the Prosecutor to apply to a PTC for authorisation if the proposed investigation is not in the interests of justice. Nevertheless, the Prosecutor is required to conduct the interests of justice assessment in case of Art. 15 preliminary examination, in order to adopt a decision not to investigate (*see* below Chapter III).

[339] MARSTON DANNER A., *Enhancing the legitimacy and accountability of prosecutorial discretion at the International Criminal Court*, in *American Journal of International Law*, 97, 3, 2003, p. 510 at 543. According to Goldstone, this expression has a very broad meaning, it is 'elastic' and provides the Prosecutor 'a great deal of latitude, except for certain clear-cut abuses'. GOLDSTONE J.A., *More Candour about Criteria*, in *Journal of International Criminal Justice*, 8, 2010, p. 383 at 392

[340] TURONE G., *Powers and Duties of the Prosecutor*, in CASSESE A., GAETA P., JONES J.R.W.D., *The Rome Statute of the International Criminal Court. A Commentary*, *Vol. II*, Oxford University Press, 2002, p. 1137 at 1153; RASTAN R., *Comment on Victor's Justice & the Viability of* Ex Ante *Standards*, in *The John Marshall Law Review*, 43, 3, 2010, p. 569 at 598; SCHABAS W.A., *Victor's Justice: Selecting Situations at the International Criminal Court*, in *John Marshall Law Review*, 43, 3, 2010, p. 535 at 541.

1. The interests of justice in ICL

The expression 'interests of justice' has been often used in ICL since the experience of the IMT, even if in context that have nothing to do with Art. 53 of the Statute. For example, Art. 12 IMT Charter allowed the Tribunal to proceed against the accused *in absentia* 'if he has not been found or if the Tribunal, for any reason, finds it necessary, in the interests of justice, to conduct the hearing in his absence'. The concept of 'interests of justice' seems therefore a synonym of 'interest in reaching the objective of the Tribunal'. According to Art. 1 IMT Charter, the objective of the Tribunal was trying and punishing the major perpetrators of crimes of the Axis and Art. 12 IMT Charter pursues their prosecution irrespective of the accused presence in court. The values to be balanced are the right of the accused to attend his trial and the need for prosecution: when the latter – i.e. the interest of justice – prevails the individual can be tried *in absentia*.

This approach emerges from the *Bormann* case. Mr Bormann was the only defendant tried *in absentia* as the Prosecution had ambiguous information on his death. The Deputy Chief Prosecutor for the UK did not clarify why prosecuting Mr Bormann was 'in the interests of justice' despite his absence in trial, but only described in Court the procedure followed for granting the presence of the accused. Once it was clear that despite the efforts of the Prosecution it was not possible to ensure the presence of the accused in trial, the Prosecution required to try him and the Tribunal accepted the evidence against him and decided to proceed *in absentia*.[341]

The 'interests of justice' was instead treated under the perspective of the correct administration of justice with regards to the possibility to try *in absentia* Mr Krupp von Bohlen. More specifically, contrary to the wording of Art. 12 IMT Charter the 'interests of justice' was treated as a ground for excluding prosecution, rather than a ground for prosecuting despite the absence of the defendant. The Defence for Mr Krupp claimed that his client was unable to stand in trial. While the Prosecutor wanted to try him *in absentia*, the Defence highlighted that Art. 12 IMT Charter was 'purely a regulation concerning procedure' and that a trial *in absentia* would have been contrary to justice, as a just procedure must be 'fashioned in such a way that an equitable judgment is guaranteed'.[342] The Defence further highlighted 'a contradiction between the demands of world opinion for a trial against Krupp *in absentia* and the demands for justice' because 'it would violate the recognized principles of the legal

[341] IMT, *Trial of the Major War Criminals before the International Military Tribunal*, Nuremberg, 14 Nov. 1945-1 Oct. 1946, Vol. II, Nuremberg, Germany, 1947, p. 27-28.
[342] *Ibid.*, p. 2.

procedures of all states and especially Art. 12 of the Charter, to try a mentally deranged man who cannot defend himself in a trial in which everything is at stake for the defendant'.[343]

The President seemed also to interpret the 'interests of justice' under the perspective of the correct administration of justice when he asked the Prosecution: 'Can it be in the interest of justice to find a man guilty, who, owing to illness, is unable to make his defense properly?'. The Prosecution, although recognising the disadvantages for the defendants of a trial *in absentia*, stated that the *ratio* of Art. 12 IMT Charter was to avoid manners for the defendants of escaping the trial and that Mr Krupp had all the necessary resources and assistance to be defended.[344] The final decision of the Tribunal declaring Mr Krupp unable to stand in trial and dismissing the charges seems to confirm that the Tribunal interpreted the interests of justice in the perspective of the correct administration of justice.[345] The Defence for Mr Hess, aiming at obtaining a dismissal of the charges for amnesia and then excluding the applicability of Art. 12 IMT Charter, seemed oriented to consider the interest of justice in the same perspective by stating that: 'The question then is whether it is in the interest of justice to proceed against the defendant in absentia. In my opinion it is incompatible with real justice to proceed against the defendant if he is prevented by his impaired condition [amnesia] [...] from personally safeguarding his rights by attending the proceedings'.[346]

However, on two occasions also when referring to the situation of Mr Krupp, the Chief Prosecutor of the UK seemed to interpret the 'interests of justice' as in the Bormann case: the first time when, discussing with the President over the possibility or not to try Mr Krupp, he said that '[e]xpress provision [on the trial in absentia] is made for such trials in the Charter constituting this Tribunal, provided that the Tribunal considers it in the interests of justice'; and the second time when stating that: 'For our part, the case against them has been ready for some time, and it can be shortly and succinctly stated; and in my submission to the Tribunal, the interests of justice demand, and world opinion expects, that these men should be put upon their defense without further delay'.[347]

[343] *Ibid.*, p. 4.
[344] *Ibid.*, p. 5.
[345] 'It is the decision of the Tribunal that upon the facts presented the interests of justice do not require that Gustav Krupp von Bohlen be tried *in absentia*. The Charter of the Tribunal envisages a fair trial, in which the Chief Prosecutors may present the evidence in support of an indictment and the defendants may present such defence as they may believe themselves to have. Where nature rather than flight or contumacy has rendered such a trial impossible, it is not in accordance with justice that the case should proceed in the absence of a defendant'. *Ibid.*, p.21.
[346] *Ibid.*, p. 483.
[347] *Ibid.*, p. 13.

The interests of justice was also mentioned at Art. 21 ICTY Statute and Art. 20 ICTR Statute with regards to the right of the accused to have legal assistance in any case 'where the interests of justice so require' and at Art. 28 ICTY Statute and Art. 27 ICTR Statute recognising to the Presidents of the Tribunal the power to decide on the applicability to a person convicted by the Tribunal of the pardon or commutation of sentence that could be applied to her pursuant to the law of the State in which the convicted person is imprisoned. It is also used with broad sense in many rules of the RPE.[348] This expression is normally used in connection to judicial economy, smooth proceedings of the trial or as synonym of 'fair trial' in connection with the rights of the accused.

The expression 'interests of justice in the case-law of the *ad hoc* Tribunals mirrors its use in the statutory law. It is used rarely and in broad sense. It appears to be a sort of 'general principle' such as the principle of fair trial or *in dubio pro reo*, guiding the activity of the Court as a whole. Most of the time it is used in decisions related to procedural issues not entirely ruled by the statutory provisions and it is predominantly associated with judicial economy.[349]

[348] Rules 3; 4; 15*bis*; 15*ter*; 44; 45; 45*ter*; 53; 62; 70; 71; 73*bis*; 73*ter*; 79; 81*bis*; 82; 85; 89; 92*quinquies*; 93; and 108*bis* ICTY RPE and Rules 3; 4; 15bis; 45*quater*; 46; 53; 66; 71; 71*bis*; 73*bis*; 73*ter*; 79; 82; 85; 93 ICTR RPE.

[349] It is for example mentioned with regards to: the appropriateness of continuing the proceedings with a substitute Judge (ICTR, AC, *The Prosecutor v. Eduard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera, Andre Rwamakuba*, *Reasons for Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera'a Motion for Leave to Consider New Material*, 22 Oct. 2004, ICTR- 98-44-AR15bis.2, paras 52-54); the admissibility of additional evidence (ICTY, AC, *The Prosecutor v. Vidoje Blagojević, Dragan Jokić*, *Decision on Appellant Vidoje Blagojević's Motion for Additional evidence Pursuant to Rule 115*, 21 Jul. 2005, IT-02-60-A, para. 11); the appropriateness of an extension of the time limits (ICTR, AC, *The Prosecutor v. Eliézer Niyitegeka*, *Decision on the Prosecutor's Motion to Move for Decision on Niyitegeka's Request for Review Pursuant to Rules 120 and 121 and the Defence Extremely Urgent Motion Pursuant to (i) Rule 116 for Extension of Time Limit (ii) Rule 68 (A), (B) and (E) for Disclosure of Exculpatory Evidence Both of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda and (iii) Response to Prosecutor's Motion of 15 August 2005 Seeking a Decision, in the Absence of any Legal Submissions from the Applicant*, 28 Sep. 2005, ICTR-96-14-R, pp. 8-9); the need for convening a status conference in the absence of a specific rule of procedure (MICT, AC, *The Prosecutor v. Augustin Ngirabatware*, *Decision on Request for Status Conference*, 3 Oct. 2017, MICT-12-29-R, p.1); the appropriateness of specific procedural issues (MICT, AC, *The Prosecutor v. Ratko Mladić*, *Decision on Prosecution's Motion to Strike Mladić's Motions to Admit additional Evidence*, 11 Jan. 2019, MICT-13-56-A, p. 3); the appropriateness to recognise a notice of appeal (MICT, AC *The Prosecutor v. Jean Uwinkindi*, *Decision on Motions to Strike Notice of Appeal and Appeal Brief*, 4 Feb. 2016, MICT-12-25-AR14.1, para. 10), the appellate brief (MICT, AC, *The Prosecutor v. Phènèas Munyarugarama*, *Decision on Appeal Against the Referral of Phénéas Munyarugarama's case to Rwanda and Prosecution Motion to Strike*, 5 Oct. 2012, MICT-12-09-AR14, para. 12) or response brief (ICTR, AC, *The Prosecutor v. Théoneste Bagosora, Aloys Ntabakuze, Anatole Nsengiyumva*, *Decision on Aloys Ntabakuze's Motion for Severance, Retention of the Briefing Schedule and Judicial Bar to the Untimely Filing of the Prosecution's Response Brief*, 24 Jul. 2009, ICTR-98-41-A, para. 34) validly filed.

As to the ICC, in the 1994 Draft Statute prepared by the ILC there was no trace of the interests of justice clause.[350] It was only during the session of the Preparatory Committee that the UK delegation proposed its introduction in order to 'reflect a wide discretion on the part of the prosecutor to decide not to investigate comparable to that in (some) domestic systems, e.g. if the suspected offender was very old or very ill or if, otherwise, there were good reasons to conclude that a prosecution would be counter-productive'.[351] The proposal encompassed both a negative and a positive determination of the interests of justice and its applicability was limited to the prosecution, while no reference was made to the investigation. Later during the works the interests of justice was associated also with the initiation of the investigations, requesting the Prosecutor to positively ascertain whether the investigation was in the interests of justice.[352] With regards to prosecution, the criteria remained a negative requirement. It was only in Rome that the assessment was harmonised for both the initiation of the investigation and the prosecution maintaining a negative wording as it now appears in Art. 53.

The main reason for conflict among the delegations was related to the possible inclusion of truth commissions and amnesties – and possibly which kind of amnesties – among those national solutions preventing the Court from exercising its jurisdiction. Some delegations, such as the South African, strongly supported the introduction of a clause in Art. 17 of the Statute expressly recognising mechanisms of transitional justice as ground for inadmissibility in front of the Court and therefore welcomed the insertion of a concept capable of giving competence to the Court to honour amnesties granted by national governments under certain circumstances or to respect to the work of alternative justice mechanisms such as truth commissions.[353] The UK proposal reached the objective of introducing a provision allowing the Prosecutor to defer an investigation or a prosecution without exacerbating the debate among States, because the vague concept of interests of justice would have allowed the Court to develop its content where necessary.[354]

[350] The drafting history of the interests of justice clause has been recently retraced by BITTI G., *The Interests of Justice – where does that come from? Part I*, in *EJIL: Talk!*, 13 Aug. 2019.

[351] *UK comments on complementarity*, 26 Jun. 1996, para. 30.

[352] *Revised Abbreviated Compilation*, 14 Aug. 1997, A/AC.249/1997/WG.4/CRP.4.

[353] ROBINSON D., *Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court*, in *European Journal of International Law*, 14, 3, 2003, p. 481; VARAKI M., *Revisiting the 'Interest of Justice' Policy Paper*, in *Journal of International Criminal Justice*, 15, 2017, p. 455 at 460.

[354] *UK Discussion Paper, International Criminal Court, Complementarity*, 29 Mar. 1996, para. 30.

The concept of 'interests of justice' was never defined during the drafting of the Statute, but this expression was used by some delegations during the Rome Conference in connection with the participation of the victims to the proceedings[355] or in general terms.[356]

Even if it has been argued that 'interests of justice' is a legal term and does not require further definition,[357] the fact that it must perform legal functions and the large discussion about it seem instead calling for a clearer understanding of its content.[358]

The OTP itself issued in September 2007 a non-binding document[359] that offers a view of the Office's understanding of this ethereal concept: the Policy Paper on the Interests of Justice. As most of the policy papers, its content is generic as it includes guidelines leading the activity of the OTP in its choices concerning the interests of justice. The capacity of guidelines to offer concrete solutions is often doubtful. Nevertheless, in this case, contrary to many expectations, the OTP has even been reproached for the restrictive approach adopted with the risk that this clause may remain a dead letter.[360] The Policy Paper gives information on the

[355] *See* United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 Jun. – 17 Jul. 1998, Official Records, Vol. II, , Doc. U.N., A/CONF.183/13 (Vol. II). Representatives of Kenya 'reaffirmed Kenya's commitment to the establishment of an effective, impartial, credible and independent international criminal court, free from political manipulation, pursuing only the interests of justice, with due regard to the rights of the accused and the interests of the victims' (*Ibid*., p. 77); representatives of Nepal stated that: 'The interests of justice would be served if victims could also be made parties to the trial and be given the opportunity to obtain restitution from the assets of the perpetrator' (*Ibid*., p. 99);

[356] Trinidad and Tobago, Spain and Denmark used this expression in broad sense respectively commenting on the possibility to extend the applicability of the triggering mechanism ('The trigger mechanism should not be restricted to States parties only. That might not be in the interests of justice in the long run') (*Ibid*., p. 203); commenting on the possibility to collect evidence despite a suspension of the proceedings ('The Court should take all appropriate measures for the preservation of evidence and any other precautionary measures in the interests of justice') (*Ibid*., p. 212) and commenting on the possible suspension of the proceedings under request of the UNSC ('The Court might itself consider that suspending a case would serve the interests of justice, or the Court and the Council might cooperate on the basis of non-binding arrangements, but not through a dictate') (*Ibid*., p. 302). The representative of Syria, instead, expressed concern about the introduction of a clause allowing the Prosecutor to suspend an investigation 'in the supposed interests of justice' (*Ibid*., p. 359). *See* also VARAKI M., *Revisiting the 'Interest of Justice' Policy Paper*, in *Journal of International Criminal Justice*, 15, 2017, p. 455 at 458.

[357] SAFFERLING C., *International Criminal Procedure*, Oxford University Press, 2012, p. 221.

[358] According to Schabas, the general scope of the concept testifies the inability of legal texts to codify answers for difficult issues. SCHABAS W.A., *Article 53*, in *Commentary on the Rome Statute*,2nd ed., 2016, p. 836.

[359] As expressly recognised in the introduction, the Paper 'does not give rise to rights in litigation and is subject to revision based on experience and in the light of legal determination by the Chambers of the Court'. ICC, OTP, *Policy paper on the interest of justice*, p. 1.

[360] VARAKI M., *Revisiting the 'Interest of Justice' Policy Paper*, in *Journal of International Criminal Justice*, 15, 2017, p. 455, at 456; *see* also POLTRONERI ROSSETTI L., *The Pre-Trial Chamber's Afghanistan Decision*, in *Journal of International Criminal Justice*, 17, 2019, p. 585 at 598 that with regards to the relevant factors in the interests of justice assessment refers to the 'unreasonably restrictive interpretation in the policy and practice of the OTP'.

OTP's stance on what it calls discretion to be exercised under 'exceptional circumstances'.[361] Its rationale is offering 'limited clarification in the abstract' and not to deal with detailed discussion, bearing in mind that each and every situation or case should be treated *in concreto*.[362] The Policy Paper identifies three key elements. First, the prosecutorial discretionary power vested under Art. 53(1)(c) and Art. 53 (2)(c) of the Rome Statute should be exercised in exceptional circumstances and 'there is a presumption in favour of investigation or prosecution wherever the criteria established in Art. 53(1) (a) and (b) or Art. 53(2)(a) and (b) have been met'.[363] Second, the exercise of the prosecutorial discretion should be guided by the purpose of the Rome Statute to prevent the commission of serious crimes of concern to the international community through ending impunity.[364] Third, the Office distinguishes the concept of *interests of justice* from the notion of *interest of peace.* The latter, it is submitted, falls outside its mandate.[365]

2. The notion of 'interests of justice'

The first problem in finding a definition to the interests of justice is defining 'justice' under Art. 53 of the Statute.[366] Two main alternatives are possible: (i) justice is to be interpreted as 'criminal justice' or (ii) justice has a broader meaning.

Many scholars exclude that 'justice' can be equated to 'criminal justice' as the decisions under Art. 53(1)(c) and 53(2)(c) are decisions of *not* investigating or prosecuting as investigation and prosecution would *not serve* the interests of justice: it would be at least odd saying that a decision not to investigate or not to prosecute would serve the purpose of criminal justice.[367] Moreover, the introduction of the interests of justice clause as means for

[361] ICC, OTP, *Policy paper on the interest of justice*, p. 1.
[362] *Ibid*.
[363] *Ibid*.
[364] *Ibid*.
[365] *Ibid*.
[366] VARAKI M., *Revisiting the 'Interest of Justice' Policy Paper*, in *Journal of International Criminal Justice*, 15, 2017, p. 457; LEPARD B.D., *How should the ICC Prosecutor exercise his or her discretion? The role of fundamental ethical principles*, in *John Marshall Law Review*, 43, 3, 2010, p. 553 at 565-566; RUBIN A.P., *The International Criminal Court: Possibilities for Prosecutorial Abuse*, in *Law and Contemporary Problems*, 64, 1, 2001, p. 153 at 162; MINOW M., *Do Alternative Justice Mechanisms Deserve Recognition in International Criminal Law?: Truth Commissions, Amnesties, and Complementarity at the International Criminal Court*, in *Harvard International Law Journal*, 60, 2019, p. 1 at 19 ff.; CRYER R., FRIMAN H., ROBINSON D., VASILIEV S. (eds.), *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, 2019, p. 163.
[367] AMBOS, K., *Treatise on International Criminal Law, Vol. III: International Criminal Procedure*, Oxford University Press, 2016, p. 387; DE SOUZA DIAS T., *'Interests of justice': Defining the scope of Prosecutorial discretion in Article 53(I)(c) and (2)(c) of the Rome Statute of the International Criminal Court*, in *Leiden Journal of International Law*, 30, 2017, p. 731 at 740; STAHN C., *Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative guidelines for*

possibly safeguarding justice mechanisms not involving prosecution militate against an interpretation of justice exclusively focused on criminal justice.[368] Also the OTP notes in its Policy Paper that the concept of justice must be broader than criminal justice.[369]

The question is therefore to determine how broad the concept of justice is and what it entails. Only answering these questions, it is possible to identify the relevant factors in the interests of justice assessment.

In its Policy Paper, the OTP notes that the 'concept of interests of justice should not be conceived of so broadly as to embrace all issues related to peace and security'.[370] It underlines that its mandate is not to deal with international peace and security but to reach the objectives of the Court to put end to impunity and to ensure that the most serious crimes do not go unpunished. Even if alternative options exist and the Office should consider potential adverse impact on security, 'a decision not to proceed on the basis of the interests of justice should be understood as a course of last resort'.[371] The paper eventually concludes by stating that with the Rome Statute 'a new legal framework has emerged' that 'necessarily impacts on conflict management efforts'.[372] Moreover, '[a]ny political or security initiative must be compatible with the new legal framework insofar as it involves parties bound by the Rome Statute.'[373] Therefore, according to the OTP, the interpretation of the notion of interests of justice 'should be guided by ordinary meaning of the words in the light of their context and the objects and purpose of the Statute'.[374] The list of relevant objectives prioritises investigation and prosecution: putting an end to impunity; prevention of the most serious crimes of concern to the international community; and guarantee of 'lasting respect for international justice'.[375]

Despite the absence of a clear definition, the Policy Paper explains in which case the action is *not* in the interests of justice and is rather detrimental to prevention or respect for

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the International Criminal Court, in *Journal of International Criminal Justice*, 3, 2005, p. 695 at 716; HEINZE A., FYFE S., *Prosecutorial Ethics and Preliminary Examinations at the ICC*, in BERGSMO M., STAHN C., (ed.), *Quality Control in Preliminary Examination: Volume 2*, Brussels, Torkel Opsahl Academic EPublisher, 2018, p. 51.

[368] ROBINSON D., *Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court*, in *European Journal of International* Law, 14, 3, 2003, p. 481 at 488; VARAKI M., *Revisiting the 'Interest of Justice' Policy Paper*, in *Journal of International Criminal Justice*, 15, 2017, pp. 461-464; STEGMILLER I., *The Pre-Investigation Stage of the ICC*, Dunker & Humbolt, Berlin, 2011, p. 379; WERLE G., JESSBERGER F., *Principles of International Criminal Law*, 4th ed., Oxford University Press, 2020, p. 114.

[369] ICC, OTP, *Policy paper on the interest of justice*, p. 8, fn. 13.

[370] *Ibid*., p. 9.

[371] *Ibid*., p. 9.

[372] *Ibid*., p. 4.

[373] *Ibid*.

[374] *Ibid*.

[375] *Ibid*.

international justice. For instance when 'a suspect's right(s) had been seriously violated in a manner that could bring the administration of justice into disrepute'.[376] This example seems to limit the interests of justice assessment to the judicial proceedings suggesting that the interests of justice should be read as 'respect for international justice'. This interpretation is consistent with the abovementioned jurisprudence of the IMT in the *Krupp case* and of the *ad hoc* Tribunals when dealt with possible cases of abuse of process.[377] The same idea emerges (*a contrario*) from the Policy Paper on Preliminary Examinations where the OTP highlights that Art. 16 of the Statute recognises the specific role of the UNSC in matters affecting international peace and security. Notwithstanding this, although it infers that the concept of the interests of justice 'should not be perceived to embrace all issues related to peace and security' and should not be considered a conflict management tool requiring the Prosecutor to assume the role of mediator in negotiations',[378] the OTP does not ignore that peace, despite not being the final objective, is one of the possible interests included in the definition of justice. Indeed, part 6 of the Policy Paper on the interests of justice includes in the list of potential factors also complementary justice mechanisms (truth seeking, reparations programs, institutional reform and traditional justice mechanisms) and peace processes which may be relevant in deciding whether to defer an investigation or a prosecution. In any event, the OTP focuses the attention on the exceptional nature of the decision not to investigate and prosecute, since investigating and prosecuting are the main objective of its mandate. Therefore (in those exceptional circumstances) when peace is included among the factors influencing the Prosecutor's decision to defer an investigation or a prosecution, a causal link between the investigation and prosecution from the one side and the threat to peace and security to the other must exist and the Prosecutor (and the Chambers) must be persuaded that the potential damage justifies the departure from the general rule.[379]

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[376] *Ibid*., fn. 8, p. 4.

[377] *See*, for example, ICTR, AC, *The Prosecutor v. Jean Bosco Barayagwiza*, *Decision, Prosecutor's request for review or reconsideration*, 31 Mar. 2000, ICTR-97-19-AR72.

[378] ICC, OTP, *Policy Paper on Preliminary Examinations*, Nov. 2013, p.16. *See* also BERGSMO M., KRUGER P., BEKOU O., *Article 53*, in AMBOS K., *The Rome Statute of the International Criminal Court*, 4th ed., Beck/Hart/Nomos, 2021, mn. 29, fn. 78.

[379] *See* DE SOUZA DIAS T., *'Interests of justice': Defining the scope of Prosecutorial discretion in Article 53(I)(c) and (2)(c) of the Rome Statute of the International Criminal Court*, in *Leiden Journal of International Law*, 30, 2017, p. 742. Similarly HEINZE A., FYFE S., *Prosecutorial Ethics and Preliminary Examinations at the ICC*, in BERGSMO M., STAHN C., (ed.), *Quality Control in Preliminary Examination: Volume 2*, Brussels, Torkel Opsahl Academic EPublisher, 2018, pp. 53-55 noting that even if transitional justice mechanism should not be banned from the concept of interests of justice, 'the demands of cosmopolitan justice should be a factor in an assessment of justice. The concept of universality is central for the ICC' and that 'in the light of the facts that the ICC claims to have the goals of ending impunity for individual criminals and protecting the global community from the harms of mass atrocities, it seems that neither of these aims or constituencies can be ignored altogether.'

Summarising, according to the OTP, the interests of justice must be strictly understood in light of the mandate of the Office, which, differently from other international organisations, has the duty to investigate and prosecute.[380] Accordingly, the concept of interests of justice should be restrictively interpreted and its assessment should be mainly based on the factors expressly mentioned in Art. 53 (i.e. gravity of crime and interests of victims when both deciding whether not to investigate and prosecute and the accused's particular circumstances and his or her role in the alleged crime as additional factors when deciding whether not to prosecute). Alternative justice mechanisms and peace processes should only be ancillary factors.

Even if the possible 'disregard' of the Prosecutor for peace negotiations may mirror her independence from political pressure,[381] criticisms to this restrictive interpretation imply that it would be inappropriate to limit the interests of justice to the good administration of justice[382] and that all the situations relevant in ICL are usually connected to peace and security, factors that should therefore be taken into account in determining whether an investigation or a prosecution is not in the interests of justice.[383] Moreover, with regards to the argument that

[380] *See* TURONE G., *Powers and Duties of the Prosecutor*, in CASSESE A., GAETA P., JONES J.R.W.D., *The Rome Statute of the International Criminal Court. A Commentary*, vol. 2, Oxford University Press, 2002, p. 1137 at 1142-1143; OCAMPO M., *A positive approach to complementarity. The impact of the Office of the Prosecutor*, in STAHN C., EL ZEIDY M. (eds), *The International Criminal Court and complementarity from theory to practice*, Vol. I, Cambridge University Press, 2011, p. 19.

[381] CÔTÉ L., *Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law*, in *Journal of International Criminal Justice*, 3, 2005, p. 162 at 179 who gives the example of the SCSL, which issued the indictment against former President of Liberia Charles Taylor even if he was in Ghana negotiating the peace process. *See* also SCHABAS W.A., *Prosecutorial Discretion v. Judicial Activism at the International Criminal Court*, in *Journal of International Criminal Justice*, 6, 2008, p. 731 at 750; RASTAN R., *Comment on Victor's Justice & the Viability of* Ex Ante *Standards*, in *The John Marshall Law Review*, 43, 3, 2010, p. 569 at 601; VINJAMURI L., *The ICC and the Politics of Peace and Justice*, in STAHN C. (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015, p. 13.

[382] DUKIĆ D., *Transitional justice and the International Criminal Court – in 'the interests of justice'?*, in *International Review of the Red Cross*, 89, 867, 30 Sep. 2007. P. 691 at 700.

[383] DE SOUZA DIAS T., *'Interests of justice': Defining the scope of Prosecutorial discretion in Article 53(I)(c) and (2)(c) of the Rome Statute of the International Criminal Court*, in *Leiden Journal of International Law*, 30, 2017, p. 742. SCHABAS W.A., *Prosecutorial Discretion v. Judicial Activism at the International Criminal Court*, in *Journal of International Criminal Justice*, 6, 2008, p. 731 at 749, stating that 'there is certainly no evidence in the drafting history of the ICC Statute that a distinction between "interests of justice" and "interests of peace" was intended'. That the activity of the Prosecutor is always related to peace and security also emerged during the discussion that led to the Declaration of Freiburg. On that occasion, one participant to the discussion also highlighted that political considerations such as peace and security had to be a relevant factor in the assessment of whether to investigate and prosecute (if the Statute adopted a discretionary model) or justification adopted by an external political body and preventing the activity of the Prosecutor (if the Statute adopted the mandatory model). *See* SANDERS A., *Summary of Discussions (28 May 1998)*, in ARBOUR L., ESER A., AMBOS K., SANDERS A. (eds.), *The Prosecutor of a Permanent International Criminal Court, International Workshop in co-operation with the Office of the Prosecutor of the International Criminal Tribunals (ICTY and ICTR), Freiburg im Breisgau, May 1998*, Edition Iuscrim, 2000, p. 121 at 619.

granting peace and security falls within the competence of other institutions and in particular the UNSC, it has been argued that Art. 24 UN Charter states that granting peace and security is primary, but not exclusively responsibility of the UNSC and that when the UNSC refers a situation to the ICC or defers a criminal investigation under Art. 16 of the Statute, it aims at maintaining or restoring international peace and security as it acts under Chapter VII of the UN Charter.[384] Therefore, peace and security should be primary factors in the Prosecutor's assessment. It has also been noted that the drafting history of Art. 53 of the Statute does not exclude the interests of peace from the concept of interests of justice and a restrictive interpretation contradicts public statements made by the Prosecutor before the publishing of the Policy Paper.[385] The OTP's restrictive interpretation of the interest of justice clause would be a consequence of the pressure of NGOs and the civil society[386] and this approach would prevent the Prosecutor from really exercising her discretionary power for fear of being accused of acting as a political subject.[387]

Concerns on the OTP's attitude towards peace and security seem sometimes overrated.[388] Whether and to what extent external considerations of international peace and

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RODMAN K.A., *Is Peace in the Interests of Justice? The Case for Broad Prosecutorial Discretion at the International Criminal Court*, in *Leiden Journal of International Law*, 22, 1, 2009, p. 99 notes the importance of not insulating the activity of the Prosecutor from the context in which she operates. Even if not directly focused on the concept of interests of justice, with regards to the relationship between the peace and justice and in particular with regard to the non-absoluteness and negotiability of justice *vis-à-vis* other values, including peace, *see* VINJAMURI L., *The ICC and the Politics of Peace and Justice*, in STAHN C. (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015, p. 13.

[384] DE SOUZA DIAS T., *'Interests of justice': Defining the scope of Prosecutorial discretion in Article 53(I)(c) and (2)(c) of the Rome Statute of the International Criminal Court*, in *Leiden Journal of International Law*, 30, 2017, pp. 743, 745. *See* also PARROTT L., *The role of the International Criminal Court in Uganda: ensuring that pursuit justice does not come at the price of peace*, in *Australian Journal of Peace Studies*, 1, 1, 2006, p. 8 ff.

[385] VARAKI M., *Revisiting the 'Interest of Justice' Policy Paper*, in *Journal of International Criminal Justice*, 15, 2017, pp. 461-464. *See* also AMBOS, K., *Treatise on International Criminal Law, Vol. III: International Criminal Procedure*, Oxford University Press, 2016, p. 389 who notes that the drafting history of the provision testifies that its aim was giving the Prosecutor 'an additional instrument to exercise her discretion going beyond the rather "technical" requirements of Art. 17'. Nevertheless, he also gives credit to the narrow interpretation of the concept of interests of justice and states that this criterion does not give the Prosecutor unlimited political discretion.

[386] *See* for example, HUMAN RIGHTS WATCH, *Policy Paper, The Meaning of ' the Interests of Justice' in Article 53 of the Rome Statute*, expressly requesting the OTP to adopt 'a narrow construction of the words "interests of justice"'; AMNESTY INTERNATIONAL, *Open Letter to the Chief Prosecutor of the International Criminal Court: Comments on the concept of the interests of justice*, 17 Jun. 2005, IOR 40/023/2005.

[387] VARAKI M., *Revisiting the 'Interest of Justice' Policy Paper*, in *Journal of International Criminal Justice*, 15, 2017, pp. 461-464.

[388] As noted by a participant to the workshop in Freiburg of 1998, 'instead of saying that prosecutions would jeopardise international peace and security [...] it is those crimes that jeopardise international peace and security'. SANDERS A., *Summary of Discussion (28 May 1998)*, in ARBOUR L., ESER A., AMBOS K., SANDERS A. (eds.), *The Prosecutor of a Permanent International Criminal Court,*

security should affect the activity of the Prosecutor was not even clear at the *ad hoc* Tribunals, created by the UNSC under Chapter VII of the UN Charter as means for reaching this objective.[389] As any other criminal system, the international one pursues retributive and preventive purposes, even though other functions, such as the symbolic one,[390] may be more palpable than in other systems.[391] Nevertheless the relevance of these additional functions should not shadow the main purpose of criminal courts, i.e., investigating and prosecuting

International Workshop in co-operation with the Office of the Prosecutor of the International Criminal Tribunals (ICTY and ICTR), Freiburg im Breisgau, May 1998, Edition Iuscrim, 2000, p. 121 at 622. *See* also MÉGRET F., *La Cour Pénale Internationale comme un objet politique*, in FERNANDEZ J., PACREAU X., *Statut de Rome de la Cour pénale internationale. Commentaire article par article*, Pedone, 2012, p. 119 at 122; SAFFERLING C., *International Criminal Procedure*, Oxford University Press, 2012, p. 228; STEGMILLER I., *The Pre-Investigation Stage of the ICC*, Dunker & Humbolt, Berlin, 2011, p. 396.

[389] JALLOW H.B., *Prosecutorial Discretion and International Criminal Justice*, in *Journal of International Criminal Justice*, 3, 1, 2005, p. 145 at 154. *See* also ZAPPALÀ S., *Human Rights in International Criminal Proceedings*, Oxford University Press, 2003 noting that in the case of the *ad hoc* Tribunals the UNSC had already deemed that prosecution was the right mean for achieving peace and security as it established the Tribunals acting under Chapter VII of the UN Charter; CÔTÉ L., *Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law*, in *Journal of International Criminal Justice*, 3, 2005, p. 162 at 178.

[390] *See* APTEL C., *Prosecutorial Discretion at the ICC and Victims' Right to Remedy*, in *Journal of International Criminal Justice*, 10, 2012, p. 1357 at 1372.

[391] *See* CLARK T.H., *The Prosecutor of the International Criminal Court, Amnesties, and the 'Interests of Justice': Striking a Delicate Balance*, in *Washington University Global Studies Law Review*, 4, 2, 2005, p. 389 at 402 ff. who lists the many purposes that criminal prosecution may pursue, especially in post-conflict situations: in addition to utilitaristic and retributive functions, there are also deterrence, reconciliation, individualisation of guilt 'by exposing a leadership group's role in carrying out the crimes, allowing the public separation from the crime', moral satisfaction, strengthening the rule of law 'by reinforcing the basic beliefs of a society and educating it in the proper working of democracy'. JORDA C. *The Major Hurdles and Accomplishments of the ICTY – What the ICC Can Learn from them*, in *Journal of International Criminal Justice*, 2, 2004, p. 572 at 579 who states that '[i]n addition to the function of any criminal tribunal - to try, then convict or acquit defendants - it is generally agreed that two specific functions have fallen to international criminal courts. First, through their decisions, such courts work toward eliminating impunity, namely that of the highest civilian and military leaders, thereby helping prevent a recurrence of armed criminal conduct on a massive scale. Secondly, through individual trials, they shed light on the local history leading up to the events, thereby lighting the way to national reconciliation'. According to Jessberger and Geneuss the ICC should be treated as a small criminal law system rather than simply a Court. Moreover, in their view 'it would be too narrow to consider the Court only as an institution to adjudicate individual guilt of perpetrators of international crimes' and that the Court has at least three important functions: adjudicating cases; acting as 'watchdog' over the State through the complementarity principle; and acting as 'security Court' when triggered by the UNSC. The limited Court's intervention would enhance functions other than prosecution. They also admit that objectives such as peace and security are beyond those of a criminal court *stricto sensu*, even if they highlight that 'it is precisely in this tension where the multi-functional nature of the ICC surfaces'. JESSBERGER F., GENEUSS J., *The Many Faces of the International Criminal Court*, in *Journal of International Criminal Justice*, 10, 2012, p. 1081. Also Fletcher and Weinstein identify other four main goals for International criminal justice in addition to punishing perpetrators: truth telling, promoting healing for victims, advancing the rule of law and facilitating national reconciliation. FLETCHER L.E., WEINSTEIN H.M., *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*, in *Human Rights Quarterly*, 23, 2002, p. 573 at 586 ff. *See* also OHLIN J.D., *Peace, Security, and Prosecutorial Discretion*, in STAHN C., SLUITER G. (eds.) *the Emerging Practice of the International Criminal Court*, Nijhoff, 2009, p. 21; STAHN C., *Introduction. More than a Court, Less than a Court, Several Courts in One?*, in STAHN C. (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015, p. LXXXIII at LXXXVII.

people allegedly responsible for crimes when States fail to do it.[392] The preamble of the Statute and the supposed contribution of the action of the Court to peace and security shifted too often the attention on these relevant but secondary objectives.[393]

But that the relevance of alternative justice mechanisms in the assessment of the interests of justice is sometimes overestimated is also proved by the fact that, as seen above, these mechanisms are first of all relevant in the admissibility assessment under Art. 53(1)(b) and (2)(b). The interests of justice test follows the positive determinations of both jurisdiction and admissibility. Even if during the negotiations the interests of justice clause was introduced as a reply to the request for an inadmissibility clause related to alternative justice mechanisms, it is apparent that the compatibility of these mechanisms with the action of the Court must be determined first of all under the perspective of admissibility.[394] Borrowing the language of the Policy Paper, the concept of interests of justice is contemplated as 'a countervailing consideration that might produce a reason not to proceed' even if the jurisdictional and admissibility requirements are fulfilled.[395] If the Prosecutor shifts to the interests of justice assessment, it means that, in her opinion, these mechanisms did not make the potential or actual cases inadmissible. Therefore, these mechanisms must have exceptional features in order to determine that an investigation or a prosecution is not in the interests of justice.

In conclusion, despite the possible importance that amnesties and alternative justice mechanisms may have, the great attention given to the exceptions to the investigation and the prosecution gives the impression that the investigation and prosecution is generally a hinder to reconciliation, when they are usually a useful means in this regard as the presumption in their favour demonstrates. The discussion should therefore be reassessed considering the exceptional nature of these hypotheses.[396]

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[392] *See* MÉGRET F., *La Cour Pénale Internationale comme un objet politique*, in FERNANDEZ J., PACREAU X., *Statut de Rome de la Cour pénale internationale. Commentaire article par article*, Pedone, 2012, p. 119 at 123.

[393] *See* FLETCHER G.P., OHLIN J.D., *The ICC – two Courts in One?*, in *Journal of International Criminal Justice*, 4, 2006, p. 428. *See* below, Chapter III, Section I, 2. The UN Security Council.

[394] *See* above, Section III, 2.3. The complementarity test.

[395] ICC, OTP, *Policy paper on the interest of justice*, pp. 2-3.

[396] In this regard *see* STAHN C., *Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative guidelines for the International Criminal Court*, in *Journal of International Criminal Justice*, 3, 2005, p. 695; MÉGRET F., *La Cour Pénale Internationale comme un objet politique*, in FERNANDEZ J., PACREAU X., *Statut de Rome de la Cour pénale internationale. Commentaire article par article*, Pedone, 2012, p. 119 at 122; SAFFERLING C., *International Criminal Procedure*, Oxford University Press, 2012, pp. 228; STEGMILLER I., *The Pre-Investigation Stage of the ICC*, Dunker & Humbolt, Berlin, 2011, p. 397 ff.

3. The exceptional nature of the interests of justice clause and the presumption in favour of investigation and prosecution

While the relevance of the alternative justice mechanisms and the possible opposition between investigation and prosecution on the one side and peace and security on the other side have been overestimated, the exceptional nature of interests of the justice clause seems to have often been underestimated.[397] Part 4 of the Policy Paper stresses the exceptional nature of a decision under Art. 53(1)(c) and (2)(c) because it deviates from the fight against impunity. Eventually the Policy Paper affirms the existence of a presumption in favour of investigation or prosecution and their conformity with the interests of justice. Thus, the Prosecutor is not required to provide for concrete evidence of the consistency of the investigation and prosecution with the interests of justice. In practice this presumption applies only in case of submission of a request for authorisation to commence an investigation under Art. 15, because, even if Art. 53 of the Statute is applicable irrespective of the mechanism triggering the jurisdiction of the Court, the compliance with the parameters set forth in Art. 53 is subject to the control of a third subject (the PTC) only when Art. 15 applies. In case of referral by a State or the UNSC the Prosecutor's assessment *follows* the request for intervention of a third subject and a positive determination by the Prosecutor of the requirements of Art. 53 is not subject to scrutiny. Conversely, when the Prosecutor exceptionally believes that her action would be in contrast with the interests of justice, she must extensively support her decision[398] irrespective of the mechanism triggering the jurisdiction of the Court. As it will be seen in Chapter III, the decision not to proceed is subject to the control of the referring entity and the PTC in charge of overseeing its non-arbitrariness. Although this decision will be adequately challenged, it is also worth mentioning that the AC has recently excluded that the PTC's assessment under the Art. 15 procedure extends to the interests of justice.[399]

The approach adopted by the OTP in the first requests for authorisation under Art. 15 of the Statute and the majority of case-law of several PTCs that will be analysed mirror the aforementioned understanding of the clause: the Prosecutor's decision under Art. 53(1)(c) (and by association Art. 53(2)(c)) is exceptional and there is a presumption in favour of investigating and prosecuting whenever the criteria established in Art. 53(1)(a) and (b) and

[397] *See* BITTI G., *Article 53,* in FERNANDEZ J., PACREAU X., *Statut de Rome de la Cour pénale internationale. Commentaire article par article*, Pedone, 2012, p. 1173 at 1197.

[398] Bitti notes that there must exist serious reasons for justifying a departure from the duty to investigate and prosecute. *Ibid*., p. 1173 at 1197.

[399] ICC, AC, *Situation in the Islamic Republic of Afghanistan, Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan*, 5 Mar. 2020, ICC-02/17-138 OA4.

Art. 53(2)(a) and (b) are met. It is instead not necessary to demonstrate the consistency of investigating and prosecuting with the interests of justice.[400]

The presumption of consistency between investigation and prosecution with the interests of justice also emerges from the negative structure of the clause. As opposed to the two 'positive' requirements of Art. 3(1)(a) and (b) and 53(2)(a) and (b) (i.e. the existence of the reasonable/sufficient basis and the admissibility assessment) the interests of justice is a 'negative requirement' and the Prosecutor is allowed to commence an investigation or a prosecution if the proceedings is not against the interests of justice, hence *in the absence* of the interests of justice in not to proceed.

This interpretation was repeatedly adopted by the Prosecutor, who, since her first request under Art. 15 in the *Kenya situation*, observed that:

> '[u]nder Article 53(1), while the jurisdiction and admissibility are positive requirements that must be satisfied, the interests of justice is a potential countervailing consideration that may produce a reason not to proceed. As such, the Prosecutor is not required to establish that an investigation is in the interests of justice, but rather, whether there are specific circumstances which provide substantial reasons to believe it is not in the interests of justice to do so at that time'.[401]

The PTC followed this approach, highlighting that:

> 'As for the assessment of "interests of justice" under article 53(l)(c), the Chamber considers that its review is only triggered when the Prosecutor decides not to proceed on the basis of this clause. Indeed, unlike the assessment to be made in accordance with article 53(l)(a) and (b), the Prosecutor is not required to positively determine that an investigation is in the interests of justice and does not have to present reasons or supporting material in this respect. It is only when the Prosecutor decides that an investigation would not be in the interests of justice that he or she must notify the Chamber of the reasons for such a decision not to proceed, therefore triggering the review power of the Chamber.'[402]

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[400] Conversely, according to Schabas, even if the Prosecutor is not required to make an affirmative finding about the interests of justice, there is a contradiction between the claim of presumption in favour of investigation and prosecution and the practice of the Office. In his view, the situations in which the Prosecutor has already decided to investigate are few in comparison with the enormous jurisdictional reach of the Court. Thus, the policy of the OTP would rather be not to investigate and not to prosecute, even within the situations under investigation, where the targets fixed by the Office have been narrowed down. SCHABAS W.A., *The International Criminal Court: A Commentary on the Rome Statute, Article 17*, Oxford University Press, 2016.

[401] ICC, OTP, *Situation in the Republic of Kenya, Request for authorisation of an investigation pursuant to Article 15*, 26 Nov. 2009, ICC-01/09-3, para.60. The exactly same wording can be found in ICC, OTP, *Situation in Côte d'Ivoire, Request for authorisation of an investigation pursuant to article 15*, 23 Jun. 2011, ICC-02/11-3, para. 59.

[402] ICC, PTC II, *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 Mar. 2010, ICC-01-09-19, para. 24, fn. 35.

It also added:

> 'Unlike sub-paragraphs (a) and (b), which require an affirmative finding, sub-paragraph (c) does not require the Prosecutor to establish that an investigation is actually in the interests of justice. Indeed, the Prosecutor does not have to present reasons or supporting material in this respect'[403].

This jurisprudence, that clearly reduces the Prosecutor's burden of proof and the PTC's intrusion in her assessment,[404] was followed in all the subsequent decisions under Art. 15[405] until the decision rejecting the request for authorisation to initiate an investigation in Afghanistan. In this decision the PTC II provided an alternative reading, according to which the PTC, in reviewing the Prosecutor's request (thus the Prosecutor in her request) 'must' positively determine that the investigation serves the interests of justice.[406] Following this approach a Prosecutor's request under Art. 15, if not adequately reasoned, should be rejected. Leaving for the moment aside the critical parts of this decision and the unsupported departure of the Chamber from the previous jurisprudence, one may wonder whether the Prosecutor has always applied the interests of justice as a negative requirement.

As of today, the Prosecutor has submitted six requests for investigation under Art. 15 of the Statute. With regards to the first two requests (Kenya[407] and Côte d'Ivoire[408]) the Prosecutor's intervention on the interests of justice was basically limited to a statement to the effect that the Office had not received information according to which an investigation was not in the interests of justice. The same applies to the most recently submitted request (Bangladesh/Myanmar[409]). The Prosecutor's approach is instead more articulated in the other three requests (Georgia, Burundi and Afghanistan).

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[403] *Ibid*., para. 63.

[404] *See* below Chapter III, Section II.

[405] ICC, PTC III, *Situation in Côte d'Ivoire*, *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation in the Republic of Côte d'Ivoire*, 3 Oct. 2011, ICC-02/11-14, para. 207; ICC, PTC I, *Situation in Georgia*, *Decision on the Prosecutor's request for authorisation of an investigation*, 27 Jan. 2016, 02/17-12, para. 58. The reference is implicitly acknowledged also in the decision authorising an investigation in Burundi. *See* ICC, PTC III, *Situation in Burundi*, *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi*, 9 Nov. 2017, ICC-01/17-9, para. 190.

[406] ICC, PTC II, *Situation in the Islamic Republic of Afghanistan*, *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan*, 12 Apr. 2019, ICC-02/17-33, paras 33, 35.

[407] ICC, OTP, *Situation in the Republic of Kenya*, *Request for authorisation of an investigation pursuant to Article 15*, 26 Nov. 2009, ICC-01/09-3, paras 60-61.

[408] ICC, OTP, *Situation in Côte d'Ivoire*, *Request for authorisation of an investigation pursuant to article 15*, 23 Jun. 2011, ICC-02/11-3, paras 59-60.

[409] ICC, OTP, *Situation in the People's Republic of Bangladesh/ Republic of the Union Myanmar*, *Request for authorisation of an investigation pursuant to article 15*, 4 Jul. 2019, ICC-01/19-7, para. 295.

In her request pursuant to Art. 15 for commencing an investigation in Georgia, after the redundant statement that she has not to prove the investigation to be in the interests of justice,[410] quite incongruously the Prosecutor provides the PTC with a relevant number of attachments containing information militating in favour of an investigation:[411] she refers to material sent to her Office where victims of the alleged crimes '[manifest] their interest in seeing justice done in various ways', where human rights organisations highlight 'the desire of victims who have survived the […] conflict to restore justice' and expressly refers to an open letter to the Prosecutor, where 'seven Georgian and international human rights organisations manifested that they "believe […] that these serious crimes do not go unpunished, and that there should be no impunity […]", stressing the "undeniable role" the ICC has to play in ensuring that "justice is delivered to victims"'. Moreover she refers to the wishes of the Georgian Ombudsman and the Parliamentary Assembly of the Council of Europe for independent investigation by the Court into the conflict 'which would be in the basic interest of the people if conducted in a transparent manner' in order to respond to the 'high public demand for justice'. Only in the last part of her assessment the Prosecutor comes back to the lack of information according to which an investigation would not serve the interests of justice and excludes that the tense security and political situation could challenge the investigation.[412]

This inconsistency was not adequately caught by the PTC I, that after having adhered to the previous jurisprudence reaches the conclusion that also in light of the victims' representations 'which overwhelmingly speak in favour of the opening of an investigation' no interest in non-investigating has been detected.[413]

Even if not as detailed as in the Georgia situation, the Prosecutor adopts a similar approach in her request to open an investigation in Burundi. For the first time the Prosecutor does not introduce the section dedicated to the interests of justice stating that her office does not have to prove that investigating is in interest of justice. On the contrary she stresses that 'the seriousness and extent of the alleged crimes […], highlighted by the period of time over which crimes have been and continue to be committed, the identification of the perpetrators as part of the Burundi's security and political apparatus, the recurring patterns of criminality, the limited prospects at the national level for accountability of the persons allegedly most

[410] ICC, OTP, *Situation in Georgia, Request for authorisation of an investigation pursuant to article 15*, 13 Oct. 2015, 02/17-4, para. 338.

[411] *Ibid.*, paras 339-342.

[412] *Ibid.*, paras 343-344.

[413] ICC, PTC I, *Situation in Georgia, Decision on the Prosecutor's request for authorization of an investigation*, 27 Jan. 2016, 01/15-12, para. 58. *See* also POLTRONERI ROSSETTI L., *The Pre-Trial Chamber's Afghanistan Decision*, in *Journal of International Criminal Justice*, 17, 2019, p. 585 at 592.

responsible, all weigh heavily in favour of an investigation'. After this statement, she generally refers to 'multiple letters from Burundian civil society organisations on the incapacity of the judicial system in Burundi to investigate and prosecute international crimes and its lack of independence from the executive, requesting the Prosecutor to open an investigation into crimes committed in Burundi' and marginally informs the Chamber that she did not receive any views that the interests of justice would not be served by an investigation.[414]

In this case, the PTC III authorising the investigation, although recovering the old formula of the 'negative nature' of the requirement concludes that taking into account the views of the victims overwhelmingly speaking in favour of commencing an investigation, the Prosecutor's request has to be granted since she did not determine that initiating an investigation would not serve the interest of justice.[415]

Since the request to commence an investigation in Afghanistan was submitted less than three months after the request regarding situation in Burundi, it is not surprising that the style of the two requests is the same, but with regards to the situation in Afghanistan, the attention given to the circumstances militating in favour of an investigation covers almost four pages.[416] After a general reference to the interest manifested by the victims in seeing justice to be done, the Prosecutor amply refers to the consultation realised in 2005 by the Afghanistan's Independent Human Rights Commission, which reported a strong desire for criminal justice among the surveyed and the necessity of criminal trials for conflict-related human rights violations, 'inter alia in order to prevent future violations, as means to avoid revenge killings, to restore the dignity of the victims, and to bring about reconciliation'. The Prosecutor goes further with a list of percentages demonstrating the importance given by the respondents to a judicial reaction to the conflicts: the report highlights the need for a rapid judicial response in particular for the most serious responsible and their commanders in order to facilitate reconciliation; the link between security and justice; and the disfavour for amnesties for war criminals. In addition, she referred to numerous victims' associations, local organisations, NGOs, the Afghanistan's Independent Human Rights Commission and the Transitional Justice Coordination Group calling upon the Government to refer the situation to the Court or directly for action by the Court.

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[414] ICC, OTP, *Situation in Burundi*, *Request for authorisation of an investigation pursuant to article 15*, 6 Sep. 2017, ICC-01/17-5, paras197-199.

[415] ICC, PTC III, *Situation in Burundi*, *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi*, 9 Nov. 2017, ICC-01/17-9, para. 190. *See also* POLTRONERI ROSSETTI L., *The Pre-Trial Chamber's Afghanistan Decision*, in *Journal of International Criminal Justice*, 17, 2019, p. 585 at 592.

[416] ICC, OTP, *Situation in Afghanistan*, *Request for authorisation of an investigation pursuant to article 15*, 20 Nov. 2017, ICC-02/17-7, paras 364-372.

Although not even the PTC II noted the inconsistency in the Prosecutor's approach when rejecting her request, it expressly stated that its filtering function imposes the Chamber to positively determine[417] whether the investigation would serve the interests of justice, in order to avoid engaging in investigations which are likely to ultimately remain inconclusive.

In conclusion, as of today the analysis of the requests under Art. 15 uncovers a nebulous practice. Requesting the proof of a negative requirement would be a *probatio diabolica* and at least in three situations out of six the Prosecutor felt compelled to integrate her 'negative' assessment of the interests of justice with the available information suggesting that the investigation is in the interests of justice. This new practice has been apparently interrupted by the request for authorisation in the situation in Bangladesh/Myanmar.[418]

Despite the wording of Art. 53(1)(c), a positive determination of the interests of justice (or at least the inclusion in the request for authorisation of information supporting the need for an investigation) is not only recommendable because of its persuasive power. A positive determination is in fact inevitable in the PTC assessment of the clause when the Prosecutor adopts a decision of non-investigation under Art. 53(1)(c). As it will be seen in Chapter III,[419] in case of adoption of a decision not to investigate or prosecute adopted under Art. 53(1)(c) and (2)(c), the effect of the decision is subordinated to the confirmation of the PTC under Art. 53(3)(b) and the PTC may order the Prosecutor to investigate. Therefore, if the PTC disagrees with the Prosecutor on her conclusions on the interests of justice, it is difficult to imagine that the PTC limits its review by saying that the Prosecutor committed a mistake in concluding that the proceeding would not serve the interests of justice without providing reasons supporting why an investigation is in the interests of justice. The PTC would therefore assess the existence of the interests of justice which, in its view, should lead to the intervention of the Court.

[417] *See* also ICC, PTC II, *Situation in the Islamic Republic of Afghanistan*, *Concurring and Separate Opinion of Judge Antoine Kesia-Mbe Mindua*, attached to the *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan*, 31 May 2019, ICC-02/17-33-Anx, para. 23.

[418] A statement on the communications and reports 'stress[ing] the desire [of victims] for justice' appears also in the request for opening an investigation in the situation in Bangladesh/Myanmar. Nevertheless, the focus of the concise section on the interests of justice is predominantly the absence of information militating against an investigation. *See* ICC, OTP, *Situation in the People's Republic of Bangladesh/ Republic of the Union Myanmar*, *Request for authorisation of an investigation pursuant to article 15*, 4 Jul. 2019, ICC-01/19-7, para. 294.

[419] *See* below, Chapter III, Section II, 3. The decision not to investigate or prosecute and the Chamber's power of review.

4. Relevant factors in the assessment of the interests of justice

In order to avoid arbitrary instead of reasoned decisions[420] and in order to give substance to the concept of interests of justice, it is necessary to identify those factors allowing the Prosecutor to make her assessment. As for the gravity of the crime, it has been noted that the identification of *ex ante* criteria would strengthen the legitimacy of the decisions adopted by the Prosecutor.[421] The relevant factors in the assessment of the interests of justice depend on the extent of the notion of interests of justice. But before analysing them, it is preliminary necessary to verify whether the Statute introduces limitations through the adverb 'nonetheless' in Art. 53(1)(c) of the Statute.[422]

The adverb 'nonetheless', that appears only at Art. 53(1)(c), may lead to different interpretations as to the content of the 'interests of justice', because it can oppose: (i) the interests of justice to the gravity of the crime and the interests of the victims;[423] or (ii) the whole content of para. (1)(c) to paras (1)(a) and (b).[424] One thing is deciding whether there are

[420] BERGSMO M., KRUGER P., BEKOU O., *Article 53*, in AMBOS K., *The Rome Statute of the International Criminal Court*, 4th ed., Beck/Hart/Nomos, 2021, mn. 29. The Statute itself seems to avoid arbitrariness by requiring 'substantial reasons' in Article 53(1)(c), i.e. at the situation stage, when the risk for arbitrariness is higher. *See* DE MEESTER K., *Article 53*, in KLAMBERG M. (eds.), *Commentary on the Law of the International Criminal Court*, TOAEP, Brussels, 2017, p. 387 at 393. *See* also *of Justice' Policy Paper*, in *Journal of International Criminal Justice*, 15, 2017, p. 455, at 456; *see* also POLTRONERI ROSSETTI L., *The Pre-Trial Chamber's Afghanistan Decision*, in *Journal of International Criminal Justice*, 17, 2019, p. 585 at 599 referring to the 'commendable attempt' of PTC II to define the interests of justice despite the excessive efficiency-oriented approach.

[421] WEBB P., *The ICC Prosecutor's Discretion Not to Proceed in the 'Interests of Justice'*, in *Criminal Law Quarterly*, 50, 2005, p. 305 at 318. The importance of applying *ex ante* standards applies to all the activities of the Prosecutor. *See* MARSTON DANNER A., *Enhancing the legitimacy and accountability of prosecutorial discretion at the International Criminal Court*, in *American Journal of International Law*, 97, 3, 2003, p. 510 at 538, 541. RASTAN R., *Comment on Victor's Justice & the Viability of* Ex Ante *Standards*, in *The John Marshall Law Review*, 43, 3, 2010, p. 569 at 588 ff. Other commentators find that trying to identify *ex ante* standards is 'little more than obfuscation, a contrite attempt to make the determinations look objective and judicial'. SCHABAS W.A., *Victor's Justice: Selecting Situations at the International Criminal Court*, in *John Marshall Law Review*, 43, 3, 2010, p. 535 at 574.

[422] A detailed linguistic comparative study on the official versions of the Rome Statute (English, French, Spanish, Chinese, Arabic and Russian) made by DE SOUZA DIAS T., *'Interests of justice': Defining the scope of Prosecutorial discretion in Article 53(I)(c) and (2)(c) of the Rome Statute of the International Criminal Court*, in *Leiden Journal of International Law*, 30, 2017, p. 731 at 737-738 highlights that an adversative adverb at article 53(1)(c) appears in three out of six versions (English, Russian and Arabic), in two versions an adverb may or may not suggest opposition (Spanish and Chinese), while no opposition appear in the last version (French).

[423] VARAKI M., *Revisiting the 'Interest of Justice' Policy Pa*per, in *Journal of International Criminal Justice*, 15, 2017, p. 455 at 459; BRUBACHER M.R., *Prosecutorial Discretion within the International Criminal Court*, in *Journal of International Criminal Justice*, 2, 2004, p. 71 at 81 saying that gravity of the crime and interests of victims must be considered 'against' the interests of justice.

[424] DEGUZMAN M.M., *Gravity and Legitimacy of the International Criminal Court*, in *Fordham International Law Journal*, 32, 5, 2008, p. 1400 at 1413; DE SOUZA DIAS T., *'Interests of justice':*

factors militating against an investigation or a prosecution (such as an alternative justice mechanism) and, if they exist, balancing them with the gravity of the crime and the interest of victims (which are therefore supposed to militate in favour of the investigation or the prosecution). Another thing is taking into account the gravity of the crime and the interest of victims as relevant factors in determining that the investigation or the prosecution are not in the interests of justice. In the latter case these factors could also militate against the investigation. In the first scenario it would be impossible to qualify the gravity of the crime and the interests of the victims as relevant factors in the assessment of the interests of justice as they would necessarily be counterweights to the interests of justice. Conversely, in the second case the gravity of the crime and the interests of the victims would be relevant factors in the assessment of the interests of justice and the question would only be whether they are the *only two* relevant factors or not.[425]

4.1. The adverb 'nonetheless' – the first interpretation

A plain reading of Art. 53(1)(c) seems to endorse the first alternative i.e. interpreting 'nonetheless' as opposing the interests of justice to the gravity of the crime and the interests of the victims. This interpretation is supported by a comparative reading of Art. 53(1)(c) and 53(2)(c). Since 'nonetheless' appears only at Art. 53(1)(c), this alternative is consistent with the attempt of maintaining the same relationship respectively between Art. 53(1)(a) and (b) and Art. 53(1)(c); and between Art. 53(2)(a) and (b) and Art. 53(2)(c) of the Statute.

Considering that the main reason for the introduction of the interests of justice clause was allowing the Prosecutor to consider alternative justice mechanisms, it is strange that the drafter did not explicitly refer to them as relevant factors. If the drafters felt compelled to expressly introduce the wording 'taking into account the gravity of the crime and the interests of victims' and not to mention other factors (such as other judicial mechanisms and peace processes that were the reason for the introduction of the interests of justice clause) one may argue that they wanted the Prosecutor to be free to determine the relevant factors under the concept of 'interests of justice' on a case-by-case basis. Further, it could be inferred that the drafters wanted to introduce only two specific counterweights to the interests of justice, namely the gravity of the crime and the interests of victims. Therefore, the Prosecutor would be free to develop the factors militating against an investigation or a prosecution and would be

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*Defining the scope of Prosecutorial discretion in Article 53(I)(c) and (2)(c) of the Rome Statute of the International Criminal Cou*rt, in *Leiden Journal of International Law*, 30, 2017, p. 731 at 736-737.

[425] DE SOUZA DIAS T., *'Interests of justice': Defining the scope of Prosecutorial discretion in Article 53(I)(c) and (2)(c) of the Rome Statute of the International Criminal Court*, in *Leiden Journal of International Law*, 30, 2017, p. 731 at 736-737.

subsequently requested to balance these interests with the gravity of the crime and the interests of victims.

This alternative seems consistent with the consequentiality of the admissibility and the interests of justice assessments. The admissibility assessment includes the assessment of the gravity of the case. If the Prosecutor has already determined that the potential cases are admissible it means that she has already determined that the crimes reach the gravity threshold. Even assuming to include in the gravity assessment the gravity *vis-à-vis* the perpetrators, it seems difficult for a case to pass the admissibility test if the *crime* is not grave enough:[426] as correctly pointed out, international crimes 'are usually crime-driven, not suspect-driven'.[427] Therefore, if it has already been determined that the crime is not only serious enough to be qualified as international crime, but it is serious enough to reach the admissibility standard of gravity as well, it is hardly imaginable that this factor could now militate against the initiation of the investigation. Hence, it makes more sense to refer to the gravity of the crime as a counterweight necessarily supporting the need for investigation or prosecution as opposed to those factors that, under the umbrella of the interests of justice, militate against the investigation or the prosecution.

De Souza, after a careful analysis of the proposal[428] that led to the introduction of the adverb 'nonetheless' in Art. 53(1)(c), notes that it states: '(c) ~~Notwithstanding~~ the gravity of the crime and the interests of victims, there are ~~other~~ substantial reasons to believe that an investigation would not serve the interests of justice' with 'notwithstanding' and 'other' stricken through by hand.[429] The original proposal seemed therefore to oppose gravity of the crime and interests of victims on one side and interests of justice on the other side, even if the deletion of 'other' may slightly suggest a changing of view.

Dukić implies that the different structure of Art. 53(1)(c) and (2)(c) of the Statute may be linked to the different stage of the proceedings they are applicable to. The consequence is that the 'interests of justice' might have a broader scope of application at Art. 53(1)(c) entailing also 'wide-ranging considerations not related directly to a criminal trial' and a more

[426] *See* above, Section III.

[427] SANDERS A., *Summary of Discussion (28 May 1998)*, in ARBOUR L., ESER A., AMBOS K., SANDERS A. (eds.), *The Prosecutor of a Permanent International Criminal Court, International Workshop in co-operation with the Office of the Prosecutor of the International Criminal Tribunals (ICTY and ICTR)*, Freiburg im Breisgau, May 1998, Edition Iuscrim, 2000, p. 121 at 629.

[428] *Proposal submitted by the informal working group of Argentina, Israel, et al. on Article 54.1(c) and Article 54.3(c)*, 16 Jun. 1998.

[429] DE SOUZA DIAS T., *'Interests of justice': Defining the scope of Prosecutorial discretion in Article 53(I)(c) and (2)(c) of the Rome Statute of the International Criminal Court*, in *Leiden Journal of International Law*, 30, 2017, p. 731 at 748.

limited scope at Art. 53(2)(c), exclusively focused on the criminal trial.[430] Therefore, while the interests of justice under Art. 53(1)(c) would include alternative justice mechanisms, to be balanced with the 'external factors' of gravity of the crime and interests of victims, Art. 53(2)(c) would include only the gravity of the crime, the interests of victims and other factors related to the criminal trial. Nevertheless, the same author recognises that the expression 'including' at Art. 53(2)(c) may jeopardise this interpretation and determine the inclusion of any factor (including alternative justice mechanisms) also at the prosecution stage. Moreover, despite the different structure of the two subparagraphs, it seems unadvisable to give two different interpretations of the same concept within the same provision.

4.2. The adverb 'nonetheless' – the second interpretation

According to the second alternative (i.e. interpreting 'nonetheless' as opposing para. (c) to paras (a) and (b)), the gravity of the crime and the interests of the victims are relevant factors in assessing the interests of justice on whether to initiate an investigation or not[431] and they are relevant factors both under Art. 53(1)(c) and (2)(c). But the concept of interests of justice would be broader under Art. 53(2)(c) if compared to Art. 53(1)(c) because it encompasses 'all the circumstances, including the gravity of the crime and the interests of victims and the age or infirmity of the alleged perpetrators and his or her role in the alleged crime'.

This alternative appears simpler than the first one, as it assures that common relevant factors are included in the notion of interests of justice under Art. 53(1)(c) and (2)(c), namely the gravity of the crime and the interests of victims. Despite its reasonableness, this alternative still causes some problems.

The OTP apparently chose this alternative both in the Policy Paper on the Interests of Justice and in the practice. In the Policy Paper the Office expressly refers to the gravity of the crime and the interests of victims' as 'factors to be considered'.[432] In the practice the Prosecutor always refers to the gravity of the crime and the interests of victims (and in

[430] DUKIĆ D., *Transitional justice and the International Criminal Court – in 'the interests of justice'?*, in *International Review of the Red Cross*, 89, 867, 30 Sep. 2007. P. 691 at 697.

[431] *See* ICC, PTC I, *Situation in Darfur, Sudan, Decision on Application under Rule 103*, 4 Feb. 2009, ICC-02/05-185, para. 17, where the Chamber confirms that under article 53(2) of the Statute the gravity of the crime, the interests of victims, the age or infirmity of the relevant person and his or her role in the commission of the alleged crimes are 'issues which are part of the notion of interests of justice'.

[432] ICC, OTP, *Policy paper on the interest of justice*, p. 4.

particular on the latter) as relevant factors in the assessment.[433] The only exceptions are the requests under Art. 15 in the situation in Kenya and Côte d'Ivoire, where the Prosecutor adopted the abovementioned extremely concise approach and simply stated that the Office had not received information that an investigation would not serve the interests of justice. The Chambers never addressed this issue.

Authoritative doctrine suggests that the absence of the age or infirmity of the alleged perpetrator and his or her role in the alleged crime in Art. 53(1)(c) is immaterial because they will often not be known at this stage of the proceedings.[434] Even if this conclusion contradicts the case-law of the Court, which requires the Prosecutor to identify the persons or groups of persons involved when requesting an authorisation under Art. 15 of the Statute and suggesting that the gravity assessment at the situation stage should include also the assessment of 'the persons who bear the greatest responsibility' as well, it is consistent with the view that there is no compelling reason for including the role/position of the alleged perpetrators in the gravity assessment at the situation stage.[435]

The subsequent question is whether the lists of factors set forth in Art. 53(1)(c) and (2)(c) of the Statute are exhaustive or not. The different wording and the expression 'all the circumstances' at Art. 53(2)(c) suggests that the list of para. (1)(c) is exhaustive, while the list of para. (2)(c) is open to other unidentified factors. The assumption that the drafters wanted to include only these two elements in the assessment under Art. 53(1)(c) seems confirmed by the abovementioned proposal originating the addition of the adverb 'nonetheless' and implies that the gravity of the crime and the interests of victims as relevant factors in the assessment on the interests of justice.[436]

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[433] *See* ICC, OTP, *Situation in Georgia*, *Request for authorisation of an investigation pursuant to article 15*, 13 Oct. 2015, 02/17-4, para. 344. ICC, OTP, *Situation in Burundi*, *Request for authorisation of an investigation pursuant to article 15*, 6 Sep. 2017, ICC-01/17-5, paras 197, 198; ICC, OTP, *Situation in Afghanistan*, *Request for authorisation of an investigation pursuant to article 15*, 20 Nov. 2017, ICC-02/17-7, paras 364, 365; ICC, OTP, *Situation in the People's Republic of Bangladesh/ Republic of the Union Myanmar*, *Request for authorisation of an investigation pursuant to article 15*, 4 Jul. 2019, ICC-01/19-7, paras 292, 293.

[434] BERGSMO M., KRUGER P., BEKOU O., *Article 53*, in AMBOS K., *The Rome Statute of the International Criminal Court*, 4th ed., Beck/Hart/Nomos, 2021, mn 29. On the inclusion of the information related to the alleged perpetrators only at the case stage *see* also DE SOUZA DIAS T., *'Interests of justice': Defining the scope of Prosecutorial discretion in Article 53(I)(c) and (2)(c) of the Rome Statute of the International Criminal Court*, in *Leiden Journal of International Law*, 30, 2017, p. 731 at 739.

[435] *See* above, Section III, 2.4.1.2. Gravity in relation to the alleged perpetrator.

[436] DE SOUZA DIAS T., '*Interests of justice': Defining the scope of Prosecutorial discretion in Article 53(I)(c) and (2)(c) of the Rome Statute of the International Criminal Court*, in *Leiden Journal of International Law*, 30, 2017, p. 731 at 748; STEGMILLER I., *The Pre-Investigation Stage of the ICC*, Dunker & Humbolt, Berlin, 2011, p. 381 ff.

Nevertheless, as seen above, the inclusion of the interests of justice clause aimed at allowing the Prosecutor to include in her assessment on the initiation of the investigation and prosecution variable factors, such as transitional justice mechanisms, peace and security. Probably on this basis, the Policy Paper recalls that Art. 53(1)(c) and (2)(c) require the Prosecutor to balance interests considering 'various factors'[437] and it expressly refers to 'other potential considerations under article 53(1)(c) and (2)(c)' that would include other justice mechanisms and peace processes. Therefore, it would be senseless to exclude (at least) these factors from the determination of the interests of justice at the situation stage.[438]

In conclusion, even if it does not enhance the different wording of Art. 53(1)(c) and (2)(c), this second interpretation of 'nonetheless' seems preferable, because it prevents the development of two different notions of interests of justice, including different factors depending on the stage of the proceedings. In order to reach this objective, it would also be necessary to admit in the assessment of the interests of justice additional factors to those listed in Art. 53(1)(c) and (2)(c). The reasonableness of this interpretation will emerge also from the following analysis of the single factors mentioned in Art. 53(1)(c) and (2)(c).

4.3. The relevant factors

It is now possible to turn toward the relevant factors in the interests of justice assessment. The gravity of the crime is supposed to always militate in favour of an investigation or a prosecution because in order to reach this assessment the potential or actual case has already passed the admissibility test. Therefore, the chosen interpretation of the function of the adverb 'nonetheless' under Art. 53(1)(c) would be immaterial. As opposed to Art. 17, the concept of gravity under Art. 53(1)(c) and (2)(c) refers to the 'crime'. In this regard scholars express different opinions. De Meester enhances the different meaning of 'the gravity of the case' under Art. 53(1)(b) and 53(2)(b) and the 'gravity of the crime' under Art. 53(1)(c) and 53(2)(c).[439] He claims that since the assessment of the interests of justice under Art. 53(1)(c) and 53(2)(c) follows a positive determination of the admissibility of the potential or actual cases under Art. 53(1)(b) and 53(2)(b) having two identical criteria would be

[437] ICC, OTP, *Policy paper on the interest of justice*, p. 2.

[438] *See* also VARAKI M., *Revisiting the 'Interest of Justice' Policy Paper*, in *Journal of International Criminal Justice*, 15, 2017, p. 464.

[439] DE MEESTER K., *Article 53*, in KLAMBERG M. (eds.), *Commentary on the Law of the International Criminal Court*, TOAEP, Brussels, 2017, p. 387 at 394.

pointless.[440] This contrast may nevertheless be reconsidered as highlighted above limiting the gravity of the case to the gravity of the crime.[441]

Stegmiller does not focus on the difference between the gravity of the case and the gravity of the crime in the light of the difference between case and crime but rather of the different notion of gravity under Art. 53(1)(b) and 53(1)(c) of the Statute.[442] In his view, while the gravity of the case is 'a (narrow) legal threshold that involves the Prosecutor and ultimately the Judges', the gravity of the crime is 'a wider concept' which 'has to be seen in the light of the overarching concept of the "interests of justice".' He goes further giving to gravity under Art. 53(1)(c) and (2)(c) the function of selecting situations and cases 'due to a comparison *vis-à-vis* other situations' and cases. Therefore, gravity should in this context have a higher threshold. What is not convincing in this distinction is that the interests of justice clause is not a selective criterion: the Prosecutor does not issue decisions highlighting that investigating a situation is not in the interests of justice because she is going to investigate a more serious situation, or that she is not going to prosecute some individuals as it is not in the interests of justice if compared to the prosecution of other individuals. The interests of justice clause is instead an exceptional instrument to be used when all the other factors point to an investigation or a prosecution.[443]

Webb interprets the two notions in the same way and suggests that the relevance of the gravity of the crime in the assessment of both admissibility and interests of justice mirrors the importance of the complementarity regime and the preference towards States primacy.[444] DeGuzman argues that the gravity assessment within the interests of justice clause gives the Prosecutor a second opportunity for declining to investigate situations and cases that do not

[440] *Ibid.*

[441] *See* above, Section III, 2.4.1.3. The 'gravity of the situation' and the 'gravity of the case'.

[442] STEGMILLER I., *The Pre-Investigation Stage of the ICC*, Dunker & Humbolt, Berlin, 2011, p. 333-334. In his view the use of the words 'case' and 'crime' was not meant to be technical, since the word 'case' had to be harmonised with the other provisions of the Statute. Therefore, he only infers that there must be a difference between the two expressions but transfers this distinction on gravity.

[443] DeGuzman adduces further reasons opposing to the possible use of the gravity assessment under Art. 53(1)(c) and 53(2)(c) with selective purposes. These reasons include: (i) that it would be inappropriate for the Prosecutor to decide not to investigate into a situation referred to her Office for example by the UNSC after an assessment of selective gravity; (ii) that the PTC would be allowed to interfere into a personal determination of the Prosecutor, because according to Art. 53(3)(b) the PTC may review on its own motion the Prosecutor's decision not to investigate or proceed adopted under Art. 53(1)(c) and 53(2)(c) and to subordinate the effectiveness of the Prosecutor's decision to its confirmation. DEGUZMAN M.M., *Gravity and Legitimacy of the International Criminal Court*, in *Fordham International Law Journal*, 32, 5, 2008, p. 1400 at 1413.

[444] WEBB P., *The ICC Prosecutor's Discretion Not to Proceed in the 'Interests of Justice'*, in *Criminal Law Quarterly*, 1 Jan. 2005, p. 305 at 327 whose comments precede the Court's jurisprudence distinguishing between case and crime.

meet the required gravity threshold.[445] Turone simply takes for granted that the parameter set forth in Art. 53(1)(c) overlaps with the parameter set forth in Art. 17(1)(d) of the Statute and analyses the consequences of such overlapping.[446] Art. 53(1)(c) would be *lex specialis* with respect to Art. 53(1)(b), hence when the Prosecutor decides not to open an investigation because of insufficient gravity she should always adopt her decision under Art. 53(1)(c). This allows not only to consider the interest of the victims, but it also enables the judicial control over the discretionary decision of the Prosecutor. It is unlikely that the Prosecutor will follow this approach, when the Statute allows her to adopt a decision not subject to the *proprio motu* power of review of the PTC.

The inclusion of the interests of victims in Art. 53(1)(c) and 53(2)(c) is generally treated as a counterweight to the adoption of a decision not to investigate or prosecute, rather than a component of the interests of justice in not investigating or prosecuting. Authoritative literature considers the interests of victims in the 'counterweight perspective' and does not highlight the possible different role that the different structure of Art. 53(1)(c) and 53(2)(c) may assign to this factor.[447] It has been even highlighted that the interests of victims was introduced under pressure of groups focused on the victims of international crimes in order to avoid that the interests of justice clause could be transformed in a tool for circumventing investigation and prosecution irrespective of the suffering of the victims and that its relevance was such that it was the only factor that appeared in the draft discussed in Rome.[448]

A hint of this tendency emerges also from the above-mentioned practice of the OTP introducing a reference to the victims' needs for investigation in at least three out of six requests under Art. 15. This practice is nevertheless partially inconclusive because the Policy Paper on the Interests of Justice, even if not expressly referring to possible interests of victims militating against an investigation or prosecution, evokes not only 'the victim's interest in justice to be done', but also 'other essential interests such as their protection'.[449] The impossibility to completely exclude the interest of victims among those factors discouraging

[445] DEGUZMAN M.M., *Gravity and Legitimacy of the International Criminal Court*, in *Fordham International Law Journal*, 32, 5, 2008, p. 1400 at 1413.

[446] TURONE G., *Powers and Duties of the Prosecutor*, in CASSESE A., GAETA P., JONES J.R.W.D., *The Rome Statute of the International Criminal Court. A Commentary*, vol. 2, Oxford University Press, 2002, p. 1137 at 1153-1154; BITTI G., *Article 53*, in FERNANDEZ J., PACREAU X., *Statut de Rome de la Cour pénale internationale. Commentaire article par article*, Pedone, 2012, p. 1173 at 1222.

[447] BERGSMO M., KRUGER P., BEKOU O., *Article 53*, in AMBOS K., *The Rome Statute of the International Criminal Court*, 4th ed., Beck/Hart/Nomos, 2021, mn 24; 41.

[448] VARAKI M., *Revisiting the 'Interests of Justice' Policy Paper*, in *Journal of International Criminal Justice*, 15, 2017, p. 464. *See* Committee of the Whole, Working Group of Procedural Matters, *Working paper on article 54*, 18 Jun. 1998, A/CONF.183/C.1/WGPM/L.1.

[449] ICC, OTP, *Policy paper on the interest of justice*, p. 5.

an investigation may be deduced from the illustration of the results of the consultation in the Democratic Republic of the Congo, where missions were conducted in order, among others, 'to analyse the probable consequences of OTP action for local populations, including victims and witnesses'.[450]

Indeed, the counterweight approach has been accused of being 'Court-centric' and of introducing a (rebuttable) presumption that investigation and prosecution are always in the interests of victims. In this perspective, Webb admits that the interests of victims may ground a decision not to investigate or not to prosecute.[451] This larger perspective is therefore irreconcilable with an interpretation of 'nonetheless' as opposing the interest of the victims to the interests of justice and requires the interest of the victims to be a relevant element *within* the concept of interests of justice, that may militate for or against investigation or prosecution.

As mentioned, the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime is exclusively relevant with regards to the decision not to prosecute. As already seen, the rationale of its inclusion only at the stage of the initiation of a prosecution is the logic consequence of the existence of an actual case. De Meester suggests that the different formulation of Art. 53(2)(c) *vis-à-vis* Art. 53(1)(c) and this factor in particular gives the Prosecutor the discretion to choose the cases to bring in front of the Court.[452] Discretion would be driven by the objective of focusing on those individuals 'who bear the greatest responsibility'.[453] Even if gravity is a parameter for case selection,[454] it seems incorrect to misidentify it with the interests of justice assessment. The interests of justice clause requires that prosecution *is not* in the interests of justice: the rank of the alleged perpetrator or the role in the commission of the crime, even when not satisfying the threshold justifying the Court's intervention do not go hand in hand with the conclusion that the prosecution is not in the interests of justice. An insufficient threshold may simply lead to the conclusion that prosecuting these individuals at the national level would be more appropriate.

This factor may alternatively point towards the need for prosecuting or not prosecuting. Nevertheless, the provision cannot be fully operational if it is not used in order to

[450] ICC, OTP, *Policy paper on the interest of justice*, p. 6.

[451] *See* WEBB P., *The ICC Prosecutor's Discretion Not to Proceed in the 'Interests of Justice'*, in *Criminal Law Quarterly*, 50, 2005, p. 305 at 329-330 who also refer to national legislations in this sense.

[452] DE MEESTER K., *Article 53*, in KLAMBERG M. (eds.), *Commentary on the Law of the International Criminal Court*, TOAEP, Brussels, 2017, p. 387 at 396.

[453] On the different possible reading of this expression *see* above, Section III, 2.4.1.2. Gravity in relation to the alleged perpetrator.

[454] *See* above, Section III, 3. The prosecutorial strategies: case selection and prioritisation.

pursue the second purpose. For example, it might be used in order not to prosecute a suspect in light of her minor age at the time of the commission of the crime or vice-versa because of the old age of the accused. Therefore, this factor supports the idea that the factors mentioned in Art. 53(2)(c) (and by associations, the factors listed under Art. 53(1)(c)) are not necessarily counterweights to the interests of justice.

As to the role of the suspect in the commission of the crime, the debate is the same that has already been analysed in the section on gravity: relevance can be given alternatively to the official role of the subject or to the actual role in the commission of the crime. Nevertheless, not treating it as a selective criterion,[455] it should be considered only for determining whether non-prosecuting is in the interests of justice on an exceptional basis.

Irrespective of the interpretation given to the adverb 'nonetheless' it is necessary to identify (other) possible relevant factors in the interests of justice assessment: interpreting 'nonetheless' as opposing the interests of justice to the gravity of the crime and the interests of the victims would require giving substance to the interests of justice through other factors; and interpreting 'nonetheless' as opposing the whole content of para. (1)(c) to paras (1)(a) and (b) would still not clarify the possible additional factors to be included in the expression 'all the circumstances' not expressly mentioned under Art. 53(2)(c).

The questions on international peace and security, alternative justice mechanisms and transitional justice have already been addressed.[456] It has also been seen that the OTP includes in the notion of interests of justice the respect of the principle of non-discrimination and the need for ensuring the correct administration of justice.[457]

A first additional factor may be the consideration of the continued existence of the OTP and the ICC itself, should an investigation put in danger their credibility and perception of legitimacy.[458] Deterrence has also been included among relevant factors,[459] but if the interests of justice is a negative requirement militating against investigation and prosecution,

[455] Differently *see* STEGMILLER I., *The Pre-Investigation Stage of the ICC*, Dunker & Humbolt, Berlin, 2011, p. 427.

[456] *See* above, 2. The notion of 'interests of justice'.

[457] *See* above, 2. The notion of 'interests of justice'.

[458] HEINZE A., FYFE S., *Prosecutorial Ethics and Preliminary Examinations at the ICC*, in BERGSMO M., STAHN C., (ed.), *Quality Control in Preliminary Examination: Volume 2*, Brussels, Torkel Opsahl Academic EPublisher, 2018, pp. 59 ff. who refers for example to the risk that the perception of the ICC in most of the African States could compromise their cooperation. Nevertheless they do not argue that it should be a reason for preventing the investigation but only a factor to take into account in a broader assessment.

[459] WEBB P., *The ICC Prosecutor's Discretion Not to Proceed in the 'Interests of Justice'*, in *Criminal Law Quarterly*, 1 Jan. 2005, p. 305 at 343.

deterrence is possibly a factor, or better, a function pursued *through* investigation and prosecution.[460] This conclusion may change if the jurisprudence of the Court would require the Prosecutor (at least in the requests under Art. 15) to positively support the allegation that investigating is in the interests of justice as requested by the PTC II in the decision rejecting the request for investigation in Afghanistan.

Another factor is the allocation of resources.[461] This factor was once again relevant in the assessment of the interests of justice in the decision rejecting the request for authorisation under Art. 15 adopted by the PTC II in the *Afghanistan situation*. Noting the absence of a statutory definition, the PTC II tried to provide its own definition with an eye to the 'overarching objectives underlying the Statute: the effective prosecution of the most serious international crimes, the fight against impunity and the prevention of mass atrocities'.[462] Teleologically interpreting the Statute, the Chamber infers that an investigation would only be in the interests of justice 'if prospectively it appears suitable to result in effective investigation and subsequent prosecution of cases within a reasonable time frame'[463] and that '[a]n investigation can hardly be said to be in the interest of justice if the relevant circumstances are such as to make such investigation not feasible and inevitably doomed to failure'.[464] Therefore, according to this decision, non-legal factors such as the lack of State cooperation and budgetary constraints may preclude the Prosecutor's intervention. Judge Mindua, in his concurring and separate opinion even doubts that these factors can be qualified as extra-legal because of their inclusion within the concept of 'interests of justice'.[465]

[460] Against the use of retribution and deterrence as selective criteria (although not within the concept of interests of justice) *see* HEINZE A., FYFE S., *Prosecutorial Ethics and Preliminary Examinations at the ICC*, in BERGSMO M., STAHN C., (ed.), *Quality Control in Preliminary Examination: Volume 2*, Brussels, Torkel Opsahl Academic EPublisher, 2018, pp. 64 ff.

[461] NSEREKO D.D.N., *Prosecutorial Discretion Before National Courts and International Tribunals*, in *Journal of International Criminal Justice*, 3, 1, 2005, p. 124 at 125; CÔTÉ L., *Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law*, in *Journal of International Criminal Justice*, 3, 2005, p. 162 at 165 The allocation of resources is often associated with the *case* selection, because the *ad hoc* Tribunals did not experience the problem of selecting situations, rather had only to decide who deserved to be tried at the supranational level. Against *see* STEGMILLER I., *The Pre-Investigation Stage of the ICC*, Dunker & Humbolt, Berlin, 2011, p. 379.

[462] ICC, PTC II, *Situation in the Islamic Republic of Afghanistan, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan*, 12 Apr. 2019, ICC-02/17-33, para. 89

[463] *Ibid.*, para. 89

[464] *Ibid.*, para. 90.

[465] See also *Ibid., Concurring and Separate Opinion of Judge Antoine Kesia-Mbe Mindua*, attached to the *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan*, 31 May 2019, ICC-02/17-33-Anx, para. 47.

The question whether allocation of resources could be considered a valid argument for deferring investigation or prosecution had been raised also in front of the ICTY, but the approach was completely different. In the appeals against the Judgment in the *Jelisić case*, Judge Wald appended a partial dissenting opinion[466] expressing her point of view on the majority decision *ordering* the accused to be retried after having recognised the TC's error in the application of the standard provided by Rule 98*bis*. In her view, the appropriate standard would have instead made it clear that a reasonable TC might have found the accused guilty of genocide beyond reasonable doubt. She underlined that the trial Judge receiving the request for confirmation could reject the indictment because she did not believe it was 'a wise use of the tribunal resources or for any other reason other than the lack of a *prima facie* case. Moreover, nowhere in the Statute is any Chamber of the ICTY given authority to dismiss an indictment or any count therein because it disagrees with the wisdom of the Prosecutor's decision to bring the case.'[467] In her view, the Prosecutor had to be given absolute discretion on whether or not to proceed with a trial erroneously cut off by the TC. Recognising such a power to a judiciary subject (in this case the AC) might have 'serious implications for the relationship between the Prosecutor and the Judges'.[468] She further concluded that deciding which cases were worthy to proceed with a retrial and which were not, and *a fortiori* which cases were worthy of investigation and prosecution

> 'is the job of the Prosecutor who must calibrate legal and policy considerations in making her choices on how to utilise limited resources. To recognise a parallel power in judges to accept or reject cases on extra-legal grounds invites challenges to their impartiality as exclusively definers and interpreters of the law. I fear the Appeals Chamber is entering into strange and uncharted terrain today by announcing a power to declare that prosecution of a crime as serious as genocide may not go forward because of extra-record considerations.'[469]

The partial dissenting opinion of Judge Wald clearly testifies a preference for attributing to the Prosecutor the discretionary power to decide how to use the resources at her disposal.

The decision of the PTC II rejecting the opening of an investigation in Afghanistan has been harshly criticised not only for the departure from this (however non-binding) precedent.[470] For example the Chamber ignored that in the Policy Paper on Preliminary

[466] ICTY, AC, *The Prosecutor v. Jelisić, Judgment*, 5 Jul. 2001, IT-95-10-A, *Partial dissenting opinion of Judge Wald.*

[467] *Ibid.*, para. 4.

[468] *Ibid.*, para. 12.

[469] *Ibid.*, para. 14.

[470] HELLER K.J., *One Word for the PTC on the Interest of Justice: Taliban*, in *Opinio Juris*, 13 Apr. 2019.

Examinations the OTP had considered irrelevant the feasibility of effective investigations in the interests of justice assessment.[471] In particular the Paper clarifies that 'feasibility is not a separate factor under the Statute as such when determining whether to open an investigation. Weighing feasibility as a separate self-standing factor, moreover, could prejudice the consistent application of the Statute and might encourage obstructionism to dissuade ICC intervention'. Since the Policy Paper is not a binding document, this argument is not compelling. Rather, it is worth mentioning that according to Art. 42 of the Statute, '[t]he Prosecutor shall have *full authority* over the management and administration of the Office, including the staff, facilities and other resources thereof' (*emphasis added*). It is therefore questionable whether the Chambers have the authority to intervene on the management of the resources of the Office.[472]

Other two factors, that, in the opinion of the PTC II, must be included in the assessment of the interests of justice and that, in this case, militates against the investigation are the probable lack of cooperation from the interested States and the difficulty in finding evidence concerning alleged crimes committed years ago. The latter argument is not a novelty in international criminal justice: from the practice of the *ad hoc* Tribunals it emerges the tendency of concentrating the limited resources on cases supported by adequate evidence.[473]

With regards to the lack of cooperation, it has been noted that rejecting a request for investigation because it would be difficult for the Prosecutor to obtain the necessary assistance would reward those States that publicly and loudly declare their opposition to the action of the Court.[474] Moreover, the decision is accused of ignoring that the difficulties in assessing the responsibility for crimes committed by one side in the conflict do not exclude the possibility to prosecute individuals belonging to other sides and does not take into consideration the

[471] ICC, OTP, *Policy Paper on the Preliminary Examinations*, 1 Nov. 2013.

[472] POLTRONERI ROSSETTI L., *The Pre-Trial Chamber's Afghanistan Decision*, in *Journal of International Criminal Justice*, 17, 2019, p. 585 at 596; WEBB P., *The ICC Prosecutor's Discretion Not to Proceed in the 'Interests of Justice'*, in *Criminal Law Quarterly*, 50, 2005, p. 305 at 342.

[473] JALLOW H.B., *Prosecutorial Discretion and International Criminal Justice*, in *Journal of International Criminal Justice*, 3, 1, 2005, p. 145 at 150, 152; STEGMILLER I., *The Pre-Investigation Stage of the ICC*, Dunker & Humbolt, Berlin, 2011, p. 369.

[474] JACOBS D., *ICC Pre-Trial Chamber rejects OTP request to open an investigation in Afghanistan: some preliminary thoughts on an ultra vires decision*, in *Spreading the Jam*, 12 Apr. 2019; POLTRONERI ROSSETTI L., *The Pre-Trial Chamber's Afghanistan Decision*, in *Journal of International Criminal Justice*, 17, 2019, p. 585 at 599-600; STAHN C., *From Preliminary Examination to Investigation: Rethinking the Connection*, in AGIRRE X., BERGSMO M., DE SMET S., STAHN C., (ed.), *Quality Control in Criminal Investigation*, Torkel Opsahl Academic EPublisher, 2020, p. 37 at 46.

cooperation obligations arising with the opening of an investigation. Other feebler considerations include the inconsistency with other decisions of the Court.[475]

It is worth mentioning that in the *Registered Vessels situation* the Prosecutor herself, attaching her arguments to the gravity rather than to the interests of justice assessment, seems to refer to the to the difficulty of conducting an investigation as an argument supporting a decision not to investigate. In fact, she refers to the scarese prospects of success in case of investigation of IDF high-ranking commanders, inducing the PTC I to affirm that – within the determination of the gravity of potential cases, therefore not within the context of the interest of justice determination – the Prosecutor shall not refer to the obstacles that she may find during the investigation as an argument against the initiation of an investigation.[476] This decision does not exclude the inclusion of these considerations withing the interests of justice assessment.

5. Concluding remarks

The interests of justice has been introduced in the Statute in order to give the Prosecutor a margin of discretion as to the initiation of the investigation or the prosecution. This attribution allows the Prosecutor to take into consideration specific factors which depone against the Court's intervention. Nevertheless, contrary to the importance that is often given to this provision as it should be frequently applied, the application of the interests of justice clause must remain an exception.

The Statute does not provide for a definition of interests of justice. This lacuna has therefore encouraged various interpretations. The historical background of the provision suggests an extensive notion of justice, which does not encompass only criminal justice. Thus, it is possible to include also external factors in this notion. Although without depriving the notion of interests of justice of its inherent fluid nature, trying to give it a clear content is the first way in order to assess whether its use respects the limits of discretion or trespasses into the field of arbitrariness. A limited notion of interests of justice is therefore in the primary interest of the OTP that, when it exceptionally applies it, will not be accused of adopting unpredictable and therefore arbitrary decisions.

[475] *Ibid.*

[476] ICC, PTC I, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia*, *Decision on the 'Application for Judicial Review by the Government of the Comoros'*, 16 Sep. 2020, ICC-01/13-111, paras. 39, 44.

Despite welcoming an extensive notion of justice, the approach of the OTP is correctly focused on judicial considerations. This is consistent with the judicial role of the Prosecutor and with the judicial functions of the Court. Political considerations that are inherent to the context in which the Court acts may play a role in the Prosecutor's determinations, but still a marginal one. Peace and security are secondary objectives and only exceptional circumstances may induce the Prosecutor to depart from her duties. Generally speaking, the Court's action is an instrument assisting the reach of these objectives, while the cases were an investigation or a prosecution should put in danger these values are to be considered exceptional. The existence of a presumption of consistency of the action of the Court with the interests of justice further supports this conclusion.

The presumption in favour of the consistency between investigation and prosecution on the one side and the interests of justice on the other is linked to the negative nature of this requirement. Nevertheless, it has been seen that the practice of the OTP itself shows the tendency to support the allegation that an investigation is in the interests of justice. Even if the reviewing power over the interests of justice assessment will be analysed further in Chapter III, it has also been seen that in the situation rejecting to authorise the opening of an investigation in Afghanistan, the PTC II has officially challenged the negative nature of the interests of justice. As mentioned, the AC reversed the PTC decision not because of its understanding of the interests of justice, but rather because it excluded that the PTC included its assessment at all. For this reason the AC did not engage in an in depth discussion on the interests of justice and simply recalled its negative formulation,[477] Irrespective of the AC's determination, it will be seen that the possibility to positively assess the interests of justice is not completely stranger to the Statute and in particular to the procedure under Art. 53(3). Moreover, in the light of the many problems raised by the ACdecision, should it overrule its jurisprudence, the submission of material supporting the consistency between investigation and prosecution and the interests of justice might reduce the risk for the Prosecutor of a rejection of a request under Art. 15, and the challenge of a decision not to prosecute under Art. 53(2)(c) – that is not affected by the AC decision.

As to the relevant factors in the assessment of the interests of justice in deferring an investigation, the gravity of the crime and the interests of the victims may be counterweights to the interests of justice assessment or components of the interests of justice. The reasons for

[477] ICC, AC, *Situation in the Islamic Republic of Afghanistan, Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan*, 5 Mar. 2020, ICC-02/17-138 OA4, para. 49.

preferring the second alternative, including the need to conceive a unitary concept of interests of justice at Art. 53(1)(c) and 53(2)(c), have been analysed in depth.

Other possible relevant factors which may be taken into account (and in addition to the age or infirmity of the alleged perpetrator and his or her role in the crime with regards to the prosecution) are: the alternative justice mechanisms, which inspired the introduction of the interests of justice clause, the allocation of resources, the cooperation of the States and the perspective of successfully investigations. The relevance of alternative justice mechanisms under Art. 53(1)(c) and (2)(c) is very marginal in practice since it is instead more appropriate to include it under Art. 17 and therefore under Art. 53(1)(b) and (2)(b). As to the allocation of resources and the perspective of success these criteria seem irreconcilable with the purposes of the Court and may possibly be used only as corollary of a decision deferring an investigation or a prosecution. It is inappropriate to make them prevail over criteria such as the gravity of the crime and the interests of victims when they suggest the appropriateness of opening an investigation or prosecution.

CHAPTER III

THE CONTROL OVER THE ACTIVITY OF THE ICC PROSECUTOR

After having analysed the criteria that rule the activity of the Prosecutor, it is possible to turn towards the subjects in charge of overseeing her activity. 'Control' is here used as an umbrella for generally identifying the powers of various subjects that may affect the activity of the Prosecutor, especially when she is allowed to exercise her discretion.

The functions of these subjects are different and of various nature, therefore the intensity of their action over the Prosecutor varies significantly. While some of them may have the intensity of a proper control, as entail the power to make decisions about how the activity of the Prosecutor is run, limit it or make it done in a particular way (e.g. the decision on the budget available to the Office or the deferral of a situation by the UNSC) others are rather expression of a reviewing power, where the reviewing entity, usually a Chamber, examines the Prosecutor's decisions confirming, rejecting or amending them (or requesting amendments). Ultimately, since the Prosecutor does not operate in a *vacuum*, but in a complex and dynamic international environment rich of subjects pursuing similar goals or sharing the same values, the way these subjects look at the action of the Prosecutor may affect her behaviour. The Prosecutor is responsible for her decisions and actions and is expected to explain them even outside the Court: she is therefore primarily accountable of her choices towards the Assembly of the States Parties, the States, the UNSC, NGOs, individuals and the victims. 'Control' and 'accountability' are the two faces of the same coin: on the one side the Prosecutor is accountable towards subjects, that, on the other side, 'control' her activity with different means and degrees of intensity.

Therefore, Section I provides an overview of the 'control' that subjects external to the Court might directly or indirectly have over the activity of the Prosecutor. First, the Office of the Prosecutor, as the whole Court, is subject to the decisions adopted by the Assembly of the States Parties. Second, even if the Court is not an organ of the UN, the UNSC may play a role in the functioning of the Court. Its activities, namely the referral and deferral of situations and some prerogatives in case of investigations on the crime of aggression, are directly linked to the action of the Prosecutor, whose investigations may originate from or prevented by a decision of the Council. The role of States will briefly analysed as far as the referral and the

cooperation is concerned, as other aspects are rather interesting from a sociological perspective, that will not be treated here.[1]

Section II is focused on the judicial control provided by Article 53 of the Statute, distinguishing between: (1) the preliminary examination, (2) the authorisation for the initiation of an investigation under Art. 15, (3) the decision not to investigate or prosecute, and (4) the investigations.

The following two sections will analyses the relationship between the Prosecutor and the PTC in the two subsequent stages of the procedure. Section III will rapidly addressed the judicial control when issuing a warrant for arrest or a summon to appear. Section IV analyses the judicial control exercised in the proceedings under Article 61, at the stage of the confirmation of the charges and immediately following. After a short historical introduction and a clarification of the statutory threshold required at this stage (1), the section deals with the purpose of the confirmation of the charges procedure (2), which is particularly relevant in order to develop the controversial issues of the amendment of the charges after the end of the procedure and especially during the trial (5). The section does not ignore the consequences of a decision declining to confirm the charges or adjourning the hearing (3) and the possible continuation of the investigations after the confirmation procedure (4).

Section V closes the chapter with an analysis of the no-case-to-answer procedure. Although this procedure is not codified in the Statute, it has been used by some Chambers of

[1] For the same reason, the accountability of the Court and of the Prosecutor towards other subjects will not be analysed in detail. Thereabout *see* MARSTON DANNER A., *Enhancing the legitimacy and accountability of prosecutorial discretion at the International Criminal Court*, in *American Journal of International Law*, 97, 3, 2003, p. 510. Generally on the role of NGOs *vis-à-vis* the Court and the OTP, *see* HALL C.K., *Prosecutorial Policy, Strategy and External Relations*, in BERGSMO M., RACKWITZ K., TYANING S. (eds.), *Historical Origin of International Criminal Law: Volume 5*, Torkel Opsahl Academic EPublishers, Brussels, 2017, p. 293 at 365 ff. With regards to the NGOs, it is worth recalling that they played an active role in the redaction of the Rome Statute and their lobbying activity facilitated the introduction of many provisions, especially connected to the participation of the victims to the proceedings. Further, they are important stakeholders on the ground which may collect information and provide it to the OTP under Art. 15 facilitating the activity during the preliminary examinations. It is therefore apparent that the trust of these subjects in the activity of the OTP may be crucial in this phase. In this perspective, Reg. 18 RegOTP states that the OTP shall send acknowledgment in respect of the information received under Art. 15, possibly in a public way, protecting the confidentiality of the information and safeguarding those who provided the information. But accountability towards NGOs is not tantamount of acting on their behalf. Even if NGOs generally protect the interests of victims and the Prosecutor is legally required to take into account their interests (for example in determining whether non-investigating or non-prosecuting is in the interests of justice), her choices may also go in different directions. The Prosecutor is bound by legal parameters and it is important for the OTP to clearly and publicly explain the reasons leading her to adopt decisions within the limits of these parameters. The adoption of clear policies may also result in directing the activity of the organisation on paths useful for the OTP.

the Court in order to close proceedings that were deemed to be too weak to be continued. The introduction of an additional review of the activity of the Prosecutor in the middle of the trial may have consequences on her (and the Chamber's) approach to the confirmation of the charges procedure and on her prosecutorial strategies. Further, if the motion is granted, it may have consequences on the possible re-trial of a suspect. After a comparative overview of the procedure in some national systems ((1) and (2)) and in other international tribunals (3), the sections will analyse the practice of the Court and the major problems deriving from the its introduction in the Court's system (4). The inconsistency of this procedure with the statutory system and the risk of prejudging the case are the most relevant arguments militating against the introduction of this additional judicial review over the activity of the Prosecutor.

CHAPTER III

SECTION I

THE CONTROL FROM EXTERNAL ENTITIES

The subjects external to the Court which will be taken into account in this Section are the Assembly of the States Parties and the UNSC. A closing paragraph is devoted to the so called 'pragmatic accountability' of the Court, which will refer to the relevance of the action of the Court for the States, non-governmental organisations and the public.

1. The Assembly of the States Parties

The Prosecutor's accountability in case of violation of the limits of discretion was an open question at the ICTY and ICTR. As seen in Chapter I, the main issue at the *ad hoc* Tribunals was related to the selection of the individuals to prosecute and the possible allegation of discrimination. The Statutes and the RPE of the Tribunals did not identify specific sanctions, and the appropriateness of judicial rather than political solutions remained unanswered.[2]

Differently from its predecessors, the ICC is based on an international treaty. Therefore, States took active part in its creation and are fundamental actors in its possible future developments. In this regard, Art. 112 of the Rome Statute is entirely devoted to the Assembly of the States Parties, which, despite not being an organ of the Court, plays a meaningful role in its life.[3] Art. 112 provides a list of tasks for the Assembly, where the most relevant for the issue at stake are probably: the decision on the annual budget of the Court; the management oversight to the Presidency, the Prosecutor and the Registry regarding the administration of the Court; and the matters related to the non-cooperation of the States. In addition, the Assembly may establish subsidiary bodies, including an independent oversight mechanism for inspection, evaluation and investigation of the Court, in order to enhance its efficiency and economy.[4] The Assembly of the States Parties is also in charge of amending the Statute, following the procedure described in Articles 121, 122 and 123 of the Rome Statute.

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[2] *See*, for example, the affair related to the case of *The Prosecutor v. Jean Bosco Barayagwiza*. JALLOW H.B., *Prosecutorial Discretion and International Criminal Justice*, in *Journal of International Criminal Justice*, 3, 1, 2005, p. 145 at 155.

[3] For an overview of the functions of the Assembly *see* O'DONOHUE J., *The ICC and the ASP*, in STAHN C. (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015, p. 103. *See* also Chapter I, Section III, 3.2 The independence of the Prosecutor and the legal framework.

[4] On the agreement between the Office of the Prosecutor and the Assembly as to the possibility for the Independent Oversight Mechanism to investigate on the staff of the Office, *see* O'DONOHUE J., *The ICC and the ASP*, in STAHN C. (ed.), *The Law and Practice of the International Criminal Court*,

From this brief overview it is clear that not only the Prosecutor, but the whole Court is accountable towards the Assembly of the States Parties. Nevertheless, it is also clear that the power of the Assembly to decide the budget of the Court, may affect the OTP more than the other organs of the Court.[5] Also during the discussion in Freiburg on the role of the Prosecutor organised in preparation of the Rome Conference, the participants recognised that the withdrawing of founds (which may consist in the behaviour of one or more State, but also of the Assembly as a whole) and the denial of cooperation (which is related to the relationship between the Court and the States) would have been the most relevant means for political pressure on the action of the Office.[6]

With regards to the approval of the budget, the Assembly always refrained from determining the amount to be used by the Prosecutor in each situation. The Prosecutor has always decided by herself how to deploy the resources destinated to her Office. Scholars[7] even believe that allowing the Assembly of the States Parties to determine the amount of resources to be used in each situation by the Prosecutor would be inconsistent with her independence.

As to the direct relation between the Prosecutor herself and the Assembly of the States Parties it has already been seen in Chapter I that the Assembly is responsible for the election and the removal of the Prosecutor. Articles 46 and 47 of the Statute rule the removal from office of the elected officials, including the Prosecutor and the Deputy Prosecutor, and the disciplinary measures, whose ruling is integrated by the RPE. The Prosecutor's accountability to the Assembly of the States Parties does not mean that the Assembly may remove the

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Oxford University Press, 2015, p. 103 at 112-114; TURNER J.I., *Accountability of International Prosecutors*, in STAHN C. (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015, p. 382 at 397.

[5] *See* FORD S., *How Much Money Does the ICC Need?*, in STAHN C. (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015, p. 84.

[6] SANDERS A., *Summary of Discussion (28 May 1998)*, in ARBOUR L., ESER A., AMBOS K., SANDERS A. (eds.), *The Prosecutor of a Permanent International Criminal Court, International Workshop in co-operation with the Office of the Prosecutor of the International Criminal Tribunals (ICTY and ICTR)*, Freiburg im Breisgau, May 1998, Edition Iuscrim, 2000, p. 121 at 621. *See* also MARSTON DANNER A., *Enhancing the legitimacy and accountability of prosecutorial discretion at the International Criminal Court*, in *American Journal of International Law*, 97, 3, 2003, p. 510 at 524.

[7] BERGSMO M., CISSÉ C., STAKER C., *The Prosecutor of the International Criminal Tribunals: The Cases of the Nuremberg and Tokyo Tribunals, the ICTY and ICTR, and the ICC Compared*, in ARBOUR L., ESER A., AMBOS K., SANDERS A. (eds.), *The Prosecutor of a Permanent International Criminal Court, International Workshop in co-operation with the Office of the Prosecutor of the International Criminal Tribunals (ICTY and ICTR)*, Freiburg im Breisgau, May 1998, Edition Iuscrim, 2000, p. 121 at 133. Also O'DONOHUE J., *The ICC and the ASP*, in STAHN C. (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015, p. 103 at 112 notes that Article 112 of the Statute requires the Assembly to perform all its functions without undermining the ability of the Court to function effectively and without undermining its independence.

Prosecutor as it pleases, even if scholars[8] note that it is significant that Judges may be removed only by a two-thirds vote, while the Prosecutor may be removed by a simple majority.

2. The UN Security Council

In the system of the *ad hoc* Tribunals, the UNSC played a significant role as it was their founding organ. The Statutes of the Tribunals themselves included the duty to submit an annual report to the UNSC (and the GA).[9] The budget constraints and the completion strategies significantly influenced the case selection by the Prosecutor.[10] The identification of prosecutorial policies was considered legitimate even by the Prosecutors of these Tribunals which could then '[exercise] independent judgment in such implementation through the cases'.[11] The already mentioned Resolution 1534 of 26 March 2004 requesting the Tribunals to focus on the most senior leaders suspected of being the most responsible for the crimes under their jurisdiction is certainly one of the most relevant means, but it is not the only one. For example, issuing Resolution 1503 of 27 August 2003, the UNSC requested some African States to cooperate with the ICTR in investigating crimes allegedly committed by the members of one of the parties involved in the conflict in Rwanda. Even if this resolution was not addressed to the Prosecutor, it is to be interpreted also as a request for the ICTR Prosecutor to investigate these crimes.

In the system of the ICC, the UNSC does not have budgetary functions and is not allowed to issue policies. It has instead two main functions. First, it has the power to refer a situation to the Court. Second, under Art. 16 it has the power to defer an investigation or a prosecution for a period of twelve months. Additional specific powers are provided with regards to the crime of aggression.

2.1. The Security Council's referral

The drafting history of Art. 13 has already been seen in Chapter I.[12] In this paragraph only the possible issues concerning the Prosecutor's discretion in case of referral by the UNSC

[8] MARSTON DANNER A., *Enhancing the legitimacy and accountability of prosecutorial discretion at the International Criminal Court*, in *American Journal of International Law*, 97, 3, 2003, p. 510 at 524; OLÁSOLO H., *Issues Regarding Article 42*, in BERGSMO M., RACKWITZ K., TYANING S. (eds.), *Historical Origin of International Criminal Law: Volume 5*, Torkel Opsahl Academic EPublishers, Brussels, 2017, p. 423 at. 433.

[9] Art. 34 ICTY Statute and Art. 32 ICTR Statute.

[10] See above Chapter I, Section III, 2.2 The selection of the cases, discretion and limits.

[11] JALLOW H.B., *Prosecutorial Discretion and International Criminal Justice*, in *Journal of International Criminal Justice*, 3, 1, 2005, p. 145 at 151.

[12] *See* above, Chapter I, Section IV, 1.2. The referral by the UN Security Council.

will be addressed. The referral may limit the discretion of the Prosecutor for two reasons: first, one may wonder whether the Prosecutor is free to conduct her own assessment under Art. 53 if the situation has been referred to her Office by a subject having the authority of the UNSC. The question is therefore whether the Prosecutor can autonomously decide on the appropriateness of an investigation or a prosecution according to the legal parameters of the Rome Statute, that do not apply to the UNSC's decision for referral. Second, the referral can limit the object of the investigation, preventing the Prosecutor to freely adopt the decisions she deems necessary according to the results of her investigations.

As to the first issue, it is preliminarily worth recalling that the referral of a situation is a measure adopted by the UNSC under Chapter VII of the UN Charter: it is a measure not involving the use of force adopted in case of threat to the peace, breaches of the peace or an act of aggression. The main difficulty for the adoption of a referral is the veto power of the permanent members of the Council: since three out of the five permanent members are not States Parties to the Rome Statute the chances of a referral are quite low.[13] Louise Arbour describes the referral system as 'fundamentally inconsistent with the principles of the rule of law, in particular that of equality before the law'. In her view, the veto power and the non-signatory status of three out of five permanent members of the Council 'lifts those three Council members above the law in a manner that is fundamentally inconsistent with the notions of universality and voluntary compliance at the heart of the Rome Statute'.[14] However, irrespective the privileges of the permanent members and of the prospects of success of a referral, the composition of the UNSC and the procedure for the adoption of a referral allow the UNSC to act as a political filter,[15] deciding which situations may be dealt with by the Court. For example, despite the attempts of France to pass a resolution for referring the situation in Syria, Russia and China voted against the resolution preventing an intervention of the Court in one of the most tragic conflicts of the recent history.[16] In reality, the difficult

[13] *See* ELARABY N., *The Role of the Security Council and the Independence of the International Criminal Court: Some Reflections*, in POLITI M., NESI G., *The Rome Statute of the International Criminal Court. A challenge to impunity*, Ashgate, 1998, p. 43 at 45. who

[14] ARBOUR L., *The Relationship Between the ICC and the UN Security Council*, in *Global Governance*, 20, 2014, p. 195 at 198-199. *See* also DICKER R., *The International Criminal Court (ICC) and Double Standards of International Justice*, in STAHN C. (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015, p. 3 who refers to the 'double standards' characterising the referrals.

[15] *See* TRAHAN J., *Revisiting the Role of the Security Council Concerning the International Criminal Court's Crime of Aggression*, in *Journal of International Criminal Justice*, 17, 2019, p. 471 at 475.

[16] *See* MÉGRET F., JURDI N.N., *The International Criminal Court, the 'Arab Spring' and Its Aftermath*, in *Diritti Umani e Diritto Internazionale*, 10, 2, p. 375; DICKER R., *The International Criminal Court (ICC) and Double Standards of International Justice*, in STAHN C. (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015, p. 3; TRAHAN J., *The*

approval of a referral makes it apparent that the problem of this mechanism is its risk of ineffectiveness rather than the politicisation of the investigation, preventing the Prosecutor to examine situations that deserve her attention. Conversely, the referral of situations which do not require the Court's intervention is hardly imaginable and the agreement among the members of the Council may be seen as a guarantee of the need for the Court's intervention. However, a selection process operated outside the Court from a political body deserves particular attention.

It has been argued that the Prosecutor's declining to investigate into a situation referred by the UNSC would contravene ICL.[17] This conclusion goes too far. The OTP reasonably deems the preliminary examination a necessary part of her activity irrespective of the mechanism triggering the jurisdiction of the Court. Although the strong political backing could reasonably exclude the need for preliminary examination,[18] only a preliminary examination conducted according to the required legal standards may remove the appearance of politicisation of the investigation that could derive from the origin of the referral.[19] The Statute does not prevent the Prosecutor to decline an investigation or a prosecution in case of referral. Further, Art. 53(3)(a) rules the opposition of the referring entity, including the UNSC, to the decision of the Prosecutor not to investigate or prosecute. Notwithstanding this, the preliminary examinations in the situations in Libya and Darfur referred to the Court by the UNSC were extremely short and it is doubtful that they followed the same procedure of the other preliminary examinations.[20]

As to the second issue, namely the power of the UNSC to limit the object of the investigation, Art. 13 authorises the UNSC to refer to the OTP a 'situation'. The possibility for the UNSC to refer a 'case' was included among the proposals during the drafting of the Statute. Another proposal authorised the UNSC to specify 'as far as possible [...] the

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Relationship Between the International Criminal Court and the U.N. Security Council: Parameters and Best Practices, in *Criminal Law Forum*, 24, 2013, p. 417 at 430; KNOTTNERUS A.S., *The Security Council and the International Criminal Court: the Unsolved Puzzle of Article 16*, in *Netherlands International Law Review*, 61, 2014, p. 195 at 196 also referring to the Sri Lanka civil war.

[17] OHLIN J., *Peace, Security & Prosecutorial Discretion*, in STAHN C. AND SLUITER G. (eds), *The Emerging Practice of the ICC*, Nijhoff, 2009, p. 189.

[18] TURONE G., *Powers and Duties of the Prosecutor*, in CASSESE A., GAETA P., JONES J.R.W.D., *The Rome Statute of the International Criminal Court. A Commentary*, *Vol. II*, Oxford University Press, 2002, p. 1137 at 1148.

[19] *See* TRAHAN J., *Revisiting the Role of the Security Council Concerning the International Criminal Court's Crime of Aggression*, in *Journal of International Criminal Justice*, 17, 2019, p. 471 at 478.

[20] *See* above, p. 145.

circumstances of the alleged crime' accompanying by supporting documentation.[21] As noted among scholars, the referral of a 'case' rather than of a 'situation' is inappropriate for the excessive political pressure that it would cause on the Prosecutor and on the whole Court.[22] The risk of allowing the referral of a case was that the UNSC could reserve the right of detailing the Court's jurisdiction *ratione personae*, affecting not only the principle of equality, but also the objectives that the Court is supposed to pursue (especially the fight against impunity).[23] Nevertheless, even if the UNSC can refer a situation and not a case, there are many ways to tailor the investigation of the Prosecutor that do not necessarily include a limitation *ratione personae*. The restriction of the temporal or territorial parameters – that are typical also in case of referral of a situation – may have a selective effect as well: for example, it can exclude from the investigation the alleged crimes occurred before or after a certain date or in specific regions, indirectly determining the possibility to prosecute specific groups rather than others.[24] But the referral can direct the scope of the investigations in many ways. For example, the introduction of the resolutions referring the *Libya situation* refers to 'violence against the civilian population made from the highest level of the Libyan government'. The mandate to investigate alleged crimes against humanity may explicitly highlight what, in the view of the UNSC, should be the focus of the investigation.[25] Sometimes, as in the *Darfur situation*, the target of the referral is clear from the nature of the alleged crimes or the main events which led to the referral.[26] Moreover, excluding any political connotation in case of a

[21] *See* above, p. 127. Art. 23, *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. II, (Compilation of Proposals)*, G.A. 51st Sess., Supp. No. 22A, A/51/22, 1996, p. 75, 76.

[22] TURONE G., *Powers and Duties of the Prosecutor*, in CASSESE A., GAETA P., JONES J.R.W.D., *The Rome Statute of the International Criminal Court. A Commentary*, vol. 2, Oxford University Press, 2002, p. 1137 at 1144; SCHABAS W.A., *An Introduction to the International Criminal Court*, Cambridge University Press, 2020, pp. 164-165.

[23] JESSBERGER F., GENEUSS J., *The Many Faces of the International Criminal Court*, in *Journal of International Criminal Justice*, 10, 2012, p. 1081 at 1092. *See* also WERLE G., JESSBERGER F., *Principles of International Criminal Law*, 4th ed., Oxford University Press, 2020, p. 121.

[24] In this regard *see* STEGMILLER I., *The Pre-Investigation Stage of the ICC*, Dunker & Humbolt, Berlin, 2011, p. 107. He notes that even if not even the UNSC is allowed to refer specific cases, it enjoys 'wider discretion than a State based on its powers under Chapter VII, and it can delimit a situation more specifically than referring to a States' boundaries, if appropriate.' This power does not correspond to the possibility to issue 'conditional referrals', i.e. referrals, originally suggested to the UNSC by the firs Prosecutor Moreno Ocampo, whose effect was subordinated to specific conditions, especially the impossibility to reach a peace agreement among the parties involved in a conflict. Critically thereon *see* DICKER R., *The International Criminal Court (ICC) and Double Standards of International Justice*, in STAHN C. (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015, p. 3 at 11.

[25] Resolution 1970 (2011), 26 Feb. 2011, S/RES/1970 (2011). For a comment thereon *see* TRAHAN J., *The Relationship Between the International Criminal Court and the U.N. Security Council: Parameters and Best Practices*, in *Criminal Law Forum*, 24, 2013, p. 417 at 449 ff, 454 ff.

[26] Further, the Res. 1593 (2005) excluded from the referral nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Statute. In this regard

referral concerning a crime of aggression would be particularly difficult: in the light of its unilateral commission and of its leadership nature the referral would be tantamount to referring a 'case'.[27]

Nevertheless, if the Statute gives an external body the possibility to make a referral, it would be unrealistic to deny this body the possibility to frame the main parameters of the investigation.[28] According to Stegmiller, should the referral be excessively limited to the point of jeopardising the objectivity of the investigation, the Prosecutor could defer the investigation for lack of impartiality or – if possible – try to extend the scope of the investigations through the authorisation of the PTC acting under Art. 15 of the Statute.[29]

Differently from what will be seen in the next section with regards to the scope of the investigations in case of request for authorisation to the PTC, it seems instead acceptable to allow the Prosecutor to investigate crimes committed after the referral. Indeed, the referral by the UNSC may be a prompt reaction to a situation of crisis and an attempt to prevent the commission of further crimes. If the referral should not reach its preventive objective, the investigation should nevertheless concentrate over crimes strictly connected to the reasons which induced the Council to refer the situation. Even when the investigations focus on crimes committed years after the referral, as happened with regards to Al-Werfalli in the *Libya situation*,[30] the fact that the Council does not raise the question whether the Prosecutor is acting beyond her mandate despite the information on the developments of the investigations put at its disposal by the biannual report that the Prosecutor is required to present to the UNSC may be considered as an implicit endorsement to her activity. The fact that the Council does not even try to defer investigations or prosecutions using its powers under Art. 16 is another revelatory signal.

It is remarkable that in the very early days of the Court, scholars were quite optimistic about the powers which the Prosecutor would have been given in case of referral by the

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see SCHABAS W.A., *An Introduction to the International Criminal Court*, Cambridge University Press, 2020, pp. 163 ff.

[27] *See* below, 2.3. The role of the Security Council with regards to the crime of aggression.

[28] CHAITIDOU E., *The Judiciary and Enhancement of Classification of Alleged Conduct*, in AGIRRE X., BERGSMO M., DE SMET S., STAHN C., (ed.), *Quality Control in Criminal Investigation*, Torkel Opsahl Academic EPublisher, 2020, p. 943 at 951 arguing that the investigations must fall within the boundaries of the referral.

[29] *See* STEGMILLER I., *The Pre-Investigation Stage of the ICC*, Dunker & Humbolt, Berlin, 2011, p. 103 ff. *See* also TRAHAN J., *The Relationship Between the International Criminal Court and the U.N. Security Council: Parameters and Best Practices*, in *Criminal Law Forum*, 24, 2013, p. 417 at 458, 479, who argues that the Court would not be bound by partial referrals, or referrals in contrast with the requirements of Art. 13(b).

[30] The first warrant of arrest is for crimes committed between 2016 and 2017.

UNSC. Turone suggested that the UNSC would have provided the Prosecutor with additional powers than those granted by the Rome Statute in order to perform her activities.[31] He thought that, since the Prosecutor acts under Chapter VII of the UN Charter, she would have benefitted of powers comparable to those of the Prosecutors of the *ad hoc* Tribunals. The idea was therefore that the Prosecutor's independence would have been 'like a "variable quantity"'. Not only these expectations seem to have been disregarded because the UNSC did not provide the Prosecutor with additional powers, but it is self-evident that the UNSC's referral did not even induce the States to increase the cooperation with the OTP:[32] it is enough to remember that the long list of States Parties which 'failed' to arrest, or better, disregarded the Court's order to arrest Omar Al-Bashir.[33] The UNSC itself did not adopt any measure against the States that refused to comply with the Court's orders.[34] It is also regrettable that the UNSC did not grant

[31] TURONE G., *Powers and Duties of the Prosecutor*, in CASSESE A., GAETA P., JONES J.R.W.D., *The Rome Statute of the International Criminal Court. A Commentary*, vol. 2, Oxford University Press, 2002, p. 1137 at 1144-1146; 1169.

[32] SCHABAS W.A., *An Introduction to the International Criminal Court*, Cambridge University Press, 2020, p. 267. *See* also TRAHAN J., *The Relationship Between the International Criminal Court and the U.N. Security Council: Parameters and Best Practices*, in *Criminal Law Forum*, 24, 2013, p. 417 at 462.

[33] ICC, PTC I, *The Prosecutor v. Al Bashir, Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's recent visit to the Republic of Chad*, 27 Aug. 2010, ICC-02/05-01/09-109; ICC, PTC I, *The Prosecutor v. Al Bashir, Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's presence in the territory of the Republic of Kenya*, 27 Aug. 2010, ICC-02/05-01/09-107; ICC, PTC I, *The Prosecutor v. Al Bashir, Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's recent visit to Djibouti*, 12 May 2011, ICC-02/05-01/09-129; ICC, PTC I, *The Prosecutor v. Al Bashir, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir*, 13 Dec. 2011, ICC-02/05-01/09-139; ICC, PTC I, *The Prosecutor v. Al Bashir, Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir*, 13 Dec. 2011, ICC-02/05-01/09-140; ICC, PTC II, *The Prosecutor v. Al Bashir, Decision on the Non-compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir*, 26 Mar. 2013, ICC-02/05-01/09-151; ICC, PTC II, *The Prosecutor v. Al Bashir, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court*, 9 Apr. 2014, ICC-02/05-01/09-19; ICC, PTC II, *The Prosecutor v. Al Bashir, Decision on the Prosecutor's Request for a Finding of Non-Compliance Against the Republic of the Sudan*, 9 Mar. 2015, ICC-02/05-01/09-227; ICC, PTC II, *The Prosecutor v. Al Bashir, Decision on the non-compliance by the Republic of Djibouti with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of the State Parties to the Rome Statute*, 11 Jul. 2016, ICC-02/05-01/09-266; ICC, PTC II, *The Prosecutor v. Al Bashir, Decision on the non-compliance by the Republic of Uganda with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of State Parties to the Rome Statute*, 11 Jul. 2016, ICC-02/05-01/09-267; ICC, PTC II, *The Prosecutor v. Al Bashir, Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender or Omar Al-Bashir*, 11 Dec. 2017, ICC-02/05-01/09-309; ICC.

[34] *See* KNOTTNERUS A.S., *The Security Council and the International Criminal Court: the Unsolved Puzzle of Article 16*, in *Netherlands International Law Review*, 61, 2014, p. 195 at 196-197;

the Prosecutor with adequate financial means in order to perform the investigations in the situations it referred to her Office and, on the contrary, when referring the *Darfur* and *Libya situations* it explicitly declared that the UN had not supported any cost for the investigations. Some scholars even suggest that this practice is contrary to the common purpose of the two organisations.[35]

2.2. The Security Council's deferral

The second and more intrusive power of the UNSC *vis-á-vis* the Prosecutor (and the Court as a whole) is the power of deferral provided for by Art. 16 of the Statute[36] and preventing the Prosecutor to commence or proceed with an investigation or a prosecution for a period of 12 months after the adoption of a Resolution under Chapter VII of the UN Charter. It also adds that the request may be renewed by the UNSC under the same conditions.

This provision is the result of a long negotiation[37] opposing those States which wanted to create a permanent court that resembled to the *ad hoc* Tribunals and that wanted to give to the UNSC some oversight power over the investigative and prosecutorial activities, and those States which wanted to avoid that the permanent members of the UNSC could interfere with the independent activity of the Court. The political nature of the Council's decisions and the judicial nature of the Court were the main reason for concern.[38] The NGOs clearly opposed the introduction of this power: in a report presented to the Preparatory Committee, Amnesty International wrote 'The independence of the prosecutor from any political influence in

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TRAHAN J., *The Relationship Between the International Criminal Court and the U.N. Security Council: Parameters and Best Practices*, in *Criminal Law Forum*, 24, 2013, p. 417 at 465 ff.

[35] RUIZ VERDUZCO D., *The Relationship between the ICC and the United Nations Security Council*, in STAHN C. (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015, p. 30 at 38 ff.; CONDORELLI L., CIAMPI A., *Comments on the Security Council Referral of the Situation in Darfur to the ICC*, in *Journal of International Criminal Justice*, 3, 2005, p. 590 at 593; *see* also TRAHAN J., *The Relationship Between the International Criminal Court and the U.N. Security Council: Parameters and Best Practices*, in *Criminal Law Forum*, 24, 2013, p. 417 at 450-453; TRAHAN J., *Revisiting the Role of the Security Council Concerning the International Criminal Court's Crime of Aggression*, in *Journal of International Criminal Justice*, 17, 2019, p. 471 at 479; and SCHABAS W.A., *An Introduction to the International Criminal Court*, Cambridge University Press, 2020, pp. 165-166 noting that this practice exceeds the authority of the UNSC under the UN Charter, that grants the GA the power to decide the organisation of the UN budget.

[36] *See* EL AMINE H., *Article 16*, in FERNANDEZ J., PACREAU X., *Statut de Rome de la Cour pénale internationale. Commentaire article par article*, Pedone, 2012, pp. 669 ff.

[37] For an overview *see* CRYER R., FRIMAN H., ROBINSON D., VASILIEV S. (eds.), *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, 2019, pp. 153-154; SCHABAS W.A., *An Introduction to the International Criminal Court*, Cambridge University Press, 2020, pp. 176-177.

[38] BERGSMO M., PEJIC J., ZHU D., *Article 16*, in AMBOS K., *The Rome Statute of the International Criminal Court*, 4th ed., Beck/Hart/Nomos, 2021, mn 1.

conducting the investigation and prosecution must be effectively guaranteed by ensuring that no political body may prevent the prosecutor from initiating or continuing an investigation or prosecution. Decisions whether to approve an indictment should be solely the responsibility of the court.'[39]

Since the first drafts of the Statute, it was clear that the UNSC should have had some link with the Court, in the light of its responsibility to deal with situations threatening peace and security.[40] Art. 23(3) of the Draft Statute of 1994 gave the UNSC the power to prevent the prosecution in case of situations being dealt with by the UNSC as a threat to or breach of the peace or an act of aggression, unless it decided otherwise. The provision was deemed necessary in order to coordinate the action of the two bodies: the rationale was to leave the UN organ the power to take the necessary measures under Chapter VII and leaving the possibility for prosecution revive when the action was terminated. On the other hand, members of the Commission highlighted that this provision conferred a veto power over the commencement of a prosecution to the UNSC and said that it was 'undesirable' to subordinate the prosecution to political decisions.[41]

The Report of the *Ad Hoc* Committee of 1996 testifies that there were three positions: according to the first view it would have been unacceptable for the Court to act in defiance of the Charter and to interfere with the delicate matters of the UNSC. Therefore, the power of deferral should not be limited to those situations under Chapter VII, but to all the situations under the Council's scrutiny. According to the second view, the power of deferral infringed the judicial independence of the Court and had to be deleted. The third view suggested the need to preserve Art. 23 of the Draft but to better define the conditions for its use.[42]

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[39] AMNESTY INTERNATIONAL, *The International Criminal Court – Making the right choice, Part I*, Jan. 1997, 3rd Preparatory Committee meeting, 11-21 Feb. 1996.

[40] WILMSHURST E., *The International Criminal Court: The Role of the Security Council*, in POLITI M., NESI G., *The Rome Statute of the International Criminal Court. A challenge to impunity*, Ashgate, 1998, p. 39.

[41] Art. 23 Commentary, *Report of the ILC on the work of its forty-sixth session, Draft Statute for an International Criminal Court with commentaries*, 2 May – 22 Jul. 1994, G.A. 49th Sess. Supp. No. 10, A/49/10, 1994. Authoritative scholars note nevertheless that the draft did not expressly required the Council to adopt a resolution in order to defer a situation. BERGSMO M., PEJIC J., ZHU D., *Article 16*, in AMBOS K., *The Rome Statute of the International Criminal Court*, 4th ed., Beck/Hart/Nomos, 2021, mn 2.

[42] *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I, (Proceedings of the Preparatory Committee During March-April and August 1996)*, G.A. 51st Sess., Supp. No. A/51/22, 1996, paras 140 ff., p. 33. *See* also BERGSMO M., PEJIC J., ZHU D., *Article 16*, in AMBOS K., *The Rome Statute of the International Criminal Court*, 4th ed., Beck/Hart/Nomos, 2021, mn 3.

In 1996, Singapore proposed to amend Art. 23 of the Draft, introducing the power of the UNSC to prevent the Court not only from commencing but also from proceeding with a prosecution, and introduced the same restriction for the investigation. On the other side, the proposal reversed the presumption, requesting the UNSC to expressly prevent the intervention of the Court.[43] This proposal was followed by another one by Costa Rica,[44] requesting the adoption by the UNSC of a 'formal and specific decision [...] limited for a certain period of time'. Malaysia proposed that the proceedings might be deferred if the UNSC had decided that there was a threat to or breach of peace or an act of aggression and had decided to take measures under Chapter VII of UN Charter. Nevertheless, if the UNSC did not take action 'within a reasonable time', the Court's jurisdiction revived.[45] It was the Canadian delegation which proposed to introduce a fix (even if renewable) term of twelve months during which the UNSC could defer an investigation or a prosecution by the Court.[46] But the turning point in the negotiations was the changing attitude of a permanent member of the UNSC: the UK.[47]

During the Committee of the Whole, Spain proposed a more articulated text that reduced the power of the UNSC. The Council was only allowed to 'call on the Court to desist from commencing or continuing the proceedings for a specified [renewable] period not exceeding twelve months'. Moreover, the UNSC had to 'actively' deal with a dispute or a situation affecting international peace and security directly related to the matter referred to the Court in order to prevent the Court's intervention. The main difference was that the Court, ideally the PTC, was responsible for deciding on the deferral after having heard the Prosecutor and the interested parties. Moreover, the Court was entitled to adopt all necessary measures in order to preserve the evidence and 'any other precautionary measures in the interests of justice'. Ultimately, the inactivity of the UNSC during the suspension might lead the court to 'continue its consideration of the case'.[48]

During the Rome Conference, the actual version of Art. 16 was ultimately adopted, and the drafters, aware that the possible deferral might jeopardise the investigations, also

[43] *Proposal submitted by Singapore for Article 23*, 27 Aug. 1996, A/AC.249/WP.51.

[44] *Proposal by Costa Rica on Article 23*, 11 Aug. 1997, Non-Paper/WG.3/No.23.

[45] *Proposal of the Delegation of Malaysia, Article 23*, 11 Aug. 1997, Non-Paper/WG.3/No.17.

[46] *Proposal submitted by Canada for article 23*, 18 Aug. 1997, Non-Paper/WG.3/No. 18. Against the introduction of a fix term *see* the U.S. delegation, *Intervention on Bureau Proposal on Part 2*, 13 Jul. 1998, A/CONF.183/C.1/L.59.

[47] *Proposal by the United Kingdom of Great Britain and Northern Ireland: Triggering Mechanism*, 25 Mar. 1998, UN Doc. A/ AC249/1998/WG,3/DP. 1.

[48] 'No investigation or prosecution may be commenced or proceeded with under-this Statute [for a period of twelve months] after the Security Council[, acting under Chapter VII of the Charter of the United Nations,] has requested the Court to that effect; that request may be renewed by the Council under the same conditions.' *Proposal for article 10 submitted by Spain, Role of the Security Council*, 25 Jun. 1998, A/CONF.183/C.1/L.20.

discussed the appropriateness of introducing a system for the possible preservation of evidence.[49] Even if Schabas notes that the actual version of Art. 16 is a 'much diluted version' of the provision contained in the Draft presented by the ILC,[50] usually literature focuses on the significant consequences that Art. 16 may have on the activity of the Court, referring to it as entailing a 'strong power of obstruction'[51] and noting that the solution finally adopted in Rome is significantly more radical than other alternatives including only the Prosecutor's obligation to consider the consistency of the investigation with a decision of the UNSC.[52] Elaraby even notes that Art. 16 does not limit the scope of a deferral to a specific situation, with the consequence that the Council's decision may potentially paralyse the whole functioning of the Court.[53] One possible shelter to the arbitrary decisions of the UNSC is the required link between the power granted to the UNSC by Art. 16 and the need to ensure peace pursued by the Resolution, which must be adopted under the umbrella of Chapter VII of the UN Charter.[54] It has even been noted that preventing the UNSC from deferring a situation risks compromising the maintenance of peace and security if two institutions such as the UNSC and the ICC adopt contrasting approaches.[55] Be as it may, the Prosecutor (and more in general the Court) cannot discretionally decide whether to comply with the request of the UNSC or not, not even if the Resolution is motivated by political reasons. On a positive note, the actual formulation allows

[49] *Committee of the Whole, Bureau Proposal*, 10 Jul. 1998, A/CONF.183/C.1/L.59.

[50] SCHABAS W.A., *Victor's Justice: Selecting Situations at the International Criminal Court*, in *John Marshall Law Review*, 43, 3, 2010, p. 535 at 540.

[51] TURONE G., *Powers and Duties of the Prosecutor*, in CASSESE A., GAETA P., JONES J.R.W.D., *The Rome Statute of the International Criminal Court. A Commentary*, vol. 2, Oxford University Press, 2002, p. 1137 at 1141.

[52] *Ibid.*; BERGSMO M., PEJIC J., ZHU D., *Article 16*, in AMBOS K., *The Rome Statute of the International Criminal Court*, 4th ed., Beck/Hart/Nomos, 2021, mn 7-8; RUIZ VERDUZCO D., *The Relationship between the ICC and the United Nations Security Council*, in STAHN C. (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015, p. 30 at 53.

[53] ELARABY N., *The Role of the Security Council and the Independence of the International Criminal Court: Some Reflections*, in POLITI M., NESI G., *The Rome Statute of the International Criminal Court. A challenge to impunity*, Ashgate, 1998, p. 43 at 45-46.

[54] CRYER R., FRIMAN H., ROBINSON D., WILMSHURST E. (eds.), *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, 2014, p. 170; KNOTTNERUS A.S., *The Security Council and the International Criminal Court: the Unsolved Puzzle of Article 16*, in *Netherlands International Law Review*, 61, 2014, p. 195 at 198, 204 ff.; TRAHAN J., *The Relationship Between the International Criminal Court and the U.N. Security Council: Parameters and Best Practices*, in *Criminal Law Forum*, 24, 2013, p. 417 at 435. *See* also RUIZ VERDUZCO D., *The Relationship between the ICC and the United Nations Security Council*, in STAHN C. (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015, p. 30 at 57-60.

[55] WILMSHURST E., *The International Criminal Court: The Role of the Security Council*, in POLITI M., NESI G., *The Rome Statute of the International Criminal Court. A challenge to impunity*, Ashgate, 1998, p. 40. Similarly, EL AMINE H., *Article 16*, in FERNANDEZ J., PACREAU X., *Statut de Rome de la Cour pénale internationale. Commentaire article par article*, Pedone, 2012, p. 644 at 674, noting the need for the Council to demonstrate the link between the action of the Court and the threat against peace which enable it to adopt a resolution under Chapter VII of the Charter.

any permanent member of the Council to exercise its veto power granting the Prosecutor the possibility to continue her activity.[56]

It is apparent that the analysis of Art. 16 conducted to this point affects the discretion of the Prosecutor as far as she is prevented to investigate or prosecute despite her positive determination on the need for an investigation or a prosecution.

As to the deferral of investigations,[57] the application of Art. 16 has been invoked by some States in the situations of Libya, Darfur, Central African Republic and Kenya.[58] Further, political tension raised when the USA obtained the approval by the UNSC of Resolution 1422 (2002) and Resolution 1487 (2003) aiming at deferring all the investigations involving current or former officials or personnel from contributing States not party to the Rome Statute over acts or omissions relating to a UN established or authorised operation. The effect of these Resolutions was basically the same of a limited referral, but their non-conformity to Art. 16 has been widely discussed among scholars.[59] Its aspired general applicability and the absence

[56] In this regard *see* EL AMINE H., *Article 16*, in FERNANDEZ J., PACREAU X., *Statut de Rome de la Cour pénale internationale. Commentaire article par article*, Pedone, 2012, p. 644 at 673.

[57] For an analysis of the marginal activities that the Prosecutor could conduct despite the referral *see* KNOTTNERUS A.S., *The Security Council and the International Criminal Court: the Unsolved Puzzle of Article 16*, in *Netherlands International Law Review*, 61, 2014, p. 195 at 200-203.

[58] In this regard *see* RUIZ VERDUZCO D., *The Relationship between the ICC and the United Nations Security Council*, in STAHN C. (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015, p. 30 at 52-57; SCHABAS W.A., *An Introduction to the International Criminal Court*, Cambridge University Press, 2020, pp. 177 ff.; TRAHAN J., *The Relationship Between the International Criminal Court and the U.N. Security Council: Parameters and Best Practices*, in *Criminal Law Forum*, 24, 2013, p. 417 at 433 ff., 447 ff.; KNOTTNERUS A.S., *The Security Council and the International Criminal Court: the Unsolved Puzzle of Article 16*, in *Netherlands International Law Review*, 61, 2014, p. 195 at 208 ff., who analyses in depth the attempted deferrals. On the specific provisions in Resolution 1497 (2003) concerning the situation in Liberia and in Resolution 1593 (2005) and Resolution 1970 (2011) respectively referring to the Court the situation in Darfur and Libya *see* BERGSMO M., PEJIC J., ZHU D., *Article 16*, in AMBOS K., *The Rome Statute of the International Criminal Court*, 4th ed., Beck/Hart/Nomos, 2021, mn. 11. *See* also EL AMINE H., *Article 16*, in FERNANDEZ J., PACREAU X., *Statut de Rome de la Cour pénale internationale. Commentaire article par article*, Pedone, 2012, p. 644 at 678 ff; WERLE G., JESSBERGER F., *Principles of International Criminal Law*, 4th ed., Oxford University Press, 2020, p. 122.

[59] *See* CRYER R., WHITE N.D., *The Security Council and the International Criminal Court: Who's Feeling threatened?*, in *International Peacekeeping: The Yearbook of International Peace Organisations*, 8, 2002, p. 143; CRYER R., *Prosecuting International Crimes: Selectivity and the International Law Regime*, Cambridge University Press, 2005, p. 227; STAHN C., *The Ambiguities of Security Council Resolution 1422 (2002)*, in *European Journal of International Law*, 14, 1, p. 85; SAROOSHI D., *The Peace and Justice Paradox: The International Criminal Court and the UN Security Council*, in MCGOLDRICK D., ROWE P., DONNELLY E. (eds.), *The International Criminal Court*, Hart, 2004, p. 95 at 115; MCGOLDRICK D., *Poilitical and Legal Responses to the ICC*, in MCGOLDRICK D., ROWE P., DONNELLY E. (eds.), *The International Criminal Court*, Hart, 2004, p. 389 at 415 ff. LAVALLE R., *A Vicious Storm in a Teacup: The Action by the United Nation Security Council to Narrow the Jurisdiction of the International Criminal Court*, in *Criminal Law Forum*, 14, 2, 2003, p. 195; KNOTTNERUS A.S., *The Security Council and the International Criminal Court: the Unsolved Puzzle of Article 16*, in *Netherlands International Law Review*, 61, 2014, p. 195 at 197; TRAHAN J., *The*

of a link with a specific situation make them inconsistent with the situation-specific approach of Art. 16. Moreover, they granted 'immunity to a whole group of actors in advance and irrespective of any concrete risk of indictment or prosecution'[60] in contrast with the historical development of the provision. Indeed, the Council cannot defer specific (categories of) crimes or events, as well as categories of persons or future crimes, but only whole situations under the Court's scrutiny.[61] Notwithstanding this, it has been noted that even if the Court may declare the inconsistency of this kind of resolutions with the Statute, the Court would not have the power to nullify them and its possible opposition would foment counterproductive criticism.[62]

As to the power of the UNSC to prevent the prosecution, in the light of the complementarity principle and considering that the Prosecutor is required to prosecute the people 'most responsible', it may particularly affect the discretion of the Prosecutor. The decision to prosecute is indeed adopted at an advanced stage of the Prosecutor's activity. A resolution preventing the prosecution may even be adopted after the issuance of a warrant of arrest against one or more individuals by the Court. But even worst, the deferral can be issued when the accused it in the Court's custody, raising the question whether he should be released or not, and possibly on which basis.[63] A resolution adopted at such a later stage clearly interferes with the choices made by the Prosecutor, possibly irreparably compromising her chances to fulfil her mandate.

Relationship Between the International Criminal Court and the U.N. Security Council: Parameters and Best Practices, in *Criminal Law Forum*, 24, 2013, p. 417 at 433 ff.

[60] STAHN C., *The Ambiguities of Security Council Resolution 1422 (2002)*, in *European Journal of International Law*, 14, 1, p. 85 at 90. Stahn further notes the dubious consistency with the Statute of the quasi-permanent nature of the deferral in the light of the 'intent clause' to regularly renew the deferral.

[61] KNOTTNERUS A.S., *The Security Council and the International Criminal Court: the Unsolved Puzzle of Article 16*, in *Netherlands International Law Review*, 61, 2014, p. 195 at 198-199; TRAHAN J., *The Relationship Between the International Criminal Court and the U.N. Security Council: Parameters and Best Practices*, in *Criminal Law Forum*, 24, 2013, p. 417 at 441-443.

[62] BRUBACHER M.R., *Prosecutorial Discretion within the International Criminal Court*, in *Journal of International Criminal Justice*, 2, 2004, p. 71 at 87. *See* also RUIZ VERDUZCO D., *The Relationship between the ICC and the United Nations Security Council*, in STAHN C. (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015, p. 30 at 38. According to Knottnerus, the Court would still maintain the power to judicially review the Council's decision in order to verify the existence of the requirements provided for by Art. 16, but could not review the Council's determinantion of the threat to peace and security that grounds the referral. KNOTTNERUS A.S., *The Security Council and the International Criminal Court: the Unsolved Puzzle of Article 16*, in *Netherlands International Law Review*, 61, 2014, p. 195 at 200. *See* also TRAHAN J., *The Relationship Between the International Criminal Court and the U.N. Security Council: Parameters and Best Practices*, in *Criminal Law Forum*, 24, 2013, p. 417 at 439-441.

[63] *See* EL ZEIDY M., *The United States Dropped the Atomic Bomb of Article 16 on the ICC Statute: Security Council Power of Deferrals and Resolution 1422*, in *VanderBilt Journal of Transnational Law*, 35, 2002, p. 1503 at 1515; KNOTTNERUS A.S., *The Security Council and the International Criminal Court: the Unsolved Puzzle of Article 16*, in *Netherlands International Law Review*, 61, 2014, p. 195 at 202.

Nevertheless, temporarily putting aside the abovementioned possible interferences of the UNSC in the activity of the Court, Human Rights Watch has interestingly provided for a different reading of Art. 16. The NGO suggests that the power accorded to the UNSC under Art. 16 can be used also in order to limit the discretion of the Prosecutor to adopt a decision *not to* investigate and prosecute under Art. 53(1)(c) and 53(2)(c) for the benefit of alternative justice mechanisms and amnesties.[64] In its view, Art. 16 limits the power of adoption of a decision freezing the investigations or the prosecutions to safeguard peace and security to the UNSC. If the drafters wanted to grant the same power to the Prosecutor, they would have included it in the Statute as they did for the UNSC. Consequently, the Prosecutor cannot adopt an analogous decision under Art. 53. The absence of such a power would preserve the Prosecutor's impartiality and would prevent her from adopting decisions based on political factors. Brubacher points out that if the UNSC does not take measures in situations concerning peace and security, it is unlikely that the Prosecutor will make her own assessment of these factors.[65] However, an unsuccessful attempt of the UNSC to adopt a resolution as envisaged by Art. 16 may put the Prosecutor in the difficult position of deciding whether to continue with the investigation or the prosecution or not.

2.3. The role of the Security Council with regards to the crime of aggression

This is not the right place to illustrate the troubled history of the drafting of the crime of aggression or to describe the problematic aspects of substantive criminal law connected to the definition of this crime. From the perspective of the substantive law, Art. 8*bis* of the Statute includes two references to the U.N. system: the first one in the definition of the crime of aggression, the second one in the definition of the act of aggression. These two references are respectively to the Charter of the United Nations and the Resolution 3314 (XXIX) of the General Assembly of 14 December 1974. Notwithstanding this, the purpose of this paragraph is limited to the illustration of the possible consequences that the decisions of the UNSC may have over the activity of the Prosecutor with regards to the crime of aggression.

The exercise of the jurisdiction over the crime of aggression includes a different ruling depending on whether the intervention of the Court is triggered by a State referral and information under Art. 15 or by a referral of the UNSC. In the first case, Art. 15*bis* of the Statute provides for a specific procedure which still involves the UNSC. According to para.

[64] HUMAN RIGHTS WATCH, *Policy Paper, The Meaning of ' the Interests of Justice' in Article 53 of the Rome Statute.*

[65] BRUBACHER M.R., *Prosecutorial Discretion within the International Criminal Court*, in *Journal of International Criminal Justice*, 2, 2004, p. 71 at 83.

(6), where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression,[66] she shall first ascertain whether the UNSC has made a determination of an act of aggression committed by the State concerned. In order to make such ascertainment, the Prosecutor shall notify the UN Secretary-General of the situation before the Court, including any relevant information and document. At this stage, there must be a continuous communication between the Court, and in particular the OTP, and the UNSC, which must be constantly apprised of the Prosecutor's activities. The determination of the commission of an act of aggression is therefore left to the UNSC through a resolution adopted under Chapter VII of the UN Charter.[67] It is important to remember that the 'political determination' of the existence of an act of aggression is a preliminary requirement for the exercise of the jurisdiction, but does not replace the necessary 'legal determination' made by the Court on the aggressive nature of the act as expressly stated at Art. 15*bis*(9).

Art. 15*bis*(7) further states that, when the UNSC has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression. Conversely, if the UNSC has not yet adopted a resolution qualifying the act as an act of aggression, the Council has six months for adopting a resolution. In order not to completely prevent the Prosecutor from investigating, if the Council does not issue its determination within six months or in case the Council determines that no act of aggression has been committed, the Prosecutor may proceed with the investigation on the crime of aggression only if authorised by the Pre-Trial Division in accordance with the procedure contained in Art. 15. In an abundance of caution, the Statute also reaffirms the possibility for the UNSC to prevent the initiation of the investigation by recurring to the mechanism provided for at Art. 16.

This procedure clearly applies only to the crime of aggression. Therefore, if the State referral also concerns other crimes under Art. 5, or the Prosecutor has reasonable grounds to believe that other crimes within the jurisdiction of the Court have been committed, she can initiate an investigation or request for authorisation to the PTC in order to investigate those crimes.

[66] As pointed out by scholars, the reasonable basis standard is the same provided for in Art. 15, but differently from Art. 15 it only refers to the commission of a crime of aggression, and not to any crime under Art. 5. ZIMMERMANN A., FREIBURG E., *Article 15*bis, in AMBOS K., *The Rome Statute of the International Criminal Court*, 4th ed., Beck/Hart/Nomos, 2021, mn 46.

[67] ZIMMERMANN A., FREIBURG E., *Article 15*bis, in AMBOS K., *The Rome Statute of the International Criminal Court*, 4th ed., Beck/Hart/Nomos, 2021, mn. 47. They note that the expression 'determination' in connection with 'act of aggression' are taken from Art. 39 of the Charter, excluding therefore that the determination may be done by the President of the UNSC on behalf of the Council.

Art. 15*ter* rules the exercise of jurisdiction over the crime of aggression in case of referral by the UNSC. The source of the referral clearly excludes the procedure of notification included in Art. 15*bis* and does not require the previous determination by the UNSC of the aggressive nature of the act.[68] As correctly noted, it is not clear whether the Prosecutor may investigate alleged acts of aggression in any situation referred to her Office by the UNSC, or whether the referral must expressly request the Prosecutor to investigate on the crime of aggression.[69] In this second case, the problem whether the UNSC referral may be selective, and therefore materially, temporally, spatially and possibly personally limiting the Prosecutor's investigation revives. Art. 13(b), which remains the provision ruling the UNSC's referral, uses the expression 'situation' and the practice shows that – despite some hints contained in the Resolutions – the Council did not really specified the crimes over which the Court could exercise jurisdiction. Nevertheless, as suggested above and authoritatively argued by some scholars a temporally limited referral excluding the possible investigations over the crime of aggression may fall within the prerogatives of the UNSC.[70] This solution is more appropriate than, for example, imposing personal limitations as the Council tried to do when referring the situations in Libya and Darfur: personally limiting the jurisdiction of the Court, the Council adopts a selective approach which is more apt to the Prosecutor rather than to a political body. As seen above, there are nevertheless various ways for reaching the same result.

2.4. Concluding remarks

It is not easy to draw conclusions with regards to the role of the UNSC on the Prosecutor's activity. Scholars are divided on this issue as well. Some of them[71] describe the Court as 'largely independent' in comparison with the *ad hoc* Tribunals; others, including a former ICTY Judge (later appointed at the ICC),[72] expected the Prosecutor of the ICC to be 'more closely supervised' by the UNSC rather than his colleagues at the *ad hoc* Tribunals, and

[68] *See* TRAHAN J., *Revisiting the Role of the Security Council Concerning the International Criminal Court's Crime of Aggression*, in *Journal of International Criminal Justice*, 17, 2019, p. 471 at 476 who notes the importance of this latter aspect for preserving the independence of the judicial determination.

[69] ZIMMERMANN A., FREIBURG E., *Article 15*ter, in AMBOS K., *The Rome Statute of the International Criminal Court*, 4th ed., Beck/Hart/Nomos, 2021, mn 6. SCHABAS W.A., *The International Criminal Court: a commentary on the Rome Statute*, 2nd ed., Oxford University Press, 2016, p. 431.

[70] ZIMMERMANN A., FREIBURG E., *Article 15*ter, in AMBOS K., *The Rome Statute of the International Criminal Court*, 4th ed., Beck/Hart/Nomos, 2021, mn 7. More cautious about limited referral TRAHAN J., *Revisiting the Role of the Security Council Concerning the International Criminal Court's Crime of Aggression*, in *Journal of International Criminal Justice*, 17, 2019, p. 471 at 477

[71] MARSTON DANNER A., *Enhancing the legitimacy and accountability of prosecutorial discretion at the International Criminal Court*, in *American Journal of International Law*, 97, 3, 2003, p. 510.

[72] JORDA C. *The Major Hurdles and Accomplishments of the ICTY – What the ICC Can Learn from them*, in *Journal of International Criminal Justice*, 2, 2004, p. 572 at 581.

found it was not regrettable since international society remains a society of sovereign States. Others even talk about a system where the UNSC not only affects, but dominates the proceedings celebrated in front of the Court,[73] pointing out the paradox of giving the UNSC the power to interfere with a judicial institution that does not belong to the United Nations' system, while it has no power over the International Court of Justice, i.e. the judicial organ of the United Nations.[74] In any event, the relationship between the Council and the Court is usually considered under the perspective of the instrumental contribution of the Court in pursuing peace and security, i.e. the objectives that the Council is in charge to protect.[75]

The practice of the Court does not show an intrusive attitude of the UNSC towards the Court. Notwithstanding this, not only the Council did not provide the Prosecutor with additional powers in order to investigate into the situations it referred to her Office, but it seems, borrowing the language of the Statute, 'unwilling' or at least 'unable' to cooperate with the Court in order to facilitate her tasks in particular by favouring the States cooperation.[76] In all her regular reports to the UNSC, the Prosecutor has repeatedly highlighted the role of the Council in safeguarding the Court's ability to fulfil her mandate inviting it to adopt measures against the States which do not cooperate with the Court.[77]

It would be interesting to see the interaction between the Prosecutor (and the whole Court) and the UNSC in case of investigation concerning the crime of aggression, but the

[73] ELARABY N., *The Role of the Security Council and the Independence of the International Criminal Court: Some Reflections*, in POLITI M., NESI G., *The Rome Statute of the International Criminal Court. A challenge to impunity*, Ashgate, 1998, p. 43 at 47.

[74] *Ibid.*, 44. Elaraby notes that Article 94(2) of the Charter of the United Nations states that '[i]f any party to a case fails to perform the obligations incumbent upon it under a judgment rendered to the court, the other party may have recourse to the UNSC, which may, if it deems necessary, make recommendations or decide upon measures to be taken t ogive effect to the judgment'. From this provision it emerges that the UNSC may at best act in order to enforce a decision adopted by the International Court of Justice, while Art. 16 of the Rome Statute recognises the Council the power to defer an investigation or a prosecution, preventing the ICC to perform its tasks.

[75] Ruiz Verduzco notes that it would be possible to identify other two models of relationship: one of 'institutional autonomy clearly distinguishing the political from the judicial function and one where the Council acts as executive enforcement organ of the Court, assisting it in executing its judicial functions. RUIZ VERDUZCO D., *The Relationship between the ICC and the United Nations Security Council*, in STAHN C. (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015, p. 30.

[76] On the attitude of the UNSC towards the International Criminal Court and the eroding credibility of the Council in its ability to deal with situations concerning peace and security *see* ARCARO M., A *Vetoed International Criminal Justice? Cursory Remarks on the Current Relationship Between the UN Security Council and International Criminal Courts and Tribunals*, in *Diritti Umani e Diritto Internazionale*, 10, 2, 2016, p. 363; RUIZ VERDUZCO D., *The Relationship between the ICC and the United Nations Security Council*, in STAHN C. (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015, p. 30 at 44 ff.

[77] *See* recently: *Statement to the United Nations Security Council on the situation in Libya, pursuant to UNSCR 1970 (2011)*, 5 May 2020; *Statement to the United Nations Security Council on the situation in Libya, pursuant to UNSCR 1593 (2005)*, 18 Dec. 2019.

significant limitations with regards to the Court's jurisdiction over this crime make it difficult to imagine that this can happen in the next future.

3. The States

The States' behaviours may affect the discretionary choices of the Prosecutor as well. As for the UNSC, the questions are whether the Prosecutor may decline to open an investigation in case of referral and whether the referral may limit the Prosecutor's scope of the investigation. In addition, it is also worth recalling that the Prosecutor (and the whole Court) shall rely on the States' cooperation in order to fulfil the statutory mandate. Therefore, the activity of the Prosecutor is significantly affected by the (lack of) cooperation of the States, especially during the investigation.

As to the State's referral, its main features have already been drawn in Chapter I. Further, there is no doubt that the Prosecutor may adopt – and already has – a decision not to investigate or prosecute even if the situation has been referred by a State. More interesting is rather whether the referral can limit the scope of the investigation. This problem emerges in particular in case of self-referrals. With the exception of the recent referral of the situation in Venezuela by a group of States, all the other situations triggered by States were self-referred. In these cases the main risk for the Prosecutor is that of being 'used' by the States in order to prosecute rebel groups or opposing parties, but to be prevented from duly investigating into possible crimes committed by governmental authorities.[78] Even if the submitted referrals do not usually include limitations as to the target of the investigation, when some States tried to frame the object of the investigation – as in the *Uganda situation* – the Prosecutor has publicly rejected their effectiveness. However in practice the scope of the investigation does not seem having been extended beyond.[79] As for the UNSC's referral, Art. 13 of the Statue states that the object of the referral is a situation. Therefore, scholars infer that the referral cannot be too specific as to the persons or groups which, in the opinion of the State, should be the target of the investigation.[80] The solution of leaving the Prosecutor the power to determine the relevance of this attempt of limitation[81] is not persuasive and does not clarify on which basis the Prosecutor can reject or grant the State's request to limit the focus of her investigation. As seen

[78] *See* TOCHILOVSKY V., *Objectivity of the ICC Preliminary Examination*, in BERGSMO M., STAHN C., (ed.), *Quality Control in Preliminary Examination: Volume 2*, Torkel Opsahl Academic EPublisher, 2018, p. 395 at 396.

[79] *See Ibid*, at 401 ff.

[80] MARCHESI A., CHAITIDOU E., *Article 14*, in AMBOS K., *The Rome Statute of the International Criminal Court*, 4th ed., Beck/Hart/Nomos, 2021, mn 28.

[81] SCHABAS W.A., *The International Criminal Court: a commentary on the Rome Statute*, Oxford University Press, 2010, p. 419.

in the previous paragraph, once the State is given the power to make a referral, it is difficult to deny its power to (at least partially) frame the object of the investigation.[82] The State's backing is the precondition for the Prosecutor's (and the Court's intervention): if the Prosecutor expands the investigation against the will of the referring entity, she should at least request – whenever possible – the authorisation of the PTC.[83] Otherwise the legitimacy of her intervention could be questioned. Also in this case, it must be noted that even without imposing strict boundaries to the Prosecutor, the content of the referral may direct the investigations.[84]

Even if it is probably too soon to draw conclusions from a very recent practice, the first OTP's activities in the *Venezuela situation* seem to follow this approach. In fact, the OTP received two referrals concerning the situation in Venezuela, the first one on 27 September 2018 from a group of States Parties to the Rome Statute concerning crimes against humanity allegedly committed in the territory of Venezuela since 12 February 2014, and the second one on 12 February 2020 from Venezuela itself concerning crimes against humanity committed "*como consecuencla de la apllcaclôn de medidas coercitivas lllcitas adoptadas unilateralmente por el goblerno de les Estados Unidos de América contra Venezuela, al menos desde el ano 2014*".[85] The decision of the Prosecutor to identify the object of the second referral as an autonomous preliminary examination even if the object of the second referral could have been already included in the first (broader) referral may be interpreted as an acknowledgment by the Prosecutor of the possible limitations contained in the referral, even when the conditions would allow her to ignore them.

As to the last aspect of this brief analysis, differently from the *ad hoc* Tribunals, which could issue orders binding for both States and individuals,[86] the ICC system functions thanks

[82] The traditional problematic scenario of limited referral debated in literature concerns the exclusion of the crime of aggression, because of the possible overlapping between *jus ad bellum* and *jus in bello*. *See* also CHAITIDOU E., *The Judiciary and Enhancement of Classification of Alleged Conduct*, in AGIRRE X., BERGSMO M., DE SMET S., STAHN C., (ed.), *Quality Control in Criminal Investigation*, Torkel Opsahl Academic EPublisher, 2020, p. 943 at 951 arguing that the investigation falls within the boundaries of the referral.

[83] As to the possibility to withdraw a referral, it has been pointed out its irrelevance from a legal point of view. *See* STEGMILLER I., *The Pre-Investigation Stage of the ICC*, Dunker & Humbolt, Berlin, 2011, p. 140 ff. Further, States have more effective instruments for preventing the interventions of the Prosecutor, such as non-cooperation.

[84] MARCHESI A., CHAITIDOU E., *Article 14*, in AMBOS K., *The Rome Statute of the International Criminal Court*, 4th ed., Beck/Hart/Nomos, 2021, fn. 83.

[85] *Referral submitted by the Government of Venezuela*, 12 Feb. 2020.

[86] Art. 29 ICTY Statute and Art. 28 ICTR Statute are entitled 'Co-operation and judicial assistance'. *See* ICTY, AC, *The Prosecutor v. Blaskić, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 Jul. 1997*, IT-95-14-AR108bis, 29 Oct. 1997 paras 26 ff.

to the States' cooperation. If the Statute binds first of all the States Parties, imposing them a duty to cooperate and a failure in that regard constitutes a violation of the treaty, the Prosecutor may also obtain the cooperation of States non-parties to the Statute.[87] Cooperation may be considered under different perspectives. The tendency is to consider it as a useful tool for ensuring the respect of the complementarity principle[88] but a possible obstacle to a full investigation in case of self-referral, where the referring State limits its cooperation alleged crimes committed by rebel groups or opposing parties. Therefore, scholars note that, if on the one side the State's cooperation may be useful in order to reduce the costs of the investigations, the dependence from States in situations where the leading actors usually have an interest or may even be responsible for the crimes risks to jeopardise the action of the Court.[89]

It has been suggested that the Prosecutor might – possibly under the control of the PTC – invoke 'implied powers' in order to perform her duties.[90] Even assuming that she can, it

[87] Marston Danner notes the importance for the Prosecutor to possess diplomatic abilities and to keep an eye on the reactions of States to the Court's decisions. For example she recalls the *Barayagwiza case* in front of the ICTR, where the release of one of those considered among the most responsible for the genocide in Rwanda triggered the strong reaction of Rwanda which non only interrupted the cooperation with the Tribunal, but even stonewalled the Prosecutor's activity, which requested the AC to review the TC's decision to release the suspect. She also points out that this kind of situation may more frequently involve States which oppose to the prosecution rather than encouraging it. MARSTON DANNER A., *Enhancing the legitimacy and accountability of prosecutorial discretion at the International Criminal Court*, in *American Journal of International Law*, 97, 3, 2003, p. 510 at 530-532.

[88] In a different vein *see* MARSTON DANNER A., *Enhancing the legitimacy and accountability of prosecutorial discretion at the International Criminal Court*, in *American Journal of International Law*, 97, 3, 2003, p. 510 at 518. She argues that the independence of the ICC Prosecutor risks of being more questionable than the independence of her colleagues at the *ad hoc* Tribunals, precisely since the Court does not have primacy on national jurisdictions. Under this perspective, the principle of complementarity puts the Prosecutor in the unusual situation of acting as a counterweight to the State power.

[89] HALL C.K., *The Powers and Role of the Prosecutor of the International Criminal Court in the global Fight Against Impunity*, in *Leiden Journal of International Law*, 17, 1, p. 121 at 127-128 ff. *See* also TURONE G., *Powers and Duties of the Prosecutor*, in CASSESE A., GAETA P., JONES J.R.W.D., *The Rome Statute of the International Criminal Court. A Commentary*, vol. 2, Oxford University Press, 2002, p. 1137 at 1140. It has also been said that the Prosecutor's dependence may have other positive effects, including inducing the Prosecutor to seriously take into account the political consequences of her action on the ground. MARSTON DANNER A., *Enhancing the legitimacy and accountability of prosecutorial discretion at the International Criminal Court*, in *American Journal of International Law*, 97, 3, 2003, p. 510; GOLDSTONE J.A., *More Candour about Criteria*, in *Journal of International Criminal Justice*, 8, 2010, p. 383 at 397.

[90] BRUBACHER M.R., *Prosecutorial Discretion within the International Criminal Court*, in *Journal of International Criminal Justice*, 2, 2004, p. 71 at 90. *See* also *Informal Expert Paper: Fact Finding and Investigative Function of the Office of the Prosecutor, including International Cooperation*, 2003. It is also worth recalling that as extreme measure, Art. 57(3)(d) of the Statute gives to the PTC the power to authorise the Prosecutor to take specific investigative steps within the territory of a State Party without having secured the cooperation if the PTC has determined in that case that the State is clearly unable to execute a request for cooperation due to the unavailability of any authority or any component of its judicial system competent to execute the request for cooperation.

is not a solution to the States' refusal to cooperate. Further, only the amendment of the RPE by the ASP would guarantee the total legitimate use of these powers.[91] A more proactive role of the ASP and of the UNSC as well could be an important instrument for enhancing States' cooperation. Art. 87(7) states that where a State Party fails to comply with a request of cooperation thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the ASP or, where the UNSC referred the matter to the Court, to the UNSC. Despite the numerous referrals to the ASP and the UNSC,[92] the limited effect of the action of these two bodies[93] emerges from the lack of tangible results.

[91] *Ibid.*

[92] ICC, PTC I, *The Prosecutor v. Al Bashir*, *Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's recent visit to the Republic of Chad*, 27 Aug. 2010, ICC-02/05-01/09-109; ICC, PTC I, *The Prosecutor v. Al Bashir*, *Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's presence in the territory of the Republic of Kenya*, 27 Aug. 2010, ICC-02/05-01/09-107; ICC, PTC I, *The Prosecutor v. Al Bashir*, *Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's recent visit to Djibouti*, 12 May 2011, ICC-02/05-01/09-129; ICC, PTC I, *The Prosecutor v. Al Bashir*, *Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir*, 13 Dec. 2011, ICC-02/05-01/09-139; ICC, PTC I, *The Prosecutor v. Al Bashir*, *Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir*, 13 Dec. 2011, ICC-02/05-01/09-140; ICC, PTC II, *The Prosecutor v. Al Bashir*, *Decision on the Non-compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir*, 26 Mar. 2013, ICC-02/05-01/09-151; ICC, PTC II, *The Prosecutor v. Al Bashir*, *Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court*, 9 Apr. 2014, ICC-02/05-01/09-19; ICC, PTC II, *The Prosecutor v. Al Bashir*, *Decision on the Prosecutor's Request for a Finding of Non-Compliance Against the Republic of the Sudan*, 9 Mar. 2015, ICC-02/05-01/09-227; ICC, PTC II, *The Prosecutor v. Al Bashir*, *Decision on the non-compliance by the Republic of Djibouti with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of the State Parties to the Rome Statute*, 11 Jul. 2016, ICC-02/05-01/09-266; ICC, PTC II, *The Prosecutor v. Al Bashir*, *Decision on the non-compliance by the Republic of Uganda with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of State Parties to the Rome Statute*, 11 Jul. 2016, ICC-02/05-01/09-267; ICC, PTC II, *The Prosecutor v. Al Bashir*, *Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender or Omar Al-Bashir*, 11 Dec. 2017, ICC-02/05-01/09-309; ICC, AC, *The Prosecutor v. Al Bashir*, *Judgment in the Jordan Referral re Al-Bashir Appeal*, 6 May 2019, ICC-02/05-01/09-397. *See* also ICC, PTC I, *The Prosecutor v. Harun and Ali*, *Decision informing the United Nations Security Council about the lack of cooperation by the Republic of the Sudan*, 25 May 2010, ICC-02/05-01/07-57; ICC, PTC I, *The Prosecutor v. Gaddafi*, *Decision on the non-compliance by Libya with requests for cooperation by the Court and referring the matter to the United Nations Security Council*, 10 Dec. 2014, ICC-01/11-01/11-577; ICC, PTC II, *The Prosecutor v. Hussein*, *Decision on the Prosecutor's Request for a finding of non-compliance against the Republic of the Sudan*, 26 Jun. 2015, ICC-02/05-01/12-33; ICC, PTC IV, *The Prosecutor v. Abdallah Banda*, *Decision on the Prosecution's Request for a Finding of Non-Compliance*, 19 Nov. 2015, ICC-02/05-03/09-641; ICC, TC V(B), *The Prosecutor v. Kenyatta*, *Second decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute*, 19 Sep. 2016, ICC-01/09-02/11-1037.

[93] ASSEMBLY OF THE STATES PARTIES, *Report of the Bureau on non-cooperation*, 1 Nov. 2012, ICC-ASP/11/29; ASSEMBLY OF THE STATES PARTIES, *Report of the Bureau on non-cooperation*, 7 Nov. 2013, ICC-ASP/12/34; ASSEMBLY OF THE STATES PARTIES, *Report of the Bureau on non-cooperation*, 5 Dec. 2014, ICC-ASP/13/40; ASSEMBLY OF THE STATES PARTIES, *Report of the Bureau on non-cooperation*, 18 Nov. 2015, ICC-ASP/14/38; ASSEMBLY OF THE STATES PARTIES, *Report of the Bureau on non-cooperation*, 8 Nov. 2016, ICC-ASP/15/31; ASSEMBLY OF THE STATES PARTIES, *Report of the Bureau on non-cooperation. Addendum*, 9 Nov. 2016, ICC-ASP/15/31/Add.1; ASSEMBLY OF THE STATES PARTIES, *Report of the Bureau on non-cooperation*, 4 Dec. 2017, ICC-ASP/16/36; ASSEMBLY OF THE STATES PARTIES, *Report of the Bureau on non-cooperation*, 28 Nov. 2018, ICC-ASP/17/31.

SECTION II

THE CONTROL BY THE JUDICIARY UNDER ARTICLE 53 OF THE STATUTE

This section is entirely devoted to the control exercised by the judiciary over the activity of the Prosecutor, predominantly at the pre-trial stage. The need to regulate the relationship between the Prosecutor and the Judiciary emerged also during the preparatory works of the Statute and some of the main proposals included the germs of the provisions finally adopted in Rome in 1998.

As seen in Chapter I, Art. 26 of the 1994 Draft Statute introduced a duty for the Prosecutor to initiate the investigations unless she concluded that there was no 'possible basis' for a prosecution. It has also been mentioned that in case of adoption of a decision not to investigate the Prosecutor had to inform the Presidency (Art. 26(1)). Art. 26(4) provided for the same mechanism with regards to the adoption of a decision not to prosecute. In case of adoption of a decision not to investigate or not to prosecute the Draft gave the referring entities the possibility to ask the Presidency to review the decision. The Presidency could then request the Prosecutor to reconsider her decision. The Commission found that allowing the Presidency to 'direct a prosecution' was inconsistent with the independence of the Prosecutor, even if some members suggested to increase the powers of the Presidency allowing it to annul the decision of the Prosecutor where it was clear that the Prosecutor had made an error of law.[94]

The draft also attributed to the Presidency other two powers which raised the concern of the *Ad Hoc* Committee.[95] Art. 26(3) and (5) respectively provided for the possibility ('may') for the Presidency to issue subpoenas and warrants requested by the Prosecutor and for the duty ('shall') of the Presidency to review the Prosecutor's decision not to prosecute under request of the referring entity. Both these provisions aimed at limiting the action of the Prosecutor.

The same concern was expressed by a 'substantial number of delegations' of the *Ad Hoc* Committee in relation to the powers of the Presidency provided for in Art. 27 of the Draft

[94] According to this latter position, 'Respect is due to decisions of the Prosecutor on issues of fact and evidence but like all other organs of the court the Prosecutor is bound by the statute and the Presidency should, in this view, have the power to annul decisions shown to be contrary to law'. Art. 26 *Draft Statute for an International Criminal Court with commentaries, Report of the ILC on the work of its forty-sixth session*, 2 May – 22 Jul. 1994, G.A. 49th Sess. Supp. No. 10, A/49/10, 1994.

[95] *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, G.A., 50th Sess. Supp. No. 22, A/50/22, 1995, par. (139), p.31.

Statute.[96] From the report it emerges the need to rule the relationship between the Prosecutor and (at that time) the Presidency, whose powers could undermine the independence of the former. The fear that the Presidency could not be the right organ to control the activity of the prosecution,[97] especially during the investigations, is the reason why some delegations proposed the constitution of an investigations chamber[98] that could 'monitor the investigative activities of the prosecutor, [give] judicial authority to his or her actions, [decide] on requests for State cooperation, [ensure] equality between the prosecution and the defence and [enable] the suspect to request that certain investigations be carried out'.[99] The ultimate solution of the actual version of Art. 15 was found in Rome following the proposal submitted by Argentina and Germany.[100]

1. The control during the preliminary examination

From the preparatory works it does not emerge any form of supervision of the PTC over the activity of the Prosecutor during the preliminary examination. This is not surprising since the preliminary examination is a pre-judicial stage possibly leading to the initiation of an investigation. Despite some attempts of the PTCs to intervene on the duration of the preliminary examinations[101] the case-law leaves unanswered the question concerning the role of the PTC during this stage.[102] Nevertheless, it has been noted that the refusal of the Prosecutor to recognise the Chambers any overseeing function would render the supervisory role of the PTC only optional or discretionary.[103] The downside of such approach is that in the procedure under Art. 15 the Prosecutor (but not only) does not have adequate instruments in

[96] *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, G.A., 50th Sess. Supp. No. 22, A/50/22, 1995, par. (147), p. 31.

[97] According to Human Rights Watch the "enormous amount of power" of the Presidency determined the violation of some rights of the suspected/accused and supported the establishment of a separate chamber for deciding in preliminary matters. HUMAN RIGHTS WATCH, *Commentary for the August 1997 Preparatory Committee Meeting on the Establishment of an International Criminal Court*, 4th Preparatory Committee Meeting, 4-15 Aug. 1997.

[98] *See Proposal submitted by Switzerland for article 9 and 26 to 29 of an indictment chamber*, 15 Aug. 1996, A/AC.249/WP.4.

[99] *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I, (Proceedings of the Preparatory Committee During March-April and August 1996)*, G.A. 51st Sess., Supp. No. A/51/22, 1996, par. (228, 233, 234), pp. 50 ff.

[100] *Proposal submitted by Argentina and Germany*, UN Doc. A/AC.249/1998/W.G.4/DP.35, 25 Mar. 1998.

[101] See above, Chapter I, Section IV, 3.2.2 The structure and length of the examination.

[102] *See* CHAITIDOU E., *The Judiciary and Enhancement of Classification of Alleged Conduct*, in AGIRRE X., BERGSMO M., DE SMET S., STAHN C., (ed.), *Quality Control in Criminal Investigation*, Torkel Opsahl Academic EPublisher, 2020, p. 943 at 949 ff.

[103] EL ZEIDY M.M., *The Gravity Threshold Under the Statute of the International Criminal Court*, in *Criminal Law Forum*, 19, 2008, p. 35 at 53.

order to seek guidance from the PTC neither.[104] The only instrument available to the Prosecutor is Reg. 46 of the RegC. According to Sub-Reg. (2), as soon as the Prosecutor has informed the Presidency that a situation has been referred to her Office, the Presidency shall assign the situation to a PTC, which shall be responsible for any matter, request or information arising out of the situation. In addition, according to Sub-Reg. (3), '[a]ny matter, request or information not arising out of a situation assigned to a Pre-Trial Chamber in accordance with Sub-Reg. 2, shall be directed by the President of the Pre-Trial Division to a Pre-Trial Chamber according to a roster established by the President of the Division'. Therefore, while in case of referral the Prosecutor or, possibly, a referring entity may request guidance from the PTC constituted following the referral, Sub-Reg. (3) may be applicable in the absence of a formal situation.

Reg. 46(3) has been used twice, with regards to the events concerning the Arab Republic of Egypt (which never reached the stage of the situation) and the events in the Rakhine region in what later became known as *Bangladesh/Myanmar situation*.[105]

As far as the events that took place in Egypt are concerned, the intervention of the judiciary was triggered by the Applicant (Former President Morsi) after the refusal of the Prosecutor to open a preliminary examination. The Prosecutor had denied President Morsi's authority to submit a declaration under Art. 12(3) on the acceptance of the jurisdiction of the Court. According to the Applicant it was for the PTC to determine whether the Chamber had the power to review such a decision adopted by the Prosecutor in the light of the powers conferred to it under Art. 53 or, in alternative, in the light of its inherent powers.[106]

The Applicant noted that although the Prosecutor 'enjoys a wide discretion' in deciding on whether to investigate and prosecute or not, 'these powers should not be capable

[104] STAHN C., *Damned If You Do, Damned If You Don't. Challenges and Critiques of Preliminary Examination at the ICC*, in *Journal of International Criminal Justice*, 15, 2017, p. 413 at 431. *See* also STEGMILLER I., *The Pre-Investigation Stage of the ICC*, Dunker & Humbolt, Berlin, 2011, p. 229.

[105] Despite the similarities, the recent request of the Proecutor to the PTC I concerning the determination of the territorial jurisdiction of the Court in the situation in Palestine does not follow this procedure. In fact, in the situation in Palestine the Prosecutor acts by virtue of a State referral, and requests the intervention of the Chamber in conjunction (or better, immediatly after) having concluded on the existence of all the requirements set forth in Art. 53 for opening an investigation, therefore after the end of the preliminary examination.

[106] ICC, *President Mohammed Morsi et al*., *Situation in the Arab Republic of Egypt, Request for review of the Prosecutor's decision of 23 April 2014 not to open a Preliminary Examination concerning alleged crimes committed in the Arab Republic of Egypt, and the Registrar's Decision of 25 April 2014*, 23 May 2014, ICC-RoC46(3)-01/14-2-AnxA, paras 15-16.

of being exercised without any judicial limit'.[107] Since the decision of the Prosecutor may derive from a wrong interpretation or application of the law, there must be a judicial review granting the adherence of the decision to the law.

The PTC II, in charge of deciding on the issue,[108] interpreted Reg. 46(3) RegC as a 'purely administrative provision', 'merely meant to regulate the assignment of the Request to the relevant Pre-Trial Chamber'.[109] Therefore, it exclusively referred to the Statutory provisions ruling the initiation of the investigations, namely Arts 15 and 53, denying to have any power of reviewing the Prosecutor's decision not to proceed.

The Applicant therefore further submitted a request for reconsideration since the PTC had omitted to clarify whether it had the power to review the Prosecutor's decision in the light of inherent powers. In alternative, it requested leave to appeal the decision. Also in this case the PTC II rejected the request *in limine* excluding the admissibility of 'an unqualified "motion for reconsideration"'.[110] Further, the Chamber easily rejected the request for leave to appeal denying to the Applicant the status of 'party' required for appealing under Art. 82(1)(d).

The second time Reg. 46(3) of the RegC was invoked it was in relation to the Situation in Bangladesh/Myanmar. Ignoring the PTC II qualification of Reg. 46 as a 'purely administrative provision', the Prosecutor submitted to the President of the Pre-Trial Division a request for ruling on jurisdiction under Art. 19(3) with regards to the crime of deportation.[111] Arguing the applicability of Art. 19(3) at any stage of the proceedings and focusing on the general applicability of the principle of the '*compétence de la compétence*', the Prosecutor requested for guidance from the Judiciary before adopting a decision on whether to open a preliminary examination.

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[107] *Ibid.*, para. 17.

[108] ICC, President of the Pre-Trial Division, *Request under Regulation 46(3) of the Regulations of the Court, Decision assigning the 'Request for review of the Prosecution's decision of 23 April 2014 not to open a Preliminary Examination concerning alleged crimes committed in the Arab Republic of Egypt, and the Registrar's Decision of 25 April 2014' to Pre-Trial Chamber II*, 10 Sep. 2014, ICC-RoC46(3)-01/14-1.

[109] ICC, PTC II, *Request under Regulation 46(3) of the Regulations of the Court*, *Decision on the 'Request for review of the Prosecutor's decision of 23 April 2014 not to open a Preliminary Examination concerning alleged crimes committed in the Arab Republic of Egypt, and the Registrar's Decision of 25 April 2014'*, 12 Sep. 2014, ICC-RoC46(3)-01/14-3, para. 5.

[110] ICC, PTC II, *Request under Regulation 46(3) of the Regulations of the Court*, *Decision on a Request for Reconsideration or Leave to Appeal the "Decision on the 'Request for review of the Prosecutor's decision of 23 April 2014 not to open a Preliminary Examination concerning alleged crimes committed in the Arab Republic of Egypt, and the Registrar's Decision of 25 April 2014'"*, 22 Sep. 2014, ICC-RoC46(3)-01/14-5, para. 5.

[111] ICC, OTP, *Application under Regulation 46(3), Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute*, 9 Apr. 2018, ICC-RoC46(3)-01/18-1.

The need for judicial guidance resulted from the peculiar features of deportation as crime against humanity. While Myanmar is not a State Party, Bangladesh ratified the Rome Statute in 2010. Therefore, before opening a preliminary examination into the situation, the Prosecutor requested the PTC I whether the Court might exercise its jurisdiction over crimes partially committed in Bangladesh. The PTC I, by majority,[112] Judge Perrin de Brichambaut partially dissenting,[113] did not find it necessary to decide on the appropriateness of a decision under Art. 19(3) of the Statute at the stage of the preliminary examination. The Majority relies on the principle of the *compétence de la compétence* and on Art. 119(1) of the Statute stating that '[a]ny dispute concerning the judicial functions of the Court shall be settled by the decision of the Court' in order to declare its competence in deciding on the request. Moreover, the Majority does 'not consider it necessary to pronounce itself on the limits or conditions of the exercise of its *compétence de la compétence* since it was required to decide on a concrete question arisen in the context of communications received by the OTP under Art. 15.[114]

According to the dissenting Judge, Art. 19(3) is not an appropriate legal basis for a request on jurisdiction at this stage of the proceedings (or better said, before the opening of a preliminary examination). In his view, the whole Art. 19 can be applied only at the 'case stage'. The Judge even envisages a scenario where the Prosecutor can distort the use of a request under Art. 19(3) posing to the PTC 'hypothetical or abstract questions of jurisdiction that do not arise from a concrete case or even situation' and where she can 'circumvent the procedures otherwise applicable, delay her decision-making, or even shift the burden of assembling a case onto the Pre-Trial Chamber'.[115] Furthermore, the Judge opposes the applicability of both Art. 119 of the Statute and of the principle of the *compétence de la compétence* in the light of the absence of any 'dispute' on jurisdiction with States possibly exercising the jurisdiction over the crimes concerned and in the light of the very limited

[112] ICC, PTC I, *Request under Regulation 46(3) of the Regulations of the Court*, *Decision on the 'Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute*, 6 Sep. 2018, ICC-RoC46(3)-01/18-37.

[113] ICC, PTC I, *Request under Regulation 46(3) of the Regulations of the Court*, *Partially Dissenting Opinion of Judge Marc Perrin de Brichambeau*, annex to *Decision on the 'Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute*, 6 Sep. 2018, ICC-RoC46(3)-01/18-37-Anx.

[114] On the merit the Chamber, by majority, Judge Perrin de Brichambaut partially dissenting found that since deportation requires the transfer from a State to another State (while the crime of 'forcibly transfer' is linked to the destination of another location) and includes among its constitutive elements the 'cross-border transfer', the Court might exercise its jurisdiction over acts of deportation initiated in a State not Party (Myanmar) and completed in a State Party (Bangladesh) because part of the crime can be considered as committed in the State Party.

[115] ICC, PTC I, *Request under Regulation 46(3) of the Regulations of the Court*, *Partially Dissenting Opinion of Judge Marc Perrin de Brichambeau*, annex to *Decision on the 'Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute*, 6 Sep. 2018, ICC-RoC46(3)-01/18-37-Anx, para. 13.

applicability of the theory of the inherent powers. In conclusion, since ruling on the request would be tantamount to delivering an advisory opinion, which the Court is not allowed to issue, he finds that the Prosecutor should have directly opened a preliminary examination and possibly submitted a request for authorisation under Art. 15, letting the PTC to review the correctness of her assessment in the proceedings for authorisation.

This case-law testifies the problem caused by the absence of a solid instrument for seeking the guidance of the PTC at the (even if not formally declared by the Prosecutor) preliminary examination stage or before the initiation of the investigations. Therefore it gives arguments to those scholars who suggest to introduce a system allowing an interaction between the Prosecutor (but not only) and the Judiciary also before or during a preliminary examination.[116] If in the situation concerning Egypt, because of a probably too cautious and deferent approach towards the Prosecutor, the Appellant was left without any forum where to challenge the correct interpretation of the Statute made by the Prosecutor, the disagreement within the PTC I in the *Bangladesh/Myanmar situation* shows that trying to adapt the available instruments means following a dangerous path. Moreover, even if the case-law is very limited, it is apparent that in both cases the PTCs recognised a significant margin of discretion to the Prosecutor, declining to intervene on the Prosecutor's determination on whether to open a preliminary examination but admitting her (but not other applicants) to seek guidance where necessary.[117]

2. The authorisation for the initiation of an investigation under Article 15

As seen in Chapter I, the initiation of the investigations *proprio motu* is ruled by Art. 15. This procedure includes a judicial control over the request for authorisation submitted by the Prosecutor. As highlighted by authoritative doctrine, if the decision of initiating an investigation is up to the Prosecutor, 'the authority to *start* a full investigation is the Pre-Trial Chamber's prerogative'.[118] Nevertheless, it has been noted that in the first years of activity the

[116] STAHN C., *Damned If You Do, Damned If You Don't. Challenges and Critiques of Preliminary Examination at the ICC*, in *Journal of International Criminal Justice*, 15, 2017, p. 413 at 431.

[117] *See* also CHAITIDOU E., *The Judiciary and Enhancement of Classification of Alleged Conduct*, in AGIRRE X., BERGSMO M., DE SMET S., STAHN C., (ed.), *Quality Control in Criminal Investigation*, Torkel Opsahl Academic EPublisher, 2020, p. 943 at 950, who looks at the procedure under Reg. 46 RegC only from the perspective of the OTP.

[118] BERGSMO M., KRUGER P., BEKOU O., *Article 53*, in AMBOS K., *The Rome Statute of the International Criminal Court*, 4th ed., Beck/Hart/Nomos, 2021, mn 39.

Prosecutor seems having benefitted of the '*zone d'ombre*' of Art. 53 of the Statute, avoiding any form of proper control by the PTC.[119]

2.1. The Pre-Trial Chamber's review

In its first requests under Art. 15, the Prosecutor describes the role of the PTC as a filter distinguishing those situations that should form the subject of an investigation from those that should not,[120] and the proceedings in front of the PTC as 'expeditious and summary in nature, without prejudice to subsequent determinations on questions of fact and law'.[121] The Prosecutor stresses the *prima facie* nature of the assessment and compares this stage of the procedure with the admissibility mechanism in the ECtHR and the IACtHR systems: the Chamber would be entitled only to assess the non-frivolous nature and the non-manifest groundlessness of the request.[122] The Prosecutor further highlights that according to Art. 15(4), the PTC is required to assess whether the case 'appears to fall' within the jurisdiction of the Court and that therefore, referring to the jurisprudence of the PTC III on the 'appearance standard' provided for in Art. 61(7)(c)(ii), it does not need to 'engage an in-depth analysis of the information presented for the purpose of this procedural decision'.[123]

This conception of the PTC as a mere 'filter' limits the role of the PTC aiming at ensuring to the Prosecutor the freedom of assessment. Moreover, without any further clarification, this definition does not seem to add relevant information, since every proceeding leading from one stage to another involves a filtering function. Nevertheless, according to this interpretation, the powers of the Chamber are highly restricted since only in cases where the unreasonableness of the Prosecutor's decision is self-evident the Chamber could stop her action. Consequently, this interpretation does not even take into consideration the possibility for the PTC to intervene on the Prosecutor's request and to shape it: the Chamber can only authorise the investigation of the Prosecutor or to reject her request. With regards to the Chamber's assessment, although it cannot be very strict at this stage in order not to pre-judge the matter, it is better noting that the Statute uses the 'appearance standard' only with regards to the assessment of jurisdiction and not with regards to the overall assessment of the existence of the reasonable basis.

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[119] BITTI G., *Article 53*, in FERNANDEZ J., PACREAU X., *Statut de Rome de la Cour pénale internationale. Commentaire article par article*, Pedone, 2012, p. 1173 at 1185.

[120] ICC, OTP, *Situation in the Republic of Kenya*, *Request for authorisation of an investigation pursuant to Article 15*, 26 Nov. 2009, ICC-01/09-3, para. 111.

[121] *Ibid.*, para. 106.

[122] *Ibid.*, para. 111, fn. 106.

[123] *Ibid.*, para. 110.

In its decision authorising the investigations in Kenya the PTC II traces the historical development of Arts 15 and 53 and the relationship between these two provisions and concludes that the language used in both provisions is the same. Therefore, it states that the same standard should be applied both by the Prosecutor and the PTC. In its view it would be 'illogical' to dissociate the two provisions and 'to advance the view that the scope of the "reasonable basis to proceed" standard with respect to the Prosecutor is different than the one required for the Chamber's consideration'.[124] The PTC II recognises that '[t]he standard should be construed and applied against the underlying purpose of the procedure in article 15(4) of the statute, which is to prevent the Court from proceedings with unwarranted, frivolous, or politically motivated investigations that could have a negative effect on its credibility'.[125] Nevertheless, the overall pictures drawn by the Chamber gives more weight to the functions of the PTC, that is defined as 'supervisory' rather than 'filtering'.[126]

In his dissent Judge Kaul adopts a stricter view, adding that the judicial examination pursuant to Art. 15(4) is not of 'mere administrative or procedural nature but requires a substantial and genuine examination by the judges of the Prosecutor's request' and concluding that '[a]ny other interpretation would turn the Pre-Trial Chamber into a mere rubber-stamping instance'.[127] In his view, the introduction of the authorisation of the PTC marks the difference of the procedure under Art. 15 and the other triggering mechanisms and therefore justifying the 'substantial and genuine examination' of the request. Stressing that '[t]he decision whether or not the Prosecutor may commence an investigation results ultimately with the Pre-Trial Chamber',[128] the dissenting Judge clearly highlights the importance of the Chamber in the overall proceedings.

The 'filtering role' is instead supported by the partially dissenting Judge Fernández de Gurmendi in the situation of Côte d'Ivoire, which nevertheless opposes the idea that the examination of the PTC becomes 'a duplication of the preliminary examination conducted by the Prosecutor'.[129] In her view the examination is an 'inseparable part of [the Prosecutor's]

[124] ICC, PTC II, *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 Mar. 2010, ICC-01-09-19, para. 21.

[125] *Ibid.*, para. 32.

[126] *Ibid.*, para. 24.

[127] *Ibid.*, *Dissenting Opinion of Judge Hans-Peter Kaul*, para.19.

[128] *Ibid.*

[129] ICC, PTC III, *Situation in Côte d'Ivoire*, *Judge Fernández de Gurmendi's separate and partially dissenting opinion to the Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation in the Republic of Côte d'Ivoire*, annexed to the *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation in the Republic of Côte d'Ivoire*, 3 Oct. 2011, ICC-02/11-15, para. 15.

exclusive investigative functions' and the powers of the PTC under Art. 15 are significantly limited. In her view:

> 'the Chamber is only mandated (and indeed, only permitted) to review the Prosecutor's conclusions (as contained in the request) in order to confirm: (i) that the statement of facts is accurate, and (ii) that the legal reasoning applied to establish that there is a reasonable basis to believe that the facts may constitute crimes within the jurisdiction of the Court, and that cases would be admissible, is correct under the ICC legal texts and jurisprudence of the Court'.[130]

Jude Fernández de Gurmendi's opinion is mainly rooted in the drafting history of the provision and in secondary statutory law, such as Rule 50 RPE and Reg. 49 RegC which refers to the belief of the Prosecutor and identify a minimum content of the request excluding the possibility for the Chamber's assessment to replace the Prosecutor's one. Therefore, the Chamber must only determine whether the requirements of Art. 53 are met.

PTC I in the situation in Georgia adopts a 'strictly limited' supervisory role of the PTC only aimed at preventing abuses of power from the side of the Prosecutor.[131] The PTC I suggests that the Prosecutor interpreted her duties of analysing the available information in a too narrow way and authorises the investigation of alleged crimes that the Prosecutor had considered inadequately supported by the available information. The Chamber further finds that the Prosecutor correctly adopted the aforementioned elastic approach used in the *Kenya situation* because 'for the procedure under Art. 15 of the Statute to be effective it is not necessary to limit the Prosecutor's investigation to the crimes which are mentioned by the Chamber in its decision'.[132] In the view of the Chamber it would be 'illogical' to impose such a limitation since the request is grounded on limited information and binding the Prosecutor would conflict with her duty to investigate objectively.

Conversely, in his separate opinion, Judge Kovács accuses the Majority of departing from the previous practice of the Court and notes that a 'strictly limited' approach cannot prevent prosecutorial abuses.[133] He does not find any statutory basis justifying this 'self-imposed restriction' and highlights that since the Prosecutor must provide the Chamber with all the supporting material and the Chamber itself may request additional information to

[130] *Ibid*., para. 18.

[131] ICC, PTC I, *Situation in Georgia*, *Decision on the Prosecutor's request for authorization of an investigation*, 27 Jan. 2016, 01/15-12, para. 3.

[132] *Ibid.*, para. 63.

[133] ICC, PTC I, *Situation in Georgia*, *Separate Opinion of Judge Péter Kovács*, annexed to *Decision on the Prosecutor's request for authorization of an investigation*, 27 Jan. 2016, 01/15-12-Anx1, para. 4.

the Prosecutor,[134] the Chamber must fully and properly examine it. In his view, the '[j]udicial control entails more than automatically agreeing with what the Prosecutor presents'.[135] Judge Kovács believes that carrying out an assessment against 'a low procedural standard ("reasonable basis to proceed") and a low evidentiary standard ("reasonable basis to believe")' does not equate to conducting a 'marginal assessment'. In conclusion, he firmly opposes to an '*overall prima facie* finding'.[136] Adopting the opposite perspective to Judge Fernández de Gurmendi, Judge Kovács believes that the Chamber must reach its own conclusions with regards to the request since 'it is responsibility of the Chamber [...] to describe a situation which corresponds as much as possible to the "reality" on the ground'. He finds it 'all the more vital, given that the Prosecutor's methodology in assessing the facts sometimes lacks consistency and objectivity'.[137]

The PTC III adopts a similar approach to the majority of PTC II. After having made its own assessment of the information on the existence of a non-international armed conflict in contradiction with the conclusions of the Prosecutor in this regards, it recalls that 'the presence of several plausible explanations for the available information does not entail that an investigation should not be opened into the crimes concerned, but rather calls for the opening of such an investigation in order to properly assess the relevant facts'.[138] Therefore, in the Chamber's view the Prosecutor 'will have to enquire during her investigation whether a

[134] This argument is debatable. Judge Kovács refers to Rule 50(4) RPE, which states that the 'Pre-Trial Chamber, *in deciding on the procedure to be followed*, may request additional information from the Prosecutor and any of the victims who have made representations' and possibly hold a hearing (*emphasis added*). The expression 'the procedure to be followed' seems to refer more to the representations that victims may submit in writing under Rule 50(3) rather than to the procedure of authorisation under Article 15 of the Statute. The fact that the Chamber may sought information also from victims support this conclusion. *See* also STEGMILLER I., *Article 15*, in KLAMBERG M. (eds.), *Commentary on the Law of the International Criminal Court*, TOAEP, Brussels, 2017, p. 182 at 187. This conclusion seems further supported by Regulation 48 RegC, headed 'information necessary for the Pre-Trial Chamber. According to Sub-Regulation 48(1), '[t]he Pre-Trial Chamber may request the Prosecutor to provide specific or additional information or documents in his or her possession, or summarises thereof, that the Pre-Trial Chamber considers necessary in order to exercise the functions and responsibilities set forth in Article 53, paragraph 3(b), Article 56, paragraph 3(a), and article 57, paragraph 3(c)'. The absence of any reference to Art. 15 of the Statute may be interpreted as a limit for the Chamber to request for additional information. Moreover, the possibility for a partial authorisation in addition to the possibility for the Prosecutor to present a new request in case of rejection seem to compensate the absence of a procedure analogous to the adjournment of the hearing during the confirmation hearing. *See* below.

[135] ICC, PTC I, *Situation in Georgia, Separate Opinion of Judge Péter Kovács*, annexed to *Decision on the Prosecutor's request for authorization of an investigation*, 27 Jan. 2016, 01/15-12-Anx1, paras 5-6.

[136] *Ibid.*, paras 11-12.

[137] *Ibid.*, paras 19-20.

[138] ICC, PTC III, *Situation in Burundi, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi*, 9 Nov. 2017, ICC-01/17-9, paras 138.

non-international armed conflict existed in Burundi during the relevant period and whether war crimes were committed'.[139]

It seems therefore that both the Majority of PTC I and PTC III renounce to give to their authorisation any binding authority for the Prosecutor, enhancing the preliminary nature of the assessment at the stage of the preliminary examination and allowing the Prosecutor to investigate not only the crimes contained in the request and in the authorisation but also other crimes that could emerge from the investigation. The function of the authorisation seems therefore limited at ensuring the non-frivolous nature of the request.

PTC II in a different composition, rejecting for the first time a Prosecutor's request under Art. 15, went further and described the function of the PTC as 'a specific, fundamental and decisive filtering role'.[140] Even if referring to its role as a 'filter' the adjectives used suggest a more intrusive role of the PTC than the one pictured by the other Chambers. The Chamber marks the distinction between situations referred to by a State or the UNSC, where the Prosecutor can start an investigation at any time, and Art. 15 situations, whose mechanism 'is designed to set boundaries to and restrain the discretion of the Prosecution acting *proprio motu*, in order to avoid manifestly ungrounded investigations due to lack of adequate factual or legal fundaments'.[141] Even if this part of the decision seems to be shared by all the Judges of the Chamber, Judge Mindua, in his concurring and separate opinion in order to express his disagreement with the Majority on the binding nature of the authorisation with regards to the specific incidents and groups of alleged offenders, recalls that 'the rationale behind article 15(3) is merely to limit extravagant politically motivated investigations'.[142] This inconsistency further emerges because the PTC II interprets its role at this stage as protecting not only the Court's credibility but also its function and legitimacy and suggests a complete and in depth assessment of all the elements founding the Prosecutor's determination, even explicitly introducing a *positive* determination to the effect that the investigation is in the interests of justice.[143] Also Judge Mindua in his concurring and separate opinion reads Arts 15(4) and

[139] *Ibid.*, para. 141.

[140] ICC, PTC II, *Situation in the Islamic Republic of Afghanistan*, *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan*, 12 Apr. 2019, ICC-02/17-33, para. 30.

[141] *Ibid.*, para. 32.

[142] ICC, PTC II, *Situation in the Islamic Republic of Afghanistan, Concurring and Separate Opinion of Judge Antoine Kesia-Mbe Mindua*, attached to the *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan*, 31 May 2019, ICC-02/17-33-Anx, para. 6.

[143] ICC, PTC II, *Situation in the Islamic Republic of Afghanistan*, *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan*, 12 Apr. 2019, ICC-02/17-33, paras 33-35.

53(1)(c) and Rule 48 to the effect that the Chamber's assessment over the request is complete and that even 'the "interests of justice" test is mandatory to the Pre-Trial Chamber once the Prosecutor has submitted an application for an authorisation of a formal investigation'.[144]

The decision in the *Afghanistan situation* triggered the intervention of the AC, that with one decision erases ten years of PTCs' jurisprudence and basically nullifies the role of the PTC in the Art. 15 proceedings. Even the less strict of the abovementioned interpretations pales beside the reading offered by the AC and makes Judge Kaul's fears come true that the PTC may turn into a mere rubber-stamping instance.

In its judgment the AC rejects the interplay of Art. 15 and Art. 53(1), which was never questioned since the Kenya authorisation. It assumes that Art. 53 only applies in case of referral and plays no role in the procedure under Art. 15.[145] From the lack of any reference in Rule 48 to the PTC'sassessment of the factors listed in Art. 53(1) the AC infers the will of the drafters to leave this prerogative exclusively the Prosecutor.[146] It further argues that the previous jurisprudence inferring the need for the PTC to assess the elements under Art. 53(1)(a) to (c) from the use of the expression 'reasonable basis' both in Articles 15 and 53 'obscures the essential difference between the standard applicable to the assessment on the one hand and the subject-matter of the assessment on the other'.[147] Even if this observation is acceptable in principle, the consequences the AC draws from it lead to the paradoxical situation of two subjects that must reach a shared determination analysing a different subject-matter. According to the AC, the PTC's task is not reviewing the Prosecutor's determination, but rather to 'assess the information contained in the Prosecutor's request to determine whether there is a reasonable factual basis to proceed with an investigation, in the sense of whether crimes have been committed, and whether the potential case(s) arising from such investigation would appear to fall within the Court's jurisdiction'.[148] Since, according to the AC, the Prosecutor 'is not required to present evidence to support her request and is not required to present information regarding her assessment on complementarity with respect to the cases or potential cases' and 'is not required to provide her reasoning (if any) or justify her

[144] ICC, PTC II, *Situation in the Islamic Republic of Afghanistan, Concurring and Separate Opinion of Judge Antoine Kesia-Mbe Mindua*, attached to the *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan*, 31 May 2019, ICC-02/17-33-Anx, para. 22.

[145] ICC, AC, *Situation in the Islamic Republic of Afghanistan, Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan*, 5 Mar. 2020, ICC-02/17-138 OA4, paras 33-34.

[146] *Ibid*., para. 35.

[147] *Ibid*., para. 36.

[148] *Ibid*., para. 45.

conclusion regarding the interests of justice' but only 'to provide a factual description of the crimes allegedly committed and a declaration that they fall within the jurisdiction of the Court',[149] its interpretation would exclude not only the interests of justice, but also admissibility from the PTC's assessment. According to the AC the PTC should merely verify whether the narrative of the facts submitted by the Prosecutor includes (unsupported) allegations that crimes within the jurisdiction of the Court have been committed.

As seen in Chapter I, Art. 15 and Art. 53 are interrelated.[150] The statement to the effect that the reasonable basis only identifies an applicable standard but does not harmonise the subject-matter of the assessment transforms the probably poor language of Art. 15(4) – a provision that was adopted thanks to a late proposal dated 25 March 1998 and that was not easily approved by all the delegations – in an intentional choice of the drafters reducing the reach of the provision. The AC fails to take into account the purpose of the Art. 15 mechanism, namely ensuring judicial backing to the Prosecutor's decision to initiate an investigation in the absence of a referral.[151] The arguments used by the AC (some references to the deletion of proposals during the preparatory works and some inferences most of which from secondary provisions) do not seem strong enough to support its conclusion. Not surprisingly, in order to reinforce its approach and limit the Chamber's role, the AC introduces the adjective 'factual' in the 'reasonable basis' formula, repeating throughout the whole judgement that the PTC is only responsible for ascertaining the existence of 'reasonable factual basis to proceed with an investigation'.[152]

The AC further argues that it does not make sense for the PTC to engage in the admissibility assessment before the commencing of the investigation as it should rely exclusively on the word of the Prosecutor. It notes that States may submit their observations on admissibility only after the release of the authorisation. As see in Chapter II[153] explaining how to conduct the admissibility assessment at the situation stage required interpretative activity and even now it is not an easy task and both a too stringent and a too broad approach should be avoided. Nevertheless, preventing the PTC to make the assessment only because it should rely only on the Prosecutor's information is pointless for two reasons. First, the PTC must rely on

[149] *Ibid*., para. 39.

[150] *See* above Chapter I, Section IV, 1.3.2. The relationship between Article 15 and Article 53 of the Statute.

[151] In fn. 54, the AC recalls at least that '[t]he concern of the drafters was to ensure that a Prosecutor vested with *proprio motu* powers would not be able to pursue frivolous or politically motivated investigations in an unchecked manner' but does not clarify in how its understanding of the PTC's authorisation pursue at least this elementary objective.

[152] *Ibid.*, paras 34, 39, 45, 46, 53.

[153] *See* above, Chapter II, Section III, 2.1. Admissibility and initiation of the investigation.

the word of the Prosecutor with regards to jurisdiction as well, especially if, as suggested by the AC, the Prosecutor is not required to provide information or reasoning but a mere narrative of the facts and a 'declaration' that crimes fall within the jurisdiction of the Court. Second, jurisdiction may be challenged as admissibility, therefore, following the AC reasoning, the PTC's determination on jurisdiction would be weak as its determination on admissibility. There is no doubt that the PTC assessment is only provisional as Art. 15 expressly states that the determination of the Chamber is without prejudice to subsequent determinations on jurisdiction and admissibility. But inferring the superfluous nature of the assessment from its provisional character seems excessive.

Ultimately, the AC states that the 'pre-trial chamber is required to reach its own determination […] as to whether there is a reasonable basis to proceed with an investigation' as well.[154] If the Chamber 'is not called to review the Prosecutor's analysis of the factors' and the Prosecutor is not required to produce evidence, information or reasoning on her determination, it is not clear how the PTC would be expected to reach its own determination. How the conclusion on the existence of the basis could be 'reasonable' is even more difficult to imagine.

If the AC's reading of the proceedings under Art. 15 shall be rejected, it remains to decide which kind of review the PTC is entitled to do on the request for authorisation on the basis of the parameters set forth in Art. 53(1). From the analysis of the case-law of the PTCs conducted above it is possible to distinguish two different approaches towards the role of the PTC. According to the first one the Chamber has a mere filtering function and the PTC can only assess the reasonableness of the Prosecutor's determination and possibly reject the request because of its frivolousness or politically motivated nature. According to the second one the Chamber exercises a significant control over the Prosecutor's request and the PTC must share the Prosecutor's view that reasonable basis for commencing an investigation exist.[155]

Art. 15(4) requires the PTC to examine not only the request but 'the supporting material' as well and expressly states that it shall authorise the investigations 'if [it] considers that there is a reasonable basis to proceed with an investigation'. The fact that the information

[154] *Ibid*., para. 45.

[155] On the development of the jurisprudence of the PTCs *see* POLTRONERI ROSSETTI L., *The Pre-Trial Chamber's Afghanistan Decision*, in *Journal of International Criminal Justice*, 17, 2019, pp. 603-604. *See* also MARINIELLO T., *Judicial Control over Prosecutorial Discretion at the International Criminal Court*, in *International Criminal Law Review*, 19, 2019, p. 979 at 984-985, who nevertheless generally refers to the permissive attitude of various PTCs towards the Prosecutor in the Art. 15 procedure.

available at the stage of the preliminary examination is not required to point towards only one conclusion and the fact that the analysis of the supporting material is combined with the request may suggest that the Chamber only has to assess the reasonableness of the Prosecutor's conclusion. Nevertheless, Art. 15(4) of the Statute and even the quite deferential jurisprudence since the decision in the *Kenya situation*, expressly requires the PTC to be satisfied of the existence of the reasonable basis standard.[156] Eventually, the PTC must reach the same conclusion reached by the Prosecutor.

The case-law of the Court does not adequately take into account a Rule that may be useful in order to determine the kind of the Chamber's review and to better define the role of the PTC: Rule 50(5) RPE. This Rule, which is mentioned only by Judge Fernández de Gurmendi in her partly dissenting opinion for other purposes than those here under consideration, includes an important element suggesting that the PTC must reach its own determination: the reasoning. The relevant part of the Rule reads as follows:

> 'The Pre-Trial Chamber shall issue its decision, including its reasons, as to whether to authorize the commencement of the investigation in accordance with article 15, paragraph 4, with respect to all or any part of the request by the Prosecutor.'

The Rule highlights that the decision of the PTC shall comprise a reasoning. The reasoning presupposes a determination based on the material put at the disposal of the Chamber, otherwise it could simply refer to the Prosecutor's assessment. Since the duty to reason the decision applies both if the PTC grants and rejects the Prosecutor's request, it would be difficult for the PTC to reason on the political nature of the Prosecutor's determination on the basis of the information provided by the Prosecutor herself, considering that the procedure under Art. 15 is *ex parte* and does not require the participation of other subjects. Rather, Combined with Art. 15(4) of the Statute, this Rules suggests that the PTC shall review the reasonableness of the need for investigation on the basis of the material provided by the Prosecutor.[157] This interpretation enhances the role of the reasoning, highlighting the importance for the PTC to reach its own determination on the existence of the reasonable basis.

[156] *See* also SCHABAS W.A., *An Introduction to the International Criminal Court*, Cambridge University Press, 2020, p. 171.

[157] Similarly *see* CHAITIDOU E., *The Judiciary and Enhancement of Classification of Alleged Conduct*, in AGIRRE X., BERGSMO M., DE SMET S., STAHN C., (ed.), *Quality Control in Criminal Investigation*, Torkel Opsahl Academic EPublisher, 2020, p. 943 at 952, stating that '[a]t the end of the review exercise, the Chamber sets the scope of the authorised investigation in terms of its geographical and temporal reach as well as its subject-matter'.

That the PTC must not limit its assessment to whether the request is frivolous or politically motivated but extends to an analysis of the supporting material instrumental to reach its own conclusion as to the existence of the reasonable basis is further confirmed by the mechanism foreseen by the Statute in case of disagreement between the Prosecutor and the PTC. Art. 15(5) states that the refusal of the authorisation does not preclude the presentation of subsequent requests based on new facts or evidence regarding the same situation.The solution proposed by the Statute highlights that the reason for rejecting a request cannot be limited to the frivolous nature of the investigation or its political nature, otherwise the submission of additional material could hardly overcome those problematics. Therefore, the object of the Chamber's assessment is the material containing the information that allows to infer the existence of the reasonable basis to commence an investigation and that allows both the Prosecutor and the Chamber to identify the scope of the investigation.

The possible partial granting of the authorisation further supports this conclusion. Rule 50 RPE foresees the power of the PTC to *partially* authorise the Prosecutor's investigation. If the PTC partially authorises the investigation, it means that the investigation as such is not frivolous, but that nevertheless part of the request cannot be granted. In the light of the content of the request under Reg. 49 RegC mentioned in Chapter I and above,[158] it is apparent that the reasons for a partial rejection are rooted in the temporal, territorial, material or personal content of the request.

Affirming that the PTC must reach its own determination does not mine the Prosecutor's independence since her assessment remains untouched and the Chamber's assessment may only serve as confirmation of the correctness of the Prosecutor's reading of the information. This mechanism avoids both the opening of unwarranted investigations and protects the Prosecutor from accusation of politicisation. Moreover, as suggested by Judge Kaul, it increases the sense of the mechanism provided for by Art. 15: the idea of a Prosecutor acting as a witch-hunter adopting frivolous decisions to open investigations without any reliable information is not a really credible scenario.[159] Therefore the need for a judicial

[158] According to the Regulation 49 RegC, the request shall contain 'a reference to the crimes which the Prosecutor believes have been or are being committed and a statement of the facts being alleged to provide the reasonable basis to believe that those crimes have been or are being committed' and the statement must contain as a minimum '(a) the places of the alleged commission of the crimes, e.g. country, town a precisely as possible; (b) the time or time period of the alleged commission of the crimes; and (c) the persons involved, if identified, or a description of the persons or groups of persons involved'.

[159] *See* GOLDSTONE R.J., FRITZ N., *In the Interests of Justice and Independent Referral: the ICC Prosecutor' Unprecedent Powers*, in *Leiden Journal of International Law*, 13, 3, 2000, p. 655, noting that the Prosecutor can always be removed from her office in case of serious misconducts. *See* also

authorisation to initiate an investigation must be linked to the checking of the existence of the legal parameters set forth in the Statute. The Prosecutor herself, even if in the attempt to differentiate the review under Art. 53(3) from the review under Art. 15 in a proceedings under Art. 53(3), recognised that in the review under Art. 15 the PTC is required 'to implement a *de novo* review´ because the Chamber and the Prosecutor must *agree* that the threshold of the reasonable basis is met.[160] Further, only the pervasive of the PTC's analysis fits with the rationale of the drafting history of Art. 15 of the Statute: a Prosecutor acting *proprio motu* requires an effective judicial backing strengthening her legitimacy to conduct the investigations.

Ultimately, in order not to deprive the assessment of the PTC of any effective meaning it is also necessary to recognise the authorisation a binding role *vis-à-vis* the subsequent investigation. Once again, the neglected Rule 50 RPE may come into play. allowing the PTC to partially authorise the investigations only for those crimes that it believes satisfy the reasonable basis standard, the Rule implicitly suggests that the Chamber's determination must represent a limit for the Prosecutor's investigation. Otherwise, assuming that the Prosecutor is not bound by the content of the Chamber's decision, she could also investigate those crimes contained in the request and rejected by the Chamber, depriving the Chamber's authorisation of its meaning. Thus, Rule 50(5) not only vouches against a weak supervisory role of the judiciary but also supports the binding nature of the authorisation for the Prosecutor's investigation.

2.2. The Chamber's different reading of the information

If the PTC must reach its own determination and the content of the authorisation is binding, one may wonder what happens if the Chamber provides for a different reading of the information made available by the Prosecutor. As previously seen, in more than one occasion various PTCs authorising the commencement of the investigations went beyond the Prosecutor's request providing their own interpretation of the available information and even contradicting the Prosecutor or suggesting her to extend the scope of the investigations.[161]

NIGNAN B., *Article 15*, in FERNANDEZ J., PACREAU X., *Statut de Rome de la Cour pénale internationale. Commentaire article par article*, Pedone, 2012, p. 644 at 656 who notes the prudent practice of the OTP in submitting requests under Art. 15.

[160] ICC, OTP, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia, Final decision of the Prosecution concerning the "Article 53(1) Report" (ICC-01/13-6-AnxA), dated 6 Nov. 2014*, 29 Nov. 2017, ICC-01/13-57, para. 46.

[161] *see* CHAITIDOU E., *The Judiciary and Enhancement of Classification of Alleged Conduct*, in AGIRRE X., BERGSMO M., DE SMET S., STAHN C., (ed.), *Quality Control in Criminal Investigation*, Torkel Opsahl Academic EPublisher, 2020, p. 943 at 953 ff.

The first time a PTC extended the field of the investigation was in the situation in Côte d'Ivoire, when the majority of PTC III suggested that the available information provided with a reasonable basis that both and not only one of the sides involved in the confrontations had committed crimes against humanity. Judge Fernández de Gurmendi in her separate and partially dissenting opinion harshly criticised this approach. She noted that the PTC does not have investigative powers, thus, it should refrain from seeking to identify additional alleged crimes and suspects.[162] Moreover, the dissenting Judge also noted that the lack of evidence-gathering capabilities of the Chamber prevents it to conduct an independent assessment of the reliability, credibility and completeness of the available information, which is moreover fragmentary.[163]

The approach of Judge Fernández de Gurmendi is consistent with her understanding of the role of the PTC: since it has a marginal role it is not allowed to provide its own reading of the information. Conversely the approach adopted by those Chambers that recognised prosecutorial discretion but re-assessed the information differently is more dubious. If the information already meets the 'reasonable basis standard' and the authorisation is not binding for the investigation of the Prosecutor, it makes no sense to *authorise* the Prosecutor to investigate additional crimes identified by the Chamber as well. The alternative reading of the Chamber can only be considered a mere *suggestion* for the Prosecutor, whose relevance is debatable. If the authorisation is not binding, this power is completely pointless.[164]

The approach adopted by Judge Kovács is more coherent. In the light of his understanding of the role of the PTC in the procedure under Art. 15 Judge Kovács states that it is 'logical and essential that the Chamber should not be prevented from presenting a different reading of the material, in particular if the Prosecutor admittedly "imposed requirements on the material that cannot reasonably be met in the absence of an investigation"' and provides his own readings of the crimes for which the Prosecutor was unable to reach a determination.[165]

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[162] ICC, PTC III, *Situation in Côte d'Ivoire*, *Judge Fernández de Gurmendi's separate and partially dissenting opinion to the Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation in the Republic of Côte d'Ivoire*, annexed to the *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation in the Republic of Côte d'Ivoire*, 3 Oct. 2011, ICC-02/11-15, paras 19-20.

[163] *Ibid.*, paras 35-45.

[164] *Contra* CHAITIDOU E., *The Judiciary and Enhancement of Classification of Alleged Conduct*, in AGIRRE X., BERGSMO M., DE SMET S., STAHN C., (ed.), *Quality Control in Criminal Investigation*, Torkel Opsahl Academic EPublisher, 2020, p. 943 at 956.

[165] ICC, PTC I, *Situation in Georgia*, *Separate Opinion of Judge Péter Kovács*, annexed to *Decision on the Prosecutor's request for authorization of an investigation*, 27 Jan. 2016, 01/15-12-Anx1, paras 24 ff.

One relevant aspect suggesting the appropriateness of giving to the PTC's review of the information a relevant meaning can be identified in its duty to conduct the admissibility test. If the Prosecutor would be free to investigate irrespective of the Chamber's determination and bring in front of the Court cases concerning different crimes, incidents and individuals, the admissibility assessment of the potential cases made by the PTC would be pointless. On the contrary, the importance of the admissibility assessment is supported not only by Judge Kovács,[166] but also by the PTC II in the situation in Kenya (which even requested the Prosecutor additional information[167]) by PTC III in the situation in Côte d'Ivoire (which largely referred to the PTC II's jurisprudence[168]) and by PTC III in a different composition in the situation in Burundi[169] (which nevertheless extended the scope of the authorisation far beyond the Prosecutor's request).

It is worth noting that the stage of the proceedings affects the relevance of the Chamber's reassessment if it simply extends the scope of the investigation requested by the Prosecutor because if the Prosecutor does not share the Chamber's point of view she can simply continue to investigate only the crimes she made the request for. Differently, if the PTC provides a different qualification of the facts in the authorisation vis-à-vis the Prosecutor's request, the effect of the PTC's review is more relevant as the Prosecutor would be bound by this new qualification.

2.3. The extent of the reviewing power

It is now possible to turn to the extent of the reviewing power of the Chamber. As seen above, once the validity of the AC's judgement has been excluded, there is no doubt that the PTC reviews the parameters of jurisdiction and admissibility. It is instead debated whether the review also extends to the parameter set forth in Art. 53(1)(c), i.e. the interest of justice clause.

According to Art. 15(4) the PTC examines the Prosecutor's request and the supporting material and authorises the investigation after assessing the existence of reasonable basis to proceed with an investigation and that the case appears to fall within the jurisdiction of the

[166] *Ibid.*, paras 37 ff.

[167] *See* ICC, PTC II, *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 Mar. 2010, ICC-01-09-19, paras 181 ff.

[168] ICC, PTC III, *Situation in Côte d'Ivoire, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation in the Republic of Côte d'Ivoire*, 3 Oct. 2011, ICC-02/11-14, paras 189 ff.

[169] ICC, PTC III, *Situation in Burundi, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi*, 9 Nov. 2017, ICC-01/17-9, paras 142 ff.

Court. The provision does not refer to the interests of justice as in Art. 53. Therefore, or (i) the interests of justice is not an element that the PTC is required to review; or, (ii) despite the lack of explicit reference, the assessment of the interests of justice still falls within the power of the PTC.

The question of the power of review of the PTC over the discretion of the Prosecutor in initiating a prosecution (and consequently an investigation) with regards to the review of the interests of justice emerged in the situation in Darfur.[170] The PTC I, noting that Art. 53(3)(b) confers to the PTC the power of reviewing of the interests of justice only when the Prosecutor decides *not* to proceed, refused to extend the reviewing power also to those situations where the Prosecutor decides to proceed. It further noted that Art. 58 at paras (1) and (7) provides for the duty of the Chamber to issue a warrant of arrest or a summons to appear whenever it is satisfied that there are reasonable grounds to believe that the person subject to the Prosecution's request is criminally liable under the Statute. It is apparent that the Chamber limits its assessment in order to be satisfied that there are reasonable grounds to believe that the relevant person is criminally liable to jurisdiction and admissibility and limits the Chamber's power to the assessment of gravity included in the admissibility assessment under Art. 17(1)(d) of the Statute. In conclusion the Chamber declared that it 'neither has the power to review, nor is it responsible for, the Prosecution's assessment that [...] the initiation of a case [...] would not be detrimental to the interests of justice'[171].

Turone argues that the Chamber should limit its assessment to jurisdiction and admissibility and should even refrain from going into detail on the existence of the reasonable basis in the light of the supporting material 'in order not to pervert the correct relationship between prosecutorial and judicial functions'.[172] Similarly, Mariniello deems that excluding the interests of justice from the *ex officio* reviewing power of the PTC is more consistent with Art. 53(1)(c). He highlights that the PTC does not have investigative functions and therefore cannot be in a better position of the Prosecutor for assessing the consequences of the investigation. Further, he reads in the 'substantial reasons to believe that an investigation is not in the interests of justice' a different evidentiary threshold vis-à-vis the 'reasonable basis standard' applicable to the other two requirements that justifies the exclusion of the interests of justice from the review of the PTC. Furthermore, he deems that the purpose of the PTC in the

[170] ICC, PTC I, *Situation in Darfur, Sudan, Decision on Application under Rule 103*, 4 Feb. 2009, ICC-02/05-185, paras 19-26.

[171] *Ibid.*, para 29.

[172] TURONE G., *Powers and Duties of the Prosecutor*, in CASSESE A., GAETA P., JONES J.R.W.D., *The Rome Statute of the International Criminal Court. A Commentary*, vol. 2, Oxford University Press, 2002, p. 1161.

authorisation procedure – that he limits to the prevention of frivolous and politically motivated investigations – is inconsistent with the attribution to the PTC of the power to assess the 'highly politicised concept of interest of justice'.[173]

Nevertheless, it has been seen that Art. 53 applies irrespective of the mechanism triggering the jurisdiction of the Court and therefore also in case of *proprio motu* investigation. If the interests of justice is not only a requirement to be assessed by the Prosecutor when deciding not to investigate or prosecute, but also an implicit fundamental requirement for the initiation of her action, there is no reason for excluding the interests of justice from the PTC's assessment.[174] Moreover, according to Rule 48, 'in determining whether there is a reasonable basis to proceed with an investigation under article 15 paragraph 3, the Prosecutor shall consider the factors set out in article 53, paragraphs 1 (a) to (c)'. Hence, the PTC's assessment of the reasonable basis for authorising an investigation includes the interests of justice. If on the one side allowing the PTC's assessment of the interests of justice would interfere on the quintessential of the prosecutorial discretion (or, as suggested in Chapter II, on the only factor including a discretionary component), preventing this assessment would deprive the Chamber from its role, as it is difficult to imagine a Prosecutor's request not containing allegations at least partially falling within the jurisdiction of the Court or evidently inadmissible.[175] In all decisions authorising investigations the PTCs have subscribed the Prosecutor's assessment on the absence of interests militating against a decision not to investigate implicitly recognising that also the interests of justice clause is subject to judicial oversight.[176] Moreover, Art. 53(3)(b) subordinates the effectiveness of Prosecutor's decision not to proceed based solely on para. 1(c) or 2(c) to the confirmation of the PTC. If the judicial control on the assessment of the interests of justice is so pervasive, there is no reason for excluding it when dealing with a

[173] MARINIELLO T., *Judicial Control over Prosecutorial Discretion at the International Criminal Court*, in *International Criminal Law Review*, 19, 2019, p. 979 at 990-992. In the same vein SCHABAS W.A., *An Introduction to the International Criminal Court*, Cambridge University Press, 2020, pp. 174-175.

[174] *See* also STEGMILLER I., *Article 15*, in KLAMBERG M. (eds.), *Commentary on the Law of the International Criminal Court*, TOAEP, Brussels, 2017, p. 182 at 186.

[175] *See* HELLER K.J., *One Word for the PTC on the Interest of Justice: Taliban, 13 April 2019*, in *Opinio Juris*, 13 Apr. 2019.

[176] AKANDE D., DE SOUZA DIAS T., *The ICC Pre-Trial Chamber Decision on the Situation in Afghanistan: A Few Thoughts on the Interest of Justice*, in *EJIL: Talk!*, 18 Apr. 2019. *See* also MARINIELLO T., *Judicial Control over Prosecutorial Discretion at the International Criminal Court*, in *International Criminal Law Review*, 19, 2019, p. 979 at 989, who argues that the approach of some PTCs is contraddictory as in the same decision they claim and deny their power of review. In reality, it seems that the statements from with he infers the denyal of the PTC's reviewing power rather aim at explaining the negative nature of the interests of justice requirement.

request under Art. 15.[177] Ultimately, referring to non-binding but still authoritative documents, the OTP itself recognises this power to the PTC in the Policy Paper on the Interest of Justice when declaring that '[t]he interpretation and application of the interests of justice test may lie in the first instance with the Prosecutor, but is subject to review and judicial determination by the Pre-Trial Chamber'.[178]

Once it has been established that the PTC's reviewing power includes the interests of justice clause, it undeniable that the PTC has therefore the power to reject the Prosecutor's request on the basis of this parameter.

The question is therefore determining which kind of review the PTC is entitled to do: the PTC could alternatively conduct its own assessment of the information and replace its findings with those of the Prosecutor, or alternatively assessing the interests of justice clause adopting a deferential approach *vis-à-vis* the Prosecutor. In the second case the Chamber could only highlight its doubts about the existence of the interests of justice, underlying possible mistakes in the Prosecutor's assessment.

With regards to the first alternative, scholars, following the wording of the Prosecutor in another situation,[179] uses the expression '*de novo* review'.[180] This wording usually refers to appellate courts which are allowed to decide without deference to a previous court's decision. Transposed to this context, the expression highlights the autonomous evaluation of the PTC on the basis of the information at its disposal, irrespective to the conclusions reached by the Prosecutor. Nevertheless, since the PTC has the duty to verify the existence of the conditions for the release of the authorisation, and in light of the relationship between the Chamber and

[177] *See* DE SOUZA DIAS T., *'Interests of justice': Defining the scope of Prosecutorial discretion in Article 53(I)(c) and (2)(c) of the Rome Statute of the International Criminal Court*, in *Leiden Journal of International Law*, 30, 2017, p. 731 at 744. *See* below, 3. The decision not to investigate or prosecute and the Chamber's power of review.

[178] ICC, OTP, *Policy paper on the interest of justice*, p. 3. As mentioned more than once, the AC excludes that the interests of justice is included in the PTC's review, since it distinguishes the subject matter of the Prosecutor's and of the PTC's review. ICC, AC, *Situation in the Islamic Republic of Afghanistan, Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan*, 5 Mar. 2020, ICC-02/17-138 OA4. According to Poltroneri Rossetti, this argument is irrelevant as the internal reference to fn. 2 limits the PTC's power to the procedure under Art. 53(3)(b). POLTRONERI ROSSETTI L., *The Pre-Trial Chamber's Afghanistan Decision*, in *Journal of International Criminal Justice*, 17, 2019, p. 585 at 593.

[179] ICC, OTP, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia, Final decision of the Prosecution concerning the "Article 53(1) Report" (ICC-01/13-6-AnxA), dated 6 Nov. 2014*, 29 Nov. 2017, ICC-01/13-57, paras. 41 ff.

[180] HELLER K.J., *One Word for the PTC on the Interest of Justice: Taliban*, in *Opinio Juris*, 13 Apr. 2019; HELLER K.J., *Can the PTC Review the Interests of Justice?*, in *Opinio Juris*, 12 Apr. 2019; POLTRONERI ROSSETTI L., *The Pre-Trial Chamber's Afghanistan Decision*, in *Journal of International Criminal Justice*, 17, 2019, p. 585 at 604 ff.

the Prosecutor, which cannot be compared to the relationship between a first instance and an appeal body, referring to it as a '*de novo*' review is questionable. 'Pervasive review' seems a more appropriate expression.

Be as it may, Heller, although including the interests of justice in the Chamber's review, excludes that the PTC may replace the Prosecutor's finding with its own and states that a *de novo* (or, better, pervasive) review only aims at erasing the Prosecutorial discretion and is 'inconsistent with the structural independence of the [OTP]' which is in a better position to assess the feasibility of an investigation.[181] Nevertheless, even opting for the second cautious and more deferential solution, the Chamber should reject the Prosecutor's request if it identifies a mistake. Neither this solution would be immune from criticisms, since the Chamber would be probably accused of 'directing' the Prosecutor in her assessment of the interests of justice, introducing a procedure that does not have any statutory basis. In fact, Art. 53(3) of the Statute allows the PTC to ask the Prosecutor to review only a decision *not* to investigate or prosecute and Art. 15(4) and (5) give the PTC the power to authorise (in whole or in part) or deny the authorisation to investigate. Even if a request for review is not incompatible with Art. 15, the practice of introducing new non-codified procedures should be limited and avoided. Moreover, once it has been established that the PTC's reviewing power includes the interests of justice clause, introducing a different reviewing procedure of the interests of justice clause *vis-à-vis* the other parameters is not supported by any Statutory provision.

At this stage one may also wonder whether the PTC can reject a request if the Prosecutor fails to demonstrate that the investigation or prosecution *is* in the interests of justice. As seen above the decision rejecting the request for opening an investigation in Afghanistan is based precisely on a disagreement with regards to the interests of justice clause. This decision raised doubts among scholars not only because of the strong reviewing power of the PTC exercised on the Prosecutor's request and not only because of the decision to provide its own assessment of the interests of justice clause, but also because of the kind of assessment with regards to the interests of justice.

[181] HELLER K.J., *One Word for the PTC on the Interest of Justice: Taliban*, in *Opinio Juris*, 13 Apr. 2019; HELLER K.J., *Can the PTC Review the Interests of Justice?*, in *Opinio Juris*, 12 Apr. 2019. In the same vein, POLTRONERI ROSSETTI L., *The Pre-Trial Chamber's Afghanistan Decision*, in *Journal of International Criminal Justice*, 17, 2019, p. 585 at 594, who states that the PTC maintains the power to clarify the legal content of the interests of justice, but should recognise 'a good margin of deference towards the OTP concerning the concrete *factual* assessment of the interests of justice, which remains primarily in the domain of prosecutorial discretion'; and SCHABAS W.A., *An Introduction to the International Criminal Court*, Cambridge University Press, 2020, pp. 174-175

Some observers believe that the PTC should be prevented from rejecting the Prosecutor's request for authorisation as *an investigation is not in the interests of justice*. Bitti grounds his arguments in the drafting history of the provision;[182] Jacobs notes that Art. 53(1)(c) reserves this power to the Prosecutor, while the PTC can only determine jurisdiction and admissibility according to Art. 15(4) of the Statute.[183] His arguments are those generally excluding the PTC's power of assessment over the interests of justice simply adapted to the new 'positive' nature given to this concepts by the Chamber. He refers to the Kenya jurisprudence highlighting the negative phrasing of Art. 53(1)(c) and the presumption in favour of an investigation, excluding the existence of a positive obligation for the Prosecutor to consider the matter in the request and therefore excluding an autonomous power for the PTC to deal with the issue *proprio motu*. In his opinion, the PTC would be entitled to assess the interests of justice only pursuant to Art. 53(4) of the Statute, i.e. when the Prosecutor decides *not* to investigate.[184]

Nevertheless, other authors state that despite the negative phrasing of Art. 53(1)(c) and the presumption in favour of an investigation, the Prosecutor is implicitly required to assess the conformity of the investigation to the interest of justice and that the presumption itself would be evidence of this.[185] As a consequence the PTC would be entitled to review the interests of justice both as negative and positive requirement. On the other side, if the presumption must facilitate the activity of the Prosecutor not requiring her to prove the interests of justice in investigating and prosecuting, it would be odd that the Chamber could accuse the Prosecutor of not having proved that investigating or prosecuting is in the interests of justice.

In any event, even excluding the need to assess the consistency of the investigation with the interests of justice, an assessment of the information made available by the Prosecutor and supporting in her view the need for investigation, as well as the supporting material in general, could in theory lead the Chamber to provide for a different reading of the information and even reject a request for authorisation if it detects its inconsistency with the interests of

[182] BITTI G., *The Interests of Justice – where does that come from? Part II*, in *EJIL: Talk!*, 14 Aug. 2019. As seen above the original proposal included a positive assessment of the interests of justice which was later abandoned. Moreover, the oversight control under Article 53(3)(b) of the Statute is considered a means to 'control and restrict the use of the "interests of justice" criterion by the Prosecutor, not to increase it.'

[183] JACOBS D., *ICC Pre-Trial Chamber rejects OTP request to open an investigation in Afghanistan: some preliminary thoughts on an ultra vires decision*, in *Spreading the Jam*, 12 Apr. 2019.

[184] JACOBS D., *Some extra thoughts on why the ICC Pre-Trial Chamber acted ultra vires in using the "interests of justice" to not open an investigation in Afghanistan*, in *Opinio Juris*, 12 Apr. 2019.

[185] AKANDE D., DE SOUZA DIAS T., *The ICC Pre-Trial Chamber Decision on the Situation in Afghanistan: A Few Thoughts on the Interest of Justice*, in *EJIL: Talk!*, 18 Apr. 2019; HELLER K.J., *Can the PTC Review the Interests of Justice?*, in *Opinio Juris*, 12 Apr. 2019.

justice. The more and the better the concept of interests of justice is defined and the more its interpretation is restricted, the less the Chamber can reject the request on the basis of this criterion.

2.4. Concluding remarks

In conclusion, it has been seen that there is no agreement as to the role of the PTC should play in reviewing the request of the Prosecutor to initiate an investigation. The mere filtering role seems to underestimate the whole extent of the PTC's functions. The interpretation offered by Judge Kaul in his dissent to the decision authorising an investigation in Kenya, by Judge Kovács in his dissenting opinion to the decision authorising an investigation in Georgia and of the PTC II in the decision rejecting the authorisation to commence an investigation in Afghanistan seems instead more in line with the rationale of the authorisation procedure.

The two divergent positions identified above partially correspond to the different kinds of review that the PTC may be required to perform. On one side it may simply be required to assess the correctness of the Prosecutor's reasoning as to the determination of the reasonable basis. On the other side it could be requested to review the information provided by the Prosecutor and reach its own determination as to the existence of the reasonable basis standard about each aspect of the Prosecutor's request. Rule 50(5) RPE, requiring the Chamber to reason its decision supports the second interpretation. Besides, Rule 50(5), allowing the Chamber to partially authorise the Prosecutor's investigation lay on behalf of the binding nature of the authorisation.

The determination of the Chamber and the binding nature of the authorisation introduces the problem of the possible alternative reading of the information made by the PTC as opposed to the reading offered by the Prosecutor. The logic consequence of a pervasive judicial review is the conferral to the Chamber of a power to provide its own understanding of the information, even when it means departing from the Prosecutor's assessment. In case of different characterisation of the facts in the authorisation decision the Prosecutor would be bound to the determination of the PTC, while in case of extension of the scope of the Prosecutor's request the powers of the Chamber to 'force' the direction of the investigations would be more limited.

As to the extent of the reviewing power of the PTC and ar with regards to the inclusion of the interests of justice assessment many factors suggest a positive answer. The most relevant are: (i) the relationship between Art. 15 and Art. 53 , (ii) Rule 48 RPE; (iii) the possibility for

the PTC to review the interests of justice also in other circumstances; (iv) and the fact that, being the more (or sole) discretionary factor in the Prosecutor's assessment it would be pointless to exclude the judicial control over the interests of justice factor, i.e. the control that may grant the non-arbitrariness of the Prosecutor's decision.

As to the kind of review over the interests of justice factor, it is preferable to apply the same kind of review applied to jurisdiction and admissibility, since nothing in the Statute suggests a different and more deferential treatment. More dubious is instead the recognition of the power to challenge the Prosecutor's determination requesting her to prove that the investigation is in the interests of justice even if this aspect will be further investigated in the analysis of the procedure under Art. 53(3).

2.5. The scope of the authorisation

Once that the function of the PTC has been analysed, it is possible to turn toward the parameters that integrate the object of the Prosecutor's and the PTC's determination and that define the scope of the investigations under Art. 15. The boundaries of the investigation are those ruling the jurisdiction of the Court, i.e. temporal, territorial, material and personal limitations.

2.5.1. The temporal limitation

With regards to the temporal limitations, the PTC II authorising the commencement of an investigation in Kenya used the date of the submission of the request as temporal limit for the authorisation. This approach enhances the results of the preliminary examinations and justifies the release of the authorisation on the ground of the information available at the time of the request. It also strengthens the supervisory role of the PTC, which limits the authorisation to the events upon which it had the chance to build its determination on the appropriateness of the investigation. Nevertheless, it is notable that the request for authorisation concerned alleged crimes committed between 2005 and 2008 and the request was submitted in September 2009, therefore the authorisation *exceeded* the Prosecutor's request, extending the temporal scope of the investigations.

In the situation in Côte d'Ivoire, the PTC III recognised great discretion to the Prosecutor with regards to the temporal limits of the authorisation: it authorised the Prosecutor to investigate crimes against humanity and war crimes committed in Côte d'Ivoire since 28 November 2010 ongoing. The Prosecutor did not press the PTC to authorise the investigation for alleged crimes committed between 2002 and 2010 and left the Chamber free to assess

whether the available information was enough for extending the scope of the investigation.[186] When the Prosecutor, upon the Chamber's request, provided for additional information,[187] the PTC III expanded its previous authorisation.[188] In this case the Chamber did not limit the temporal scope of the investigation to the date of the submission of the request, on the contrary it expressly authorised the investigation 'with respect to continuing crimes that may be committed in the future [...] insofar as they are part of the context of the ongoing situation'.[189] The Chamber expressly decided to depart from the previous practice of the situation in Kenya in light of the 'volatile environment in Côte d'Ivoire' and relied on previous practice of the ICTR and on other case-law of the Court.[190] The reference to the case-law of the Court, and in particular to the *Mbarushimana case*, does not seem entirely convincing, in light of the completely different nature of the procedure applicable under Art. 15 as opposed to the situations referred to the Court by the UNSC and the possible preventive function of the referral. In the light of the decision to extend the temporal scope of the investigation to possible future crimes, it is not entirely clear why the Chamber did not immediately authorise the investigation for crimes committed *before* 2010 and possibly connected to the events of 2010 despite the lack of adequate supporting material: if the continuity is worth for the future (where the supporting material does not exist by definition) it is not clear why it should not be worth for the past, where sufficient information is considered 'an essential prerequisite for the Chamber' to conduct its assessment.[191]

Partially dissenting Judge Fernández de Gurmendi endorsed a more permissive approach which does not limit the authorisation to the 'continuing crimes' committed after the date of the authorisation but to all of them irrespective of their continuing nature.[192]

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[186] ICC, OTP, *Situation in Côte d'Ivoire, Request for authorisation of an investigation pursuant to article 15*, 23 Jun. 2011, ICC-02/11-3, paras 40-41.

[187] ICC, OTP, *Situation in the republic of Côte d'Ivoire, Prosecution's provision of further information regarding potentially relevant crimes committed between 2002 and 2010*, 3 Nov. 2011, ICC-02/11-25.

[188] ICC, PTC III, *Situation in Côte d'Ivoire, Decision on the "Prosecution's provision of further information regarding potentially relevant crimes committed between 2002 and 2010"*, 22 Feb. 2012, ICC-02/11-36.

[189] ICC, PTC III, *Situation in Côte d'Ivoire, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation in the Republic of Côte d'Ivoire*, 3 Oct. 2011, ICC-02/11-14, para. 212.

[190] *Ibid.*, para. 179 and fn. 279.

[191] *Ibid.*, para. 184-185.

[192] ICC, PTC III, *Situation in Côte d'Ivoire, Judge Fernández de Gurmendi's separate and partially dissenting opinion to the Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation in the Republic of Côte d'Ivoire*, annexed to the *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation in the Republic of Côte d'Ivoire*, 3 Oct. 2011, ICC-02/11-15, paras 62-73.

In the light of this permissive jurisprudence, in the situation in Burundi the Prosecutor identified a starting date for the initiation of the investigation, but required the authorisation also for possible crimes committed after the submission of the request and in particular up to the coming into effect of the withdrawal of Burundi from the Statute. The PTC III not only agreed with the Prosecutor, but also decided to extend the authorisation to crimes allegedly committed *before* the date for the initiation of the investigations requested by the Prosecutor if the legal requirements of the contextual elements are fulfilled.[193]

The situation in Georgia did not pose any problem, since the authorisation covered a limited period of time (from 1 July to 10 October 2008) as required by the Prosecutor. It is only worth mentioning that the Prosecutor requested the PTC to authorise the investigation including a period of one month before the actual starting of the hostilities in order to investigate 'a number of precursor events that immediately preceded the formal commencement of the hostilities'.[194] This approach suggests once again the awareness of the Prosecutor of the mandatory nature of the Chamber's determination. With regards to the situation in Bangladesh/Myanmar, the Prosecutor noted that most of the information analysed during the preliminary examination concerned alleged crimes committed in 2017, but 'in the interest of providing a fuller narrative' required the PTC III to authorise the investigation since 9 October 2016, in order to cover also a previous wave of violence.[195] Moreover, as in the situation in Côte d'Ivoire, the Prosecutor justified the request for authorisation to investigate possible crimes committed after the submission of the request with the 'nature and circumstances of the crimes and the volatile environment in Myanmar'.[196] The PTC III, noting that crimes had been committed even before 2016, decided to extend the scope of the investigation since 2010, when the Statute entered into force in Bangladesh, and even before in case of continuous crimes.[197] Moreover, it authorised the investigation of crimes committed

[193] ICC, PTC III, *Situation in Burundi*, *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi*, 9 Nov. 2017, ICC-01/17-9, para. 192.

[194] ICC, OTP, *Situation in Georgia*, *Request for authorisation of an investigation pursuant to article 15*, 13 Oct. 2015, 02/17-4, para. 82.

[195] ICC, OTP, *Situation in the People's Republic of Bangladesh/ Republic of the Union Myanmar*, *Request for authorisation of an investigation pursuant to article 15*, 4 Jul. 2019, ICC-01/19-7, para. 21.

[196] *Ibid.*, para. 23; 79-81.

[197] ICC, PTC III, *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, 14 Nov. 2019, ICC-01/19-27, paras 131-132.

after the issuance of the authorisation under the caveat that they must be sufficiently linked to the situation contained in the request.[198]

In some of the abovementioned situations, the Prosecutor and some Chambers or dissenting Judges seem to consider necessary to include in the authorisation events which occurred before the actual commencement of the commission of the crimes. Since the starting date of the investigation aims at limiting the temporal Court's jurisdiction, the date is relevant with regards to the commission of the crimes and crimes committed before that date cannot be prosecuted. Nevertheless, it does not mean that previous facts remain unknown to the Prosecutor and cannot be used in order to describe the context leading to the commission of the crimes. Therefore, if the Prosecutor's approach in the situation in Georgia is understandable because of the limited extension and because of the possible investigation of preparatory acts which may be relevant under the perspective of criminal liability, the approach in the situation in Bangladesh/Myanmar significantly extending the scope of the investigation with merely 'narrative purposes' (at least in the Prosecutor's intentions at this stage) is questionable. Even more questionable is the arbitrary decision of those Chambers that frequently excessively extend the scope of the investigation from the entry into force of the Statute when not even the Prosecutor deems it necessary.

2.5.2. The territorial limitation

With regards to the territorial limitation, the authorisation is usually not uncertain, since it covers specific geographical areas, if not the whole State where the relevant situation takes place. In the Kenya situation, the Prosecutor simply requested to open an investigation in the territory of the Republic of Kenya, even if from the content of the request it emerges that particular attention would have been given to alleged crimes committed in specific regions. Thus, the PTC II authorised the commencement of an investigation in the whole territory of the Republic of Kenya. The same applies to the situation in Côte d'Ivoire. In the situation in Georgia, the Prosecutor limited her request for authorisation to alleged crimes committed 'in and around South Ossetia', which, as noted by PTC I, 'is generally not considered an independent State and is not a Member of the United Nations', but part of Georgia.[199]

The proceedings leading to opening an investigation in the situation in Burundi probably represents the most problematic case with regards to the territorial (and material)

[198] *Ibid.*, para. 133.
[199] ICC, PTC I, *Situation in Georgia*, *Decision on the Prosecutor's request for authorization of an investigation*, 27 Jan. 2016, 01/15-12, para. 6.

boundaries of the investigation. In the request, the Prosecutor notes that '[t]he large majority of crimes identified in this request are alleged to have been committed in the province of Bujumbura Mairie, with particular focus within Bujumbura'[200] on some neighbourhood expressly enumerated. Only at the end the Prosecutor refers to 'violence spread to the other 17 provinces of Burundi'.[201] Nevertheless, the PTC III gave what PTC II will call 'a blank cheque'[202] to the Prosecutor, authorising her to conduct investigations to all crimes within the jurisdiction of the Court committed on the territory of Burundi or outside Burundi by nationals of Burundi if the legal requirements of the contextual elements of crimes against humanity are fulfilled.[203]

In the request for the authorisation to initiate an investigation in Bangladesh/Myanmar, the Prosecutor refers to relevant incidents occurred in the State of Rakhine and mentions specific townships.[204] Nevertheless, the request does not clearly set out the territorial scope of the situation and the PTC III's authorisation includes crimes committed at least in part in the territory of Bangladesh and in other States Parties without any further restriction.[205]

In the request for opening an investigation in Afghanistan, the Prosecutor refers to alleged crimes committed in all the 34 provinces of Afghanistan but specifies that two of them appeared to be the most affected ones.[206] In addition the Prosecutor requires authorisation for crimes linked to the conflict and committed in clandestine CIA detention facilities in Poland, Romania and Lithuania, which are all parties to the Rome Statute.[207] Irrespective of the denial of the authorisation, the PTC II noted that the crimes committed outside the territory of

[200] ICC, OTP, *Situation in Burundi*, *Request for authorisation of an investigation pursuant to article 15*, 6 Sep. 2017, ICC-01/17-5, para. 36.

[201] *Ibid.*, para. 37.

[202] ICC, PTC II, *Situation in the Islamic Republic of Afghanistan*, *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan*, 12 Apr. 2019, ICC-02/17-33, para. 42.

[203] ICC, PTC III, *Situation in Burundi*, *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi*, 9 Nov. 2017, ICC-01/17-9, para. 194. On the tendency of the PTCs to move away from the 'prundent approach' of the *Kenya situation see* POLTRONERI ROSSETTI L., *The Pre-Trial Chamber's Afghanistan Decision*, in *Journal of International Criminal Justice*, 17, 2019, p. 585 at 588-589.

[204] ICC, OTP, *Situation in the People's Republic of Bangladesh/ Republic of the Union Myanmar*, *Request for authorisation of an investigation pursuant to article 15*, 4 Jul. 2019, ICC-01/19-7, paras 76 ff.

[205] ICC, PTC III, *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, 14 Nov. 2019, ICC-01/19-27, para. 124.

[206] ICC, OTP, *Situation in the Islamic Republic of Afghanistan*, *Request for authorisation of an investigation pursuant to article 15*, 20 Nov. 2017, ICC-02/17-7, para. 43.

[207] *Ibid.*, para. 49.

Afghanistan did not present the required nexus with the conflict and therefore could not fall within the situation.[208]

Thus, apart from the decision in the Afghanistan situation, the tendency is requesting and granting authorisations with indefinite margins of discretion as to the territorial limitations.

2.5.3. The material limitation

In the first request under Art. 15, the Prosecutor required authorisation to investigate crimes against humanity of four types. After that, he provided for the relevant information that allowed for the legal characterisation as crimes against humanity. The PTC II devoted more than 30 pages out of 80 to the analysis of the jurisdiction *ratione materiae*. In the light of the detailed analysis of the crimes and of its supervisory role, it found that allowing the Prosecutor to investigate acts constituting crimes falling within the jurisdiction of the Court other than crimes against humanity 'would not be consistent with the specific purpose of the provision of Art. 15 of the Statute'. It further noted that leaving open the material scope of the authorisation 'would deprive of its meaning the examination of the Prosecutor's request and supporting material conducted by the Chamber for the purpose of its decision to authorize or not the commencement of an investigation'.[209] Nevertheless, it also stated that 'in the development of the proceedings the Prosecutor is neither bound by his submissions with regard to the different acts constituting crimes against humanity, nor by the incidents and persons identified in the annexes appended to the Prosecutor's Response'. Therefore, in the Chamber's view, 'upon investigation, the Prosecutor may take further procedural steps provided for in the Statute in respect of these or other acts constituting crimes against humanity, incidents or persons, subject to the parameters of the present authorization'.[210]

Within the situation in Côte d'Ivoire, the Prosecutor provided a list of crimes against humanity and war crimes allegedly committed on the basis of the available information but also introduced a clause highlighting the possibility to identify other possible crimes during the

[208] In the light of the PTC's role drafted by the AC in the appellate proceedings, the authorisation was later granted also with respect to these crimes. ICC, AC, *Situation in the Islamic Republic of Afghanistan, Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan*, 5 Mar. 2020, ICC-02/17-138 OA4.

[209] ICC, PTC II, *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 Mar. 2010, ICC-01-09-19, para. 208.

[210] *Ibid.*, para. 75.

investigation.[211] The Prosecutor further distinguished between crimes committed by the two opposing parties specifying that even if the available information did not suggest that one of the side had committed crimes against humanity in addition to war crimes, the Prosecutor intended investigating in this direction. The PTC III devoted almost 60 pages to the legal characterisation of these acts in order to assess the existence of the reasonable basis for each of them. Moreover, contrary to the Prosecutor's expectations, the Chamber provided for its own interpretation of some acts and characterised them as crimes against humanity, suggesting that both parties had committed not only war crimes, but also crimes against humanity.[212] Such a detailed analysis and the need to provide an additional characterisation of the facts is rather surprising in the light of the 'open policy' adopted with regards to the temporal scope of the investigation analysed above.

In the situation in Georgia, the Prosecutor recalled the Kenya jurisprudence and expressly requested the possibility to expand or modify the investigation with respect to the alleged acts contained in the request or other acts, incidents, groups or persons and also required authorisation for possibly adopting a different legal qualification, as long as the cases brought forward for prosecution are sufficiently linked to the authorised situation.[213] The elastic approach of the Prosecutor further emerges from the wording used when introducing the Chamber to the crimes allegedly committed by stating that the crimes committed in the relevant time period included 'at minimum' the crimes provided for in the request.[214] Moreover, both the Prosecutor[215] and the PTC I[216] deemed it important to underline that, with regards to war crimes, it was irrelevant to determine at that stage whether the conflict was of international or non-international nature, because the war crimes under consideration existed equally in international and non-international armed conflicts. It is not entirely clear why the majority or PTC I felt compelled to specify this aspect if it added that the authorisation decision did not bind the Prosecutor during its investigations.

As far as the situation in Burundi is concerned, The Prosecutor expressly noted that the available information only suggested that only governmental forces had committed crimes against humanity and that the intensity of the armed confrontation did not allow to qualify the

[211] ICC, OTP, *Situation in Côte d'Ivoire, Request for authorisation of an investigation pursuant to article 15*, 23 Jun. 2011, ICC-02/11-3, para. 39.

[212] *Ibid.*, paras 92 ff.

[213] ICC, OTP, *Situation in Georgia, Request for authorisation of an investigation pursuant to article 15*, 13 Oct. 2015, 02/17-4, para. 51.

[214] *Ibid.*, para. 53.

[215] *Ibid.*, para. 81.

[216] ICC, PTC I, *Situation in Georgia, Decision on the Prosecutor's request for authorization of an investigation*, 27 Jan. 2016, 01/15-12, para. 28.

acts as war crimes. The Prosecutor's approach, although always elastic, is more cautious in this case: she only states that if the Chamber should authorise the investigation, she would keep the allegations of acts committed by anti-government entities under review, apparently referring only to the allegations contained in the information available at the time of the submission of the request.[217] The analysis of the PTC III does not appear superficial, to the point that it recognised that one of the conducts of the alleged perpetrators appeared to be initially lawful and only later became illegal.[218] Similarly to PTC II in Côte d'Ivoire, the PTC III provided its own interpretations of the available information, contradicting the Prosecutor with regards to the possible legal characterisation of the facts as war crimes. As PTC I in the situation in Georgia, it also believed that the Prosecutor 'acted too restrictively and has imposed requirements on the material that cannot reasonably be met in the absence of an investigation'.[219] The Chamber concluded that the Prosecutor might investigate 'any crime' within the temporal scope of the authorisation and 'is not restricted to the incidents and crimes set out in the [...] decision but may, on the basis of the evidence, extend her investigation to other crimes against humanity or other article 5 crimes'. In the view of the Chamber, '[t]his complies with the Prosecutor's duty to investigate objectively, in order to establish the truth'.[220]

As to the situation in Afghanistan, the PTC simply confirmed the qualification of the alleged crimes as suggested by the Prosecutor in the request.

2.5.4. The personal limitation

The personal limitation of the authorisation is not often emphasised in the requests and in the authorisations under Art. 15 of the Statute. Most of the time, this parameter is associated with others when dealing with the admissibility of 'potential cases' (suggesting the identification of potential suspects). Therefore, the approach of the Prosecutor and of the Chamber's towards this parameter will be included in the broader framework pictured in the next paragraph.

[217] ICC, OTP, *Situation in Burundi, Request for authorisation of an investigation pursuant to article 15*, 6 Sep. 2017, ICC-01/17-5, para. 35; 140-141.

[218] ICC, PTC III, *Situation in Burundi, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi*, 9 Nov. 2017, ICC-01/17-9, paras 88-90.

[219] *Ibid.*, paras 137-141.

[220] *Ibid.*, para. 193.

2.5.5. The scope of authorisation with regards to the 'potential cases'

After having analysed the approach adopted by the various PTCs with regards to the single limitations of the authorisation it is possible to consider the approach of the Chambers to the 'potential cases' within the overall situation. It is apparent that the elastic approach with regards to the limitations analysed above corresponds to the possibility for the Prosecutor to depart from the originally identified potential cases. Conversely, a rigid approach towards the limitations binds the Prosecutor to investigate within the potential cases identified in the decision for authorisation.

As explained in Chapter II,[221] since the decision authorising an investigation in Kenya, the PTC II acknowledges the admissibility assessment of a situation, after a preliminary identification of the potential cases. It has also been explained that the definition of the potential cases includes the identification of the groups of persons involved and the crimes within the jurisdiction of the Court allegedly committed during the incidents that are likely to be the focus of an investigation. Nevertheless, the PTC II also states that the Prosecutor's selection 'is not binding for future admissibility assessments' as the selection 'may change at a later stage, depending on the development of the investigation'[222].

In the opinion of the PTC II, this interpretation allows an effective application of Art. 18 of the Statute on the preliminary ruling regarding admissibility and the cooperation with the States exercising their jurisdiction. More importantly for the issue at stake, the boundaries of the Prosecutor's investigation are not limited by the content of the request and of the decision for authorisation as the PTC expressly recognises that additional cases requiring a further assessment of admissibility may rise from the investigation.

On the basis of this jurisprudence, the Prosecutor started enhancing her discretionary power of selection once the PTC has authorised the commencement of the investigation: in various requests under Art. 15, the Prosecutor states that '[s]hould the investigation be authorised, the Prosecutor should be permitted to expand or modify its investigation with respect to these or other alleged acts, incidents, groups or persons and/or adopt different legal qualifications, so long as the cases brought forward for prosecution are sufficiently linked to

[221] *See* Chapter II, Section III, 2.1 Admissibility and initiation of the investigation.

[222] ICC, PTC II, *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 Mar. 2010, ICC-01-09-19, para. 50; ICC, PTC I, *Situation in Georgia*, *Decision on the Prosecutor's request for authorization of an investigation*, 27 Jan. 2016, 01/15-12, para. 37; ICC, PTC III, *Situation in Burundi*, *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi*, 9 Nov. 2017, ICC-01/17-9, para. 143.

the authorised situation'.[223] This statement is included also in the request to open an investigation in Burundi, where the Prosecutor closes the illustration of the groups involved in the confrontations by expressly stating that the available information did not allow her to identify other groups.

Judge Fernández de Gurmendi in her separate and partially dissenting opinion with regards to the authorisation in Côte d'Ivoire adopts the already mentioned deferent approach, stating that the facts and incidents identified in the request 'are not and could not be expected to be exhaustive either, but are intended solely to give concrete examples to the Chamber of the gravest types of criminality that appear to have occurred in the situation'.[224] She therefore concludes that once the investigation has been authorised, the Prosecutor has the 'prerogative' to deviate from the request and select cases concerning different crimes both of the same or of a different nature.[225]

The PTC I in the situation in Georgia highlights that at this stage it is immaterial to determine the admissibility or not of some potential cases if they 'only cover *a portion* of the potential cases arising out of the situation'.[226] The PTC I is satisfied that the case arising out of the situation would be '*largely* admissible'[227] and deems it appropriate to grant the Prosecutor's request to conduct her investigations and postpone the admissibility assessment of the specific cases possibly identified during the investigation at a later stage of the proceedings.

Conversely, in the decision adopted in the situation in Afghanistan, the majority of PTC II makes the decision under Art. 15 the focus of the situation at stake and not only the starting point for the investigation.[228] On the one hand it recognises the discretionary power of the Prosecutor to decide the information she intends to submit to the Chamber, identifying and

[223] ICC, OTP, *Situation in Georgia*, *Request for authorisation of an investigation pursuant to article 15*, 13 Oct. 2015, 02/17-4, para. 277; ICC, OTP, *Situation in Burundi*, *Request for authorisation of an investigation pursuant to article 15*, 6 Sep. 2017, ICC-01/17-5, para. 146; ICC, OTP, *Situation in Afghanistan*, *Request for authorisation of an investigation pursuant to article 15*, 20 Nov. 2017, ICC-02/17-7, para. 266.

[224] ICC, PTC III, *Situation in Côte d'Ivoire*, *Judge Fernández de Gurmendi's separate and partially dissenting opinion to the Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation in the Republic of Côte d'Ivoire*, annexed to the *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation in the Republic of Côte d'Ivoire*, 3 Oct. 2011, ICC-02/11-15, para. 32.

[225] *Ibid.*, para. 34.

[226] ICC, PTC I, *Situation in Georgia*, *Decision on the Prosecutor's request for authorization of an investigation*, 27 Jan. 2016, 01/15-12, para. 46 (*emphasis added*).

[227] *Ibid.*, para. 57 (*emphasis added*).

[228] ICC, PTC II, *Situation in the Islamic Republic of Afghanistan*, *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan*, 12 Apr. 2019, ICC-02/17-33, paras 39-42.

selecting 'specific incidents and conducts in the context of ongoing preliminary examinations' and confines the PTC's scrutiny to 'the incidents or category of incidents and, possibly, the groups of alleged offenders referred to by the Prosecution' while it cannot extend the scope of the situation recommending further investigations even if additional facts emerge from the information submitted by the Prosecutor. On the other hand, the Chamber's decision under Art. 15 sets specific limits to the authorised investigation. In its view,

> '[...] the precise width and breadth of the Prosecutor's power to investigate are to be determined on the basis of the scope of the Chamber's authorisation: the Prosecutor can only investigate the incidents that are specifically mentioned in the Request and are authorised by the Chamber, as well as those comprised within the authorisation's geographical, temporal and contextual scope, or closely linked to it. [...] The filtering and restrictive function of the proceedings under article 15 further implies that the Chamber's authorisation does not cover the situation as a whole, but rather only those events or categories of events that have been identified by the Prosecution. To conclude otherwise it would be tantamount to equating the authorisation to a blank cheque, which would run against the very rationale of article 15 and thus defeat its underlying purpose. The authorisation sets the framework of the probe; investigation of incidents not closely related to those authorised would only be possible on the basis of a new request for authorisation under article 15, with a view to allowing the Chamber to conduct anew its judicial scrutiny on all relevant requirements, including jurisdiction, complementarity, gravity and the interests of justice.'

This position was later confirmed by the same Majority, by stating that:

> 'only *following* a Chamber's authorisation [...] [it is] possible for the proceedings to be defined in terms of identification of the specific incidents suitable to become the subject matter of the Prosecutor's case(s) and of their relevant objective, subjective and temporal circumstances'.[229]

Judge Mindua, in his concurring and separate opinion 'partially disagrees'[230] with his colleagues as he finds their approach too restrictive and defeating the purpose and objective of the Chamber's authorisation. He notes that the rationale behind Art. 15(3) is to limit politically motivated investigations and not requiring the Prosecutor to revert to a PTC each time his or her investigation uncovers new incidents.[231] Otherwise Art. 15 proceedings would make the

[229] ICC, PTC II, Situation in the Islamic Republic of Afghanistan, *Decision on the Prosecutor and Victims' Requests for Leave to Appeal the 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan'*, 17 Sep. 2019, ICC-02/17-62, para. 19.

[230] Since Judge Mindua expressly refers to the "Article 15 decision" in the situation in Burundi adopted by PTC III he was member of, it seems that he rather *completely* disagrees with the majority decision on this issue.

[231] *See* also ICC, PTC II, *Situation in the Islamic Republic of Afghanistan, Concurring and Separate Opinion of Judge Antoine Kesia-Mbe Mindua*, attached to the *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan*, 31 May 2019, ICC-02/17-33-Anx, para. 6.

procedures 'unduly cumbersome' and would serve the purpose of organising the Prosecutor's investigative work.

Judge Mindua's has been supported by the citicisms to g the 'extraordinary restrictive' approach of the Majority to the powers of the Prosecutor during a formal investigation that could not investigate into additional incidents despite possible evidence comes to light during the investigations.[232] The Prosecutor would dispose of investigative powers allowing her to collect evidence and to decide whether and possibly which crimes can be proven only after the commencement of the investigation. Moreover, there would be an unjustified distinction between an investigation in situations under Art. 15 on one side and situations referred by a State or the UNSC and the situation would be transformed into 'a series of investigations in incidents and collapses into "mini-cases"'.

The AC's arguments basically follow this view. The Chamber deems a limited authorisation inconsistent with the responsibility of the Prosecutor to investigate incriminating and exonerating circumstances equally and with her duty to establish truth. In its view, because of the need 'to obtain a full picture of the relevant facts, their potential legal characterisation […] and the responsibility of the various actors […], the Prosecutor must carry out an investigation into the situation as a whole'.[233] It deems 'impossible for the Prosecutor to determine the course of investigating, which incidents could safely be regarded as "closely linked" to those authorised' and argues that the submission of new requests is not only an unnecessary and cumbersome procedure, but 'is contrary to the statutory scheme regulating the respective functions and powers [of the Prosecutor and the PTC] with respect to investigations' as well.[234]

These arguments are not entirely convincing: first, it is the Statute itself which provides for a peculiar procedure for the *proprio motu* investigations requesting the authorisation of the PTC. The States and the UNSC are political entities, therefore the

[232] JACOBS D., *ICC Pre-Trial Chamber rejects OTP request to open an investigation in Afghanistan: some preliminary thoughts on an ultra vires decision*, in *Spreading the Jam*, 12 Apr. 2019. *See* also POLTRONERI ROSSETTI L., *The Pre-Trial Chamber's Afghanistan Decision*, in *Journal of International Criminal Justice*, 17, 2019, p. 585 at 590-591, who, despite recognising that the '*non ultra petita* principle may be appreciated in terms of the general balance between prosecutorial responsibilities and judicial duties of oversight', deems that the novel approach 'is marked by excessive rigidity, particularly when it come its operationsl consequences'.

[233] ICC, AC, *Situation in the Islamic Republic of Afghanistan, Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan*, 5 Mar. 2020, ICC-02/17-138 OA4, para. 60.

[234] ICC, AC, *Situation in the Islamic Republic of Afghanistan, Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan*, 5 Mar. 2020, ICC-02/17-138 OA4, para. 63.

appropriateness of a detailed list of incidents in the referral is questionable as to the binding nature *vis-à-vis* the Prosecutor. But it has also been seen that possible limitations imposed at least by the UNSC may be considered legitimate in light of the specific functions of the Council and of the powers allowing it to refer a situation to the Court. In any event, differently from the States and the UNSC, the PTC is an impartial and judicial entity. Furthermore, its decision is grounded on the Prosecutor's request, who has the privilege but also the onus of identifying the borders of what she believes can be a 'situation' within the meaning of the Rome Statute. The preliminary examination is particularly important in the procedure under Art. 15, where the intervention of another subject (the PTC) *follows* the determination of the Prosecutor, while in case of referral it *precedes* her determination. Considering the length of (most of) the preliminary examinations (and in particular those without referral) and the caution of the OTP at this stage, it seems inappropriate to picture a Prosecutor unable to identify the main object of a situation. It is apparent that the strict approach suggested in the *Afghanistan situation* shall be applied keeping in mind the stage of the procedure, without exceeding in a too rigid approach.[235] In addition, it is not clear why, if the Prosecutor deems necessary to extend the scope of the investigation, the submission of a request for extension should be particularly problematic. As seen in Chapter I, the paramount principle of complementarity implies a selection of the cases. Nothing prevents the Prosecutor to request for additional authorisations modifying the extent of the situation. Even if with different premises, the legitimacy of the extension of the scope of the investigation in the situation in Côte d'Ivoire has never been questioned.[236] The approach of the Majority of PTC II is surely in contrast with the tendency of the Prosecutor to postpone focusing her investigation at a later stage.[237] This tendency has been too often supported by permissive PTCs that have granted

[235] Similarly POLTRONERI ROSSETTI L., *The Pre-Trial Chamber's Afghanistan Decision*, in *Journal of International Criminal Justice*, 17, 2019, p. 605, who proposes an intermediate orientation at 605 referring to the need to reconcile 'the OTP's primary responsibility in shaping the scope of investigations with a reasonable measure of judicial supervision, in ordert to avoid the arbitrary exercise of discretion'. Nevertheless he later adopts a more an elastic approach than that proposed above.

[236] *See ibid.*, p. 585 at 606 with fn. 93 referring to the possibility to develop simplified procedures in case of extension of the scope of the authorisation.

[237] *See*, for example, the difficulty of having a clear picture of the events constituting the contextual element of the crimes and the attempt to prove them with a lower standard of proof (*see* below 2.2.2. The facts and circumstances, the subsidiary facts and the evidence); the tendency to cumulative charges with the consequential problems of the possible infringement of the *ne bis in idem* principle (*see* below 3. The decision declining to confirm the charges and the decision adjourning the hearing). For an overview of this problem also in the case-law of the *ad hoc* Tribunals, *see* STUCKENBERG C.F., *Cumulative Charges and Cumulative Convictions*, in STAHN C. (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015, p. 840.); the inability to choose among the different kinds of modes of liability even when the narrative is inconsistent with at least some of them (*see* ICC, PTC I, *The Prosecutor v. Gbagbo, Decision on the confirmation of charges against Laurent Gbagbo*, 12 Jun. 2014, ICC-02/11-01/11-186, paras 260 ff.)

authorisations to investigate into cases sufficiently (instead of closely[238]) linked to the authorised situation.[239] It is regretful that the AC has now adhered to this position as a clearly focused investigation since its origin is instead advisable.

2.5.6. Concluding remarks

The analysis of the requests submitted by the Prosecutor under Art. 15 and of the respective decisions of the PTCs testifies a lack of precision as to the boundaries of the authorised investigations. From a temporal point of view, after the reasoned decision in the situation in Kenya, the tendency has been that of granting unlimited authorisations with regards to crimes committed after the date of the submission of the request for authorisation. The argument that it would be unreasonable to oblige the Prosecutor to request an additional authorisation in order to investigate alleged crimes committed after the date of the request si not appropriate.[240] Even if Art. 53 of the Statute, which refers to a crime which 'is being committed', it is not unreasonable to partially grant a different treatment to the investigations under Art. 15 and the situations referred to the Office by the States of the UNSC. Do not putting a time limit to the authorised investigation produces the improper effect of suggesting that a State will be always under investigation, even with regards to events that have nothing to do with the authorised investigation: for example, it seems inappropriate for the Prosecutor to warn against the commission of crime in Côte d'Ivoire during the 2020 presidential elections threatening the intervention of her Office in the light of an authorisation to commence an

[238] POLTRONERI ROSSETTI L., *The Pre-Trial Chamber's Afghanistan Decision*, in *Journal of International Criminal Justice*, 17, 2019, p. 585 at 591 duly notes that however the PTC II regrattably failed to provide guidance on the construction and application of the closeness requirement in practice.

[239] ICC, PTC III, *Situation in Côte d'Ivoire*, *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation in the Republic of Côte d'Ivoire*, 3 Oct. 2011, ICC-02/11-14, paras 178-179 and fn. 279 where the Majority recalls the jurisprudence of the Court in the *Mbarushimana case* and of the ICTR in this regard; ICC, PTC I, *Situation in Georgia*, *Decision on the Prosecutor's request for authorization of an investigation*, 27 Jan. 2016, 01/15-12, para. 64; ICC, PTC III, *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, 14 Nov. 2019, ICC-01/19-27, para. 124. As to the situation in Burundi the scope of the investigation authorised is even broader as it refers to 'any crime within the jurisdiction of the Court committed between 26 Apr. 2015 and 26 Oct. 2017' and further states that 'the Prosecutor is not restricted to the incidents and crimes set out in the present decision but may, on the basis of the evidence, extend her investigation to other crimes against humanity or other Article 5 crimes, i.e. war crimes and genocide, as long as they remain within the parameters of the authorized'. ICC, PTC III, *Situation in Burundi*, *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi*, 9 Nov. 2017, ICC-01/17-9, para. 193.

[240] RASTAN R., *Situation and case: defining the parameters*, in STAHN C., EL ZEIDY M. (eds), *The International Criminal Court and complementarity from theory to practice*, *Vol. I*, Cambridge University Press, 2011, p.421 at 432 ff.

investigation granted in 2011 in occasion of the 2010 presidential elections.[241] With regards to the territorial limitations, the attempts to identify the location of the most relevant events do not seem having limited in any way the scope of the investigations which have been authorised on the whole territory of the interested States. The only exception in this regard is Georgia. As to the material limitation, the detailed analysis of the requirements of the crime and on whether the factual allegations are able to support the constitutive elements of each crime is usually not accompanied by the logical consequential limitation of the investigation to the crimes analysed, raising doubts on the meaning of such a detailed analysis. Ultimately the personal limitation has not even been given the dignity of autonomous sections. The picture emerging from the analysis is therefore that of investigations whose boundaries are evanescent and unclear.

It is curious that the recognition of a stronger judicial oversight at this stage finds so many detractors both among scholars and practitioners. The objections lead to a different approach depending on the parameters defining the authorised investigation. For example, there is general agreement that the starting date of the investigation identified in the decision binds the Prosecutor and prevents her from investigating crimes committed before that date. Assuming that during the investigation the Prosecutor collects material demonstrating the commission of crimes before that date, there is no doubt that the Prosecutor should not charge anybody for those crimes. Similarly, the request for opening an investigation in Afghanistan, testifies that the Prosecutor is well aware of the territorial limitation of the investigation and therefore expressly required authorisation for investigating crimes committed outside Afghanistan.[242] If she had not requested this authorisation, the inclusion of these alleged crimes within the scope of the investigation would have been surely raised later in the proceedings. There is therefore no reason for excluding a rigorous application of the limits of the authorisation to all the circumstances and in particular recognising the limiting power of the decision also to the material and personal parameters. In the same vein, it is regrettable that the practice of the PTCs departed from the jurisprudence in the Kenya situations granting authorisation to investigate crimes committed up to the date of the submission of the request.

Following a more rigorous approach, the Prosecutor would be encouraged to clearly define the scope of the investigation, to primarily focus on those alleged crimes which induced

[241] *See* ICC, OTP, *Statement of the ICC Prosecutor on the pre-election violence and mounting intercommunity tensions: 'The violence seen in Côte d'Ivoire during the first pre- and post-election crisis of 2010 must not be repeated*, 28 October 2020.

[242] ICC, OTP, *Situation in the Islamic Republic of Afghanistan, Request for authorisation of an investigation pursuant to article 15*, 20 Nov. 2017, ICC-02/17-7, para. 49.

her to submit the request and that 'convinced'[243] the PTC to release the authorisation. In case of necessary amendment, the Prosecutor would not be prevented from submitting other requests, but these amendments would always be subject to the PTC's oversight which grants those judicial backing originally wanted by the drafters. It is regretful that the AC did not use its authoritative power for supporting a strictly legal approach.

2.6. The possible issues of a binding authorisation

The preliminary examination as structured by the OTP should lead the Prosecutor to submit a detailed (and hopefully focused) request for authorisation (and therefore a detailed and focused authorisation), containing precise temporal, territorial, material and personal parameters. Nevertheless, once the authorisation is granted by the PTC, recognising its binding authority may pose two main issues.

First, during the investigation the Prosecutor may collect evidence on crimes different from those included in the authorisation or committed by groups others than those identified in the authorisation. In this case, once she believes that the reasonable basis standard for investigating these newly discovered crimes or groups is met, she should request for an extension of the scope of the investigations as originally grantedwhen.

Second, the evidence collected during the authorised investigation may induce the Prosecutor to amend the legal characterisation of the facts. For example, assuming that the authorisation was released to investigate war crimes, the investigation may suggest that the legal characterisation is for crimes against humanity. The question is not whether expanding the scope of the authorised investigation, but rather to amend the legal characterisation of the same facts. The low standard required for the initiation of the investigation makes it unreasonable to prevent the Prosecutor from correcting the direction of her investigations in the light of the evidence. This is even more inappropriate considering that under Reg. 55 the Chamber (not the Prosecutor) can modify the legal characterisation of the facts during the trial. It seems instead unnecessary to limit the investigations of war crimes to the international or non-international nature of the conflict preliminary identified in the request, even if the possible different conducts in the two hypothesis require at least a first-sight characterisation (as always done by the Prosecutor[244]).[245] The possible solution is to allow the Prosecutor to

[243] *See* STEGMILLER I., *The Pre-Investigation Stage of the ICC*, Dunker & Humbolt, Berlin, 2011, p. 91.

[244] *See*, for example, ICC, OTP, *Situation in Georgia*, *Request for authorisation of an investigation pursuant to article 15*, 13 Oct. 2015, 02/17-4, para. 81.

amend the scope of the investigation in the same way the Prosecutor can amend the charges after the confirmation, i.e. under the oversight of the Chamber. Only in this way it would be possible to preserve the effectiveness of the judicial oversight in the procedure under Art. 15 of the Statute.

Therefore, allowing the Prosecutor to submit a request to the PTC for amending the scope of the investigation in the light of the supporting material obtained is the most reasonable solution in both circumstances. The procedure is not different from the one adopted in the situation of Côte d'Ivoire, even if in that case the PTC II simply extended the scope of the investigation in the light of material collected by the Prosecutor during the preliminary examination (and not during the investigation).

A legitimate question is whether the Prosecutor can request an amendment of the scope of the investigation using material obtained exercising investigative powers conferred by the first authorisation. In fact, the immediate effect of the authorisation is the possibility for the Prosecutor to use investigative powers which she is not allowed to use at the preliminary examination stage. It seems inappropriate here to apply a sort of 'fruits of the poisonous tree' doctrine, because there is no illegal collection of evidence by the Prosecutor, who had a valid legal basis for acting. The material would moreover be used in order to request for an extension of the scope of the authorisation and would not be directly used to the detriment of the rights of the defence.

One may therefore wonder whether it makes sense to request an amendment of the scope of the investigation on the ground of material collected during the investigation. Indeed, in order for the Prosecutor to support her request of amendment she must use material obtained investigating 'an unauthorised part of the situation'. In the light of the stage of the proceedings and applying the same (low) threshold required at the preliminary examination stage, it does not seem problematic to release the authorisation if the parameters of Art. 53 of the Statute are met.

This situation would not be different from the situations of possible 'selective' referrals made by the UNSC for excluding or focusing on the crime of aggression. Assuming that the UNSC refers a situation in order to allow the Prosecutor to investigate war crimes committed during a conflict from a certain date. Assuming that during the investigation the

[245] In this regard *see* JACOBS D., *A Shifting Scale of Power: Who is in Charge of the Charges at the International Criminal Court and the Uses of Regulation 55*, in SCHABAS W.A:, HAYES N., MCDERMOTT Y. (eds.), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives*, Ashgate, 2013.

Prosecutor gets hold of evidence related to a possible crime of aggression committed before the starting date of the referral. There is no doubt that she could start the proceedings under Art. 15*bis* of the Statute in order to obtain a decision from the UNSC on the aggressive nature of the act or the authorisation from the Pre-Trial Division.[246]

3. The decision not to investigate or prosecute and the Chamber's power of review

Art. 53 of the Statute does not only identify the necessary legal requirements for the initiation and continuation of an investigation and prosecution, but also focuses on the Prosecutor's decision not to investigate or prosecute. More precisely the Article rules on the possible disagreement between the Prosecutor on the one side and the referring entity and the PTC on the other side in case of adoption of a decision not to investigate or prosecute. In this case, the Prosecutor must demonstrate that there is no reasonable basis to believe that crimes within the jurisdiction of the Court have been committed or that there is no sufficient legal basis to issue a warrant of arrest; that the potential cases are or would be inadmissible under Art. 17 of the Statute; or that not investigating or prosecuting is in the interests of justice.

This paragraph deals with the features of a decision not to investigate or prosecute and on the consequences of its adoption. The analysis will follow the structure of Art 53: first an overview of the duty to inform burdening on the Prosecutor, second, the different procedures respectively under para. (3)(a) and (b) and a comparison between them; third, a study of the reviewing procedure the PTC is allowed to conduct on the Prosecutor's determination under these two procedures; eventually, the Prosecutor's authonomous reconsideration of a decision under Art. 53(4).

Most of the paragraph will be focused on the decision not to investigate, since the relevance of a discussion on a decision not to prosecute is very limited. There are five possible scenarios with regards to the decision not to prosecute: (i) the adoption of a decision of not to prosecute one or more individuals; (ii) the adoption of a decision of not to prosecute specific crimes irrespective of the alleged perpetrators; (iii) the adoption of a decision not to prosecute specific crimes committed by specific subjects; (iv) the adoption of a decision not to prosecute specific groups and to concentrate on others; and (v) the adoption of a decision not to

[246] Similarly, Stegmiller, discussing on the extent of the referred situations, argues that in case the referral contains to narrow limitations, the Prosecutor could extend her investigations requesting authorisation to the PTC, using her *proprio motu* power. This suggests the potential 'modular' structure of a situation which should therefore take into account in case of request for authorisation. STEGMILLER I., *The Pre-Investigation Stage of the ICC*, Dunker & Humbolt, Berlin, 2011, p 108.

prosecute anybody.[247] The last case is tendentially considered inconsistent with the wording of the provision, while a decision not to prosecute in each of the other four scenarios, differently from a decision not to investigate, includes some kind of prosecution. That said, once the Prosecutor has adopted a decision not to prosecute, she should make it public in order to possibly allow the judicial control over it. Therefore, it has been noted that the Prosecutor has never an interest in adopting this kind of decisions and that it is much easier to pretend not to have adopted a decision yet.[248] Moreover, under apecific circumstances, the PTC would be precluded from exercising its reviewing power: assuming that a State refers a situation within its own territory, should the Prosecutor decide not to prosecute governmental forces and concentrate over rebel groups on the basis of arguments concerning jurisdiction or admissibility it is very unlikely that the referring State requires the PTC to review the Prosecutor's decision.[249]

The Prosecutor adopted a decision not to open an investigation in six situations. The situation in Venezuela was the first where the Prosecutor adopted a decision not to open an investigation because the requirements for crimes against humanity were not met.[250] The same applies to the situations in Honduras, Republic of Korea and Gabon, which were closed with 'Article 5 Reports'.[251] In none of these cases the Prosecutor found reasonable basis to believe that crimes falling within the jurisdiction of the Court had been committed. Therefore, in these cases the situations did not meet the parameter of Art. 53(1)(a) of the Statute with regards to the jurisdiction *ratione materiae*. Except for the situation in Gabon, which was based on the referral from the Government of Gabon, all these preliminary examinations had been opened on the basis of information received under Art. 15 of the Statute. The fifth decision not to open an investigation occurred after the preliminary examination of the situation in Iraq/UK.

[247] BITTI G., *Article 53*, in FERNANDEZ J., PACREAU X., *Statut de Rome de la Cour pénale internationale. Commentaire article par article*, Pedone, 2012, p. 1173 at 1199. Doubts of whether the Prosecutor is allowed not to prosecute at all are also raised by M.M. DEGUZMAN, W.A. SCHABAS, *Initiation of investigations and Selection of Cases*, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV, S. ZAPPALÀ (eds), *International Criminal Procedure*, Oxford University Press, 2013, p. 147.

[248] BITTI G., *Article 53*, in FERNANDEZ J., PACREAU X., *Statut de Rome de la Cour pénale internationale. Commentaire article par article*, Pedone, 2012, p. 1173 at 1203-1205. *See* also HEINZE A., FYFE S., *Prosecutorial Ethics and Preliminary Examinations at the ICC*, in BERGSMO M., STAHN C., (ed.), *Quality Control in Preliminary Examination: Volume 2*, Brussels, Torkel Opsahl Academic EPublisher, 2018, p. 63 who deems the Prosecutor the *dominus litis* in this procedure and refers to the lack of reviewing power of the PTC in the absence of a formal adoption of a decision not to investigate or prosecute.

[249] BITTI G., *Article 53*, in FERNANDEZ J., PACREAU X., *Statut de Rome de la Cour pénale internationale. Commentaire article par article*, Pedone, 2012, p. 1173 at 1203-1205.

[250] ICC, OTP, *OTP response to communications received concerning Venezuela*, 9 Feb. 2006.

[251] ICC, OTP, *Situation in the Republic of Korea. Article 5 Report*, 23 Jun. 2014; ICC, OTP, *Situation in Honduras. Article 5 Report*, 28 Oct. 2015; ICC, OTP, *Situation in the Gabonese Republic. Article 5 Report*, 21 Sep. 2018.

Differently from the other four situations, as already mentioned in Chapter II,[252] the reason grounding the Prosecutor's decision was that the situation did not meet the required gravity threshold under Art. 17 and that therefore it did not satisfy the parameter set forth in Art. 53(1)(b). The sixth decision was adopted with regards to the situation on the Registered Vessels of Comoros, Greece and Cambodia. This examination was opened on the basis of a State referral as well, but, differently from Gabon, the Government of Comoros requested the PTC to review the Prosecutor's decision not to open an investigation. Also in this case the decision not to investigate was adopted in the light of the insufficient gravity under Art. 17. From the overview of the examinations mentioned above, it is apparent that there is a distinction between preliminary examinations following a referral and Art. 15 information: while in the former case the referring entity may request the intervention of the PTC in order to review the Prosecutor's decision (Art. 53(3)), in the latter case the PTC has no power of review. Therefore, it has been noted that in the Art. 15 examinations, 'a negative decision cannot be subject to judicial review even if the Prosecutor's conclusions were the result of an abuse of her discretionary powers'.[253]

The procedures that will be analysed in this paragraph are a novelty in ICL. In the system of the *ad hoc* Tribunals, the decisions of the Prosecutor to open, close or postpone an investigation were not subject to judicial review. An example of the absence of judicial control over this kind of decisions is represented by the decision of the ICTY Prosecutor not to investigate alleged crimes committed by the NATO forces during the bombing campaign against the Federal Republic of Yugoslavia. Contrarily to some statements of her predecessor, Prosecutor Del Ponte decided not to investigate these alleged crimes, accepting the recommendations provided by an *ad hoc* Committee established by the Prosecutor herself. The Report contained the reasons supporting the recommendation, providing a justification for the decision not to investigate for the first time. In the opening of the Report, the Committee declared that the Office had applied the same criteria used for the activities of other actors involved in the conflict. It further declared that the threshold was that of the 'credible evidence tending to show that crimes within the jurisdiction of the Tribunal may have been committed in Kosovo' and declared that 'any investigation failing to meet that test could be said to be arbitrary and capricious, and to fall outside the Prosecutor's mandate'.[254] Nevertheless, the

[252] *See* above, Chapter II, Section III
The Admissibility, 2.4 The gravity test under Article 17 of the Statute.

[253] MARINIELLO T., *Judicial Control over Prosecutorial Discretion at the International Criminal Court*, in *International Criminal Law Review*, 19, 2019, p. 979 at 992.

[254] ICTY, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, 13 Jun. 2000, para. 5.

Committee further declared that the Prosecutor had discretion for requiring a higher threshold in order to initiate an investigation and that she was allowed to take into account 'a number of other factors concerning the prospects for obtaining evidence sufficient to prove that the crime has been committed by an individual who merits prosecution in the international forum'.[255] After a review of the single alleged crimes and of the most relevant incidents, the Report concluded that even accepting the number of alleged victims of the campaign there was no evidence for charging for genocide or crimes against humanity and that neither an in-depth investigation related to the bombing campaign as a whole nor investigations related to specific incidents were justified.[256] The Report ultimately concluded that 'either the law is not sufficiently clear or investigations are unlikely to result in the acquisition of sufficient evidence to substantiate charges against high level accused or against lower accused for particularly heinous offences'.[257]

The decision not to investigate the bombing campaign and to publish a report on the decision was debated among scholars. Some of them[258] not only note that the voluntary decision to provide the reasons for the decision is linked to the need for showing impartiality *vis-à-vis* the NATO, but also point out that the reasons are inconclusive. They note that the conclusion of the Report is tantamount to a *non-liquet* procedure without the safeguards coming from the *non-liquet* procedure in front of a Judge. In their opinion, the unclarity of the law points towards the need for opening an investigation rather than the contrary. Other commentators[259] are more benevolent towards the Prosecutor's Report and highlight its

[255] *Ibid*.
[256] *Ibid*., para. 90.
[257] *Ibid*.
[258] CÔTÉ L., *Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law*, in *Journal of International Criminal Justice*, 3, 2005, p. 162 at 179 ff.; CRYER R., *Prosecuting International Crimes. Selectivity and the International Criminal Law Regime*, Cambridge University Press, 2005, p. 214 ff; RONZITTI N., *Is the non-liquet of the Final Report by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia acceptable?*, in *Revue Internationale de la Croix-Rouge*, 82, 2000, p. 1021; BENVENUTI P., *The ICTY Prosecutor and the Review of the NATO Bombing Campaign against the Federal Republic of Yugoslavia*, in *European Journal of International Law*, 12, 3, 2001, p. 503 ff. who highlights that the one-side attitude of the Committee in the assessment of the evidence was 'hardly consistent' with the Prosecutor's duty of impartiality and independence. He further criticises the Committee's approach giving relevance exclusively to civilian casualties in the determination of the legality of the bombing campaign and analyse the whole report noting the poor grasp of legal concepts and the departures from the established ICTY case law. In the same vein *see* BOTHE M., *The Protection of the Civilian Population and NATO Bombing on Yugoslavia: Comments on a Report ot the Prosecutor of the ICTY*, in *European Journal of International Law*, 12, 3, 2001, p. 531 ff. Critic also SAFFERLING C., *International Criminal Procedure*, Oxford University Press, 2012, pp. 219-220.
[259] MARSTON DANNER A., *Enhancing the legitimacy and accountability of prosecutorial discretion at the International Criminal Court*, in *American Journal of International Law*, 97, 3, 2003, p. 510 at 539-540. *See* also FENRICK W.J., *Targeting and Proportionality during the NATO Bombing Campaign against Yugoslavia*, in *European Journal of International Law*, 12, 3, p. 489 ff.

consistency with the *ex ante* standards of the Office. In any event, the decision of the Prosecutor was not subject to judicial scrutiny.

On some occasions the judiciary itself declined to have the power to intervene on the Prosecutor's investigative activities, even if in these cases there was no express decision of the Prosecutor not to conduct an investigation. In the *Kabiligi case* the TC III of the ICTR rejected the Defence's request for investigating the shooting down of the plane carrying President Habyarimana (the incident which triggered the tragic events of 1994 in Rwanda) by stating that the Defence 'failed to establish a legal basis on which the Trial Chamber could order supplementary investigations by the Prosecutor in this case. This issue is one solely for the discretion of the Prosecutor'.[260] In the same vein the TC II in the *Nzirorera case* stated that '[i]t is not for the Trial Chamber to order the Prosecutor to carry out any specific investigation'.[261]

With regards to the decision not to prosecute, the Statutes of the ICTY and ICTR do not include a specific provision. Rule 51 RPE of both the Tribunals only included the possibility to withdraw the indictments, even if in 1994 the OTP published the 'Prosecutor's Policy on *nolle prosequi* of Accomplices' (Reg. 1/1994), stating that the Office recognised that in principle international tribunals 'should operate without the need to grant any concessions to persons who participated in alleged offences in order to secure their evidence in prosecution of others' but also noted that 'in some cases this course may be appropriate in the interests of justice'.[262]

It has been noted that, in comparison to the discretion granted to the *ad hoc* Tribunal's Prosecutors, the framework of the Rome Statute has significantly reduced 'the obscure nature of discretionary decision-making by imposing obligations on the Prosecutor to provide reasons for decisions not to proceed with investigations or prosecution'.[263] Nevertheless, it is undeniable that the drafters of the Rome Statute paid more attention to prosecutorial discretion at the initiation of the investigations rather than to the decision not to open an investigation as States where more concerned by limiting the Prosecutor's power in the possible intrusion in

[260] ICTR, TC III, *The Prosecutor v. Kabiligi, Decision on the Defence Motion Seeking Supplementary Investigations*, 1 Jun. 2000, ICTR-97-34-I, para. 20.

[261] ICTR, TC II, *The Prosecutor v. Nzirorera, Decision on the Defence Motion for Seeking an Order to the Prosecutor to Investigate the Circumstances of the Crash of President Habyarimana's Plane*, 2 Jun. 2000, ICTR-97-20-I, para. 5.

[262] *See* BASSIOUNI M.C., *International Criminal Law, Vol. III, International Enforcement*, Nihoff, 3rd ed., 2008, p. 628-629.

[263] DUKIĆ D., *Transitional justice and the International Criminal Court – in 'the interests of justice'?,* in I*nternational Review of the Red Cross*, 89, 867, 30 Sep. 2007. P. 691 at 715.

their sovereignty.[264] But Art. 26 of the 1994 Draft Statute, even if it formally established a duty for the Prosecutor to investigate, recognised the possibility not to proceed if she concluded that there was no possible basis for a prosecution under the Statute. The provision also included the duty to inform the Presidency, giving details on the nature and basis of the complaint and on the reasons for not filing an indictment. The Presidency, at the request of a complainant State or the UNSC referring the matter, should review the decision and might ask the Prosecutor to reconsider it.[265] In taking this decision, the draft imposed the Prosecutor to have regard, *inter alia*, to the matters referred to in Art. 35, i.e. the grounds of inadmissibility of a case.[266]

During the works of the *Ad Hoc* Committee, it was even proposed to extend the number of subjects which might request the review of a decision of the Prosecutor not to initiate an investigation or not to file an indictment including subjects other than States and the UNSC. Belarus proposed to extend this power to every State Party accepting the jurisdiction of the Court 'with respect to a crime constituting the substance of a case', as well as the UNSC 'in all circumstances (even if it did not initiate the review of the case in the court)'.[267] The proposal was based on the assumption that the Court's system 'should not simply satisfy the interests of one member of a community' but 'it should restore peace and justice in the relations that exist between all the members of a community'.[268]

The final text of Art. 53 states that if the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on the interests of justice shall inform the PTC. Similarly, if upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution she shall inform the PTC and the referring entity of her conclusion and the reasons for the conclusion. It further identifies two procedures for review: according to para. (3)(a) at the request of the referring entity the PTC may review a decision of the Prosecutor under paragraph 1 or 2 not to proceed and may request the

[264] MELONI C., *The ICC preliminary examination of the Flotilla situation: An opportunity to contextualise gravity*, in *Questions of International Law*, 30 Nov. 2016.

[265] Art. 26, *Report of the ILC on the work of its forty-sixth session, Draft Statute for an International Criminal Court with commentaries*, 2 May – 22 Jul. 1994, G.A. 49th Sess. Supp. No. 10, A/49/10, 1994.

[266] Art. 35 provided that a case was inadmissible before the Court on the ground that the crime in question (a) has been duly investigated by a State with jurisdiction over it, and the decision of that State not to proceed to a prosecution in apparently well founded; (b) is under investigation by a State which has or may have jurisdiction over it, and there is no reason for the Court to take any further action for the time being with respect to the crime; or (c) is not of such gravity to justify further action by the Court.

[267] *Ad Hoc Committee on the Establishment of an International Criminal Court*, 3-13 Apr. 1995, *Comments received pursuant to paragraph 4 of General Assembly Resolution 49/53 on the establishment of an International Criminal Court, Report of the Secretary-General*, 20 Mar. 1995, A/AC.244/1, Comments of Belarus, para. 20, p. 5.

[268] *Ibid.*

Prosecutor to reconsider that decision; according to para. (3)(b) the PTC may, on its own initiative, review a decision of the Prosecutor not to proceed if it is based solely on the interests of justice clause. In such a case, the decision of the Prosecutor shall be effective only if confirmed by the PTC.

3.1. The duty to inform

It is preliminarily worth mentioning that the Prosecutor shall reason her decision when deciding not to investigate or prosecute. The reasoning grants transparency and allows external subjects to control how the Prosecutor exercised her prerogatives and to possibly identify abuses. The subject in charge of assessing a possible abuse of process is the Judiciary, which may act upon request of the referring entity or, in some circumstances, *ex officio*. The objective is avoiding that an error in the Prosecutor's decision and its contrast with the public interest may jeopardise the reputation of the judicial system.[269]

Ambos notes that the wording of Art. 53 of the Statute is ambiguous and does not clarify whether the Prosecutor only has to generally report her decision not to investigate or prosecute in a specific situation or whether she needs to report any single case she decides not to investigate or prosecute.[270] Although a too strict approach would be contrary to 'the logic of the triggering mechanism' that is grounded on the concept of situation, the decision not to prosecute with regards specific individuals or specific crimes or incidents, should be individualised.[271]

In any event, the communication of the decision not to investigate or prosecute is the fundamental means for activating the control. Art. 15(6) states that the Prosecutor shall inform those subjects which provided with information under Art. 15(2) about her decision not to open an investigation *proprio motu*. Rule 49 RPE expressly states that when the Prosecutor believes that the information received under Art. 15 does not provide reasonable basis for opening an investigation, she shall promptly ensure that notice is provided, including reasons for her decision, in a manner that prevents any danger to the safety well-being and privacy of those who provided the information or the integrity of investigations or proceedings. Moreover, the Prosecutor shall advise of the possibility of submitting further information regarding the same situation in the light of new facts and evidence.

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[269] NSEREKO D.D.N., *Prosecutorial Discretion Before National Courts and International Tribunals*, in *Journal of International Criminal Justice*, 3, 1, 2005, p. 124 at 134.

[270] AMBOS, K., *Treatise on International Criminal Law, Vol. III: International Criminal Procedure*, Oxford University Press, 2016, p. 383.

[271] *Ibid.*, p. 384.

The different wording of Art. 53 (1) and (2) poses a problem in case of referral, because Art. 53(1) does not specify whether the Prosecutor has to inform the referring entity of her decision not to open an investigation. Art. 53(1) only states that if the decision is adopted on the basis of the interests of justice clause, she shall inform the PTC. This lacuna emerges because Art. 53(2) includes a specific duty to inform the referring entity on the conclusions adopted with regards to the prosecution. Therefore, one may wonder whether this different wording involves a substantial difference, and whether the Prosecutor shall inform the referring entity also in case of adoption of a decision not to investigate.

Since Art. 15(6) states that when the Prosecutor decides not to open an investigation she 'inform[s] those who provided the information', Turone argues that also this part of the provision is applicable irrespective of the source of the information, thus to those subjects which referred the situation to the Office as well.[272] In reality, this interpretation only aims at founding a statutory basis to the notification, since Rule 105 RPE expressly refers to the notification of the decision to the referring entity. Moreover, even in the absence of a specific rule, the duty to inform the referring entity can be inferred from Art. 53(3)(a). As the referring entity may always require the PTC to review the decision, the need for information is implicit, because only in this way the referring entity can request the PTC to review the Prosecutor's decision not to open an investigation. In the same vein, Rule 106 RPE states that, when the Prosecutor decides not to prosecute under Art. 53(2) of the Statute, she shall 'promptly inform in writing' the PTC and the referring entity.

According to Bitti, the Prosecutor could refrain from publicly notifying a decision not to investigate or prosecute in order to avoid the judicial control. Further, in order to obviate the impossibility for the entity to exercise its right under Art. 53(3)(a), he proposes to invoke the *effet utile* of the provision and to allow the Chamber (and the entity) to deduce the adoption of a decision from the behaviour (inactivity) of the Prosecutor.[273] Alternatively, the Chamber could act requesting the Prosecutor to adopt a decision within a certain date as in the situation in the Central African Republic.[274] Similarly, the PTC II ordered the Prosecutor to commence the trial against Mr Kenyatta or to withdraw the charges.[275]

[272] TURONE G., *Powers and Duties of the Prosecutor*, in CASSESE A., GAETA P., JONES J.R.W.D., *The Rome Statute of the International Criminal Court. A Commentary*, vol. 2, Oxford University Press, 2002, p. 1137 at 1155.

[273] BITTI G., *Article 53,* in FERNANDEZ J., PACREAU X., *Statut de Rome de la Cour pénale internationale. Commentaire article par article*, Pedone, 2012, p. 1173 at 1210-121; 1218-1219.

[274] *See* above Chapter I, Section IV, 3.2.2. The structure and length of the examination.

[275] *See* below, 5. The amendment and the withdrawal of the charges.

The different wording of Art. 53(1) and (2) may conversely exclude a duty of the Prosecutor to inform the PTC of her decision not to investigate adopted under Art. 53(1)(a) and (b). During the Rome Conference various proposals were submitted in order to include a general duty to inform the Chambers of any decision not to investigate, irrespective of the reasons leading to the decision.[276] Since these proposals were not adopted, it is possible to infer that there is no general duty. This conclusion would be consistent with the fact that the PTC may request the Prosecutor to review a decision not to investigate *ex officio* only if the decision is adopted on the basis of the interests of justice clause. The duty to inform the referring entity which is usually fulfilled through public reports solves this problem.

3.2. The review of the Prosecutor's decision under Article 53(3)(a) and (b)

With regards to Art. 53(3)(a), the reviewing power of the Chamber is subject to the request of the referring entity and the Chamber is given discretion on whether to conduct the review or not. At first glance, the PTC cannot oblige the Prosecutor to initiate an investigation but can only request the Prosecutor to reconsider her decision.[277] This aspect will be further analysed below. Rule 107 RPE clarifies that, in order to conduct the review, the PTC may request the Prosecutor the information or the documents in her possession and adopt the necessary measures in order to protect witnesses and victims. The Chamber may also seek observations from the States and the UNSC. Besides, Rule 108 RPE requires the Chamber to reason its decision under Art. 53(3)(a). The Prosecutor must reconsider the decision as soon as possible and '[o]nce the Prosecutor has taken a final decision [...] she shall notify the Pre-Trial Chamber in writing'. The notification must include the reasoning of the Prosecutor's determination and shall be communicated to those who participated in the review.

As far as Art. 53(3)(b) is concerned, the PTC may on its own initiative review the Prosecutor's decision if it is based solely on para. (1)(c) or (2)(c), i.e. on the assessment of the interests of justice.[278] It has been highlighted that the adverb 'solely' is redundant, because the step-by-step procedure of Art. 53(1) and (2) makes it difficult to imagine a situation where a decision not to proceed based on para. (1)(c) or (2)(c) is not 'solely' based on those

[276] *See*, for example, UN Doc. A/CONF.183/C.1WGPM/L.1, 18 Jun. 1998; UN Doc. A/CONF.183/C.1WGPM/L.18, 25 Jun. 1998; UN Doc. A/CONF.183/C.1WGPM/L.87, 15 Jul. 1998.

[277] MELONI C., *The ICC preliminary examination of the Flotilla situation: An opportunity to contextualise gravity*, in *Questions of International Law*, 30 Nov. 2016.

[278] It is worth mentioning that Regulation 31 of the Regulation of the Office of the Prosecutor, states that the Prosecutor shall base her decision on an internal report which is submitted to the Executive Committee composed by the Prosecutor and the Heads of the three Divisions of the Office (Jurisdiction, Complementarity and Cooperation Division; Investigation Division; and Prosecution Division) for consideration and approval.

paragraphs.[279] According to Rule 109 RPE, the PTC may decide to review the Prosecutor's decision within 180 days following the notification. It shall inform the Prosecutor and shall establish a time limit for the Prosecutor to submit observations and other material. In case of referral the referring entity must be informed and may submit observations. As the decision adopted by the PTC under Art. 53(3)(a), also the decision adopted under Art. 53(3)(b) shall contain the reasons and shall be communicated to those who participated in the review. More importantly, according to Rule 110, when the PTC does not confirm the decision taken by the Prosecutor, she shall proceed with the investigation or the prosecution.

As to the use of the verb 'may' in Art. 53(3)(b), authoritative scholars note that, despite the permissive wording of the provision, submitting the effectiveness of the Prosecutor's decision to the confirmation by the PTC is tantamount to making the review compulsory.[280] Otherwise the activity of the Court would be paralysed and the Prosecutor's decision would remain moot. Bitti suggests that if the Chamber does not adopt a decision within 180 days as required by Rule 109, the decision of the Prosecutor must be considered implicitly confirmed.[281]

Differently from Rule 107, Rule 109 devoted to the decision under Art. 53(3)(b) does not include a reference to the possibility for the Chamber to request the Prosecutor the information in order to conduct the review. Nevertheless, Reg. 48 RegC fills this gap. Bitti notes the '*vive opposition*' of the first Prosecutor Ocampo to this Reg. and highlights his attempts to avoid judicial control over his decisions.[282] Indeed, after having considered some public statements of the Prosecutor concerning the situation in Uganda (i) with regard to the Prosecutor's intention to focus on crimes allegedly committed by LRA members; (ii) and arguing that the investigation was nearly completing, the PTC II decided to convene a status conference contemplating the possible exercise of its reviewing powers under Art. 53(3)(b) .[283] The Prosecutor reacted denying of having formally adopted any decision on non-investigating or prosecuting and challenged the applicability of Reg. 48 in order to deny access to the PTC

[279] JACOBS D., *Some extra thoughts on why the ICC Pre-Trial Chamber acted ultra vires in using the "interests of justice" to not open an investigation in Afghanistan*, in *Opinio Juris*, 12 Apr. 2019.

[280] BERGSMO M., KRUGER P., BEKOU O., *Article 53*, in AMBOS K., *The Rome Statute of the International Criminal Court*, 4th ed., Beck/Hart/Nomos, 2021, mn 54.

[281] BITTI G., *Article 53*, in FERNANDEZ J., PACREAU X., *Statut de Rome de la Cour pénale internationale. Commentaire article par article*, Pedone, 2012, p. 1173 at 1223.

[282] *Ibid.* at 1219.

[283] ICC, PTC II, *Situation in Uganda, Decision to Convene a Statuts Conference on the Investigation in the Situation in Uganda in Relation to the Application of Article 53*, 2 Dec. 2005, ICC-02/04-01/05-68.

to the information necessary for the review.[284] The Chamber, in another occasion, has instead confirmed the applicability of Reg. 48 also in case of review under Art. 53(3)(b) since only the access to the information allows the PTC to exercise its prerogatives.[285]

As in some national systems, the judicial control aims at verifying the correctness of the Prosecutor's determination and at avoiding abuses, and a disagreement between the Prosecutor and the PTC may lead (in case of decision adopted on the interests of justice clause) to a judicial order to investigate or prosecute. As noted by Turone 'the order does not change the nature of the investigation, but simply makes it compulsory for the Prosecutor'.[286] Nevertheless, he also notes that if the decision follows a proceeding under Art. 15 rather than a referral, it is better to refer to it as 'investigation on judicial command', since 'compulsory investigation *propio motu*' would not be a reasonable expression. Moreover, in this case, the following request for authorisation for initiation of an investigation would be immaterial since the order would still contain the judicial backing.[287] Brubacher, although comparing this mechanism with the judicial order for investigation or compelled prosecution known in some civil law systems, deem these provision 'a significant interference in the Prosecutor's discretion'.[288]

However, the effectiveness of the order to investigate is jeopardised by the limited controlling powers of the PTC over the Prosecutor's investigations.[289] But also in case of compelled prosecution, the effectiveness of the order seems hardly reconcilable with a system which allows the withdrawal of the charges without any judicial control until the confirmation of the charges. The only means available to the Chamber are therefore those threatened in the

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[284] ICC, OTP, *Situation in Uganda*, *OTP Submission Providing Information On Status of the Investigation In Anticipation of the Status Conference To Be Held on 13 January 2013*, 11 Jan. 2006, ICC-02/04-01/05-76.

[285] ICC, AC, *Situation in Uganda*, *Decision on the Prosecutor's Application that the Pre-Trial Chamber Disregard as Irrelevant the Submission Filed by the Registry on 5 December 2005*, 9 Mar. 2006, ICC-02/04-01/05-147, paras 25 ff.

[286] TURONE G., *Powers and Duties of the Prosecutor*, in CASSESE A., GAETA P., JONES J.R.W.D., *The Rome Statute of the International Criminal Court. A Commentary*, vol. 2, Oxford University Press, 2002, p. 1137 at 1157.

[287] TURONE G., *Powers and Duties of the Prosecutor*, in CASSESE A., GAETA P., JONES J.R.W.D., *The Rome Statute of the International Criminal Court. A Commentary*, vol. 2, Oxford University Press, 2002, p. 1137 at 1159. Differently BITTI G., *Article 53*, in FERNANDEZ J., PACREAU X., *Statut de Rome de la Cour pénale internationale. Commentaire article par article*, Pedone, 2012, p. 1173 at 1223, who still deems necessary the request for authorisation in order to allow the PTC to correctly assess all the other parameters.

[288] BRUBACHER M.R., *Prosecutorial Discretion within the International Criminal Court*, in *Journal of International Criminal Justice*, 2, 2004, p. 71 at 87. *See* also WEBB P., *The ICC Prosecutor's Discretion Not to Proceed in the 'Interests of Justice'*, in *Criminal Law Quarterly*, 50, 2005, p. 305 at 321.

[289] *See* also BITTI G., *Article 53*, in FERNANDEZ J., PACREAU X., *Statut de Rome de la Cour pénale internationale. Commentaire article par article*, Pedone, 2012, p. 1173 at 1223.

Registered Vessels situation, i.e. recurring to Art. 71(1) of the Statute and to Rule 171 RPE allowing the Chamber to sanction those subjects that do not comply with a judicial decision.

With regards to the *ex officio* reviewing power, it has been noted that the subjects which provided information under Art. 15 could in theory present submissions to the Chamber in order to stimulate its intervention.[290] Nevertheless, this does not empower the Chamber to act on its own motion if the decision of the Prosecutor has not been taken on the interests of justice ground.[291] Recently, the AC declared in the already discussed judgement in the *Afghanistan situation* that Art. 53(3)(b) is inapplicable if the decision of the Prosecutor is adopted within a *proprio motu* investigation because the compelled investigation would be 'incompatible with the nature of the Prosecutor's discretionary power under article 15'.[292] The acceptance of this limitation clearly depends on the acceptance of autonomy of Art. 15 vis-à-vis Art. 53, which has been criticised above[293] and has been rejected by Judge Ibáñez Carranza, who notes that the AC went *ultra petita* expressing its point of view on such a delicate matter in a judgement that did not concern Art. 53(3)(b).[294]

3.3. A comparison between Article 53(3)(a) and (b)

The jurisprudence of the AC tends to support the idea that the different procedure under Art. 53(3)(a) and (b) mirrors the different approaches of the drafters to the decisions of not investigating or prosecuting adopted on the basis of jurisdiction and admissibility on the one hand and on those adopted on the basis of the interests of justice clause on the other hand.[295] In the view of the AC the drafters wanted 'to preserve a higher degree of prosecutorial

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[290] TURONE G., *Powers and Duties of the Prosecutor*, in CASSESE A., GAETA P., JONES J.R.W.D., *The Rome Statute of the International Criminal Court. A Commentary*, vol. 2, Oxford University Press, 2002, p. 1137 at 1158; 1177.

[291] *See* ICC, PTC I, *Situation in the Democratic Republic of the Congo*, *Decision on the request of the legal representative of victims VPRS 3 an d VPRS 6 to review an alleged decision of the Prosecutor not to proceed*, 25 Oct. 2009, ICC-01/04-582.

[292] ICC, AC, *Situation in the Islamic Republic of Afghanistan*, *Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan*, 5 Mar. 2020, ICC-02/17-138-Anx-Corr OA4, para. 30 with fn. 52.

[293] *See* above, Section II, 2. The authorisation for the initiation of an investigation under Article 15.

[294] ICC, AC, *Situation in the Islamic Republic of Afghanistan*, *Separate opinion of Judge Luz del Carmen Ibáñez Carranza to the Judgment on the appeal against the decision of Pre-Trial Chamber II on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan*, annexed to *Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan*, 5 Mar. 2020, ICC-02/17-138-Anx-Corr OA4, para. 7, especially (v), (ix).

[295] ICC, AC, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia*, *Decision on the admissibility of the Prosecutor's appeal against the 'Decision on the Request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation'*, 6 Nov. 2015, ICC-01/13-51 OA, para. 59. For the same reason

discretion'[296] in the first case. This interpretation is based on the fact that the decisions adopted on the basis of the interests of justice clause are always subject to judicial scrutiny, while the others only upon State request. It is nevertheless worth mentioning that Judge Fernandez de Gurmendi and Judge Van den Wyngaert disagreed with the Majority as to the higher degree of discretion since the Prosecutor in her submissions recognised that she exercises her discretion within the context of the request for review.[297]

Indeed, the wording of the Majority is controversial. Focusing for one moment on the part of the decision concerning jurisdiction and admissibility, it is debatable that the reason for introducing the judicial review only in case of request from the referring entity aims at preserving 'a higher degree of prosecutorial discretion'. This statement implies that the Prosecutor's assessment of jurisdiction and admissibility requires discretion. Even admitting the discretionary assessment of gravity (which has been challenged in Chapter II) there is no doubt that jurisdiction and the other admissibility criteria are objective criteria. The AC's analysis of the preparatory works always refers to stages where the organ in charge of verifying the correctness of the Prosecutor's determination was the Presidency. The conferral of the reviewing power to the PTC, which, differently from the Presidency, is not an administrative, but a judicial organ, plays a role in the interpretation of the provision. Therefore, it seems more probable that the Drafters expected that a decision of the Prosecutor adopted on objective criteria did not require judicial control in order to be effective: they seem to assume a presumption of correctness of the Prosecutor's decision with regards to the scope of application of the Statute. Only if the referring entity deems that the determination of the Prosecutor is incorrect, this determination can be scrutinised by the PTC, that ascertains the correct application of the legal parameters by the Prosecutor.

Bitti, although suggesting that the request for review under Art. 53(3)(a) looks like a recommendation and that the Statute leaves the last word to the Prosecutor, notes the incoherence of leaving to the Prosecutor the last word with regards to legal parameters while Art. 53(3)(b) gives to the PTC the power to order the Prosecutor to commence an investigation

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the AC rejects the appealability of the PTC's request for review. *See* also POLTRONERI ROSSETTI L., *The Pre-Trial Chamber's Afghanistan Decision*, in *Journal of International Criminal Justice*, 17, 2019, p. 607.

[296] *Ibid.*

[297] ICC, AC, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia, Joint dissenting opinion of Judge Silvia Fernández de Gurmendi and Judge Christine Van den Wyngaert*, annexed to *Decision on the admissibility of the Prosecutor's appeal against the 'Decision on the Request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation'*, 6 Nov. 2015, ICC-01/13-51-Anx OA, para. 35.

when the Prosecutor adopts a decision based on a discretionary factor.[298] Therefore, he wonders which is the right approach if the Prosecutor departs from the constant jurisprudence of the Court on jurisdiction and admissibility and he correctly privileges the substance of the decision rather than its formal aspects suggesting that, since this kind of decision would evidently hide a discretionary decision under Art. 53(3)(c) with the sole purpose of avoiding the judicial control, the Chamber could *ex officio* review the decision of the Prosecutor. Accordingly, Bitti even wonders why the Prosecutor should decline an investigation or a prosecution exclusively under Art. 53(1)(c) or (2)(c), namely the interests of justice, if such a decision is subject to the Chamber's approval and implies the review *ex officio* by the PTC.[299] The Prosecutor would be inclined to declare inadmissibility under different criteria, namely jurisdiction and most of all admissibility (in particular gravity), as in these cases the Prosecutor's decision would be subject to review only upon request of the referring entity.[300] As it will be clear from the analysis of the *Registered Vessels situation* in the following paragraphs, the objective development of the concept of gravity would prevent its strategic misuse in order to reduce the effect of judicial control, that may raise tensions between the Prosecutor, the Judiciary and the referring entities.

The non-effectiveness of the Prosecutor's decision under Art. 53(1)(c) and 53(2)(b) reveals instead that the Prosecutor has a margin for discretion in the interests of justice assessment. The judicial control is required in order to prevent possible abuses precisely because of this margin of discretion. As seen in Chapter II, the interests of justice is a negative requirement, i.e. the Prosecutor initiates an investigation or a prosecution unless it would *not* serve the interests of justice. Therefore, if the Prosecutor decides not to proceed under Art. 53(1)(c) or 53(2)(c) and the PTC issues a request for review, it means that the PTC is not convinced by the Prosecutor's assessment[301] and challenges the conclusion of the Prosecutor and the consistency of not investigating or prosecuting with the interests of justice. Once again, the question is whether the PTC only has to identify an error of the Prosecutor in the assessment concerning the interests of justice, or whether it has to demonstrate that

[298] BITTI G., *Article 53*, in FERNANDEZ J., PACREAU X., *Statut de Rome de la Cour pénale internationale. Commentaire article par article*, Pedone, 2012, p. 1173 at 1214-1215; 1221.

[299] BITTI G., *Article 53*, in FERNANDEZ J., PACREAU X., *Statut de Rome de la Cour pénale internationale. Commentaire article par article*, Pedone, 2012, p. 1173 at 1197; VARAKI M., *Revisiting the 'Interest of Justice' Policy Paper*, in *Journal of International Criminal Justice*, 15, 2017, p. 455 at 466.

[300] *Ibid.*; *see* also POLTRONERI ROSSETTI L., *The Pre-Trial Chamber's Afghanistan Decision*, in *Journal of International Criminal Justice*, 17, 2019, p. 607.

[301] *See* WEBB P., *The ICC Prosecutor's Discretion Not to Proceed in the 'Interests of Justice'*, in *Criminal Law Quarterly*, 50, 2005, p. 305 at 321, who notes that the decision has a significant political dimension and is not simply based on technicalities.

investigating and prosecuting would serve the interests of justice. Following the second option would partially nullify the jurisprudence of the Court on the interests of justice, because it would imply that at least in the procedure under Art. 53(3) the interests of justice would be positively assessed, suggesting that despite the presumption in favour of the investigation it would be wise for the Prosecutor to support her determination on the interests of justice with adequate material.

Rejecting the limited understanding of the reviewing powers of the PTC in the Art. 15 proceedings as recently theorised by the AC and following the approach of the PTC II in the decision rejecting the opening of an investigation in Afghanistan, there is no doubt that the Chamber would be required to conduct her own positive assessment. Therefore, there is no doubt that the Chamber should be allowed to conduct a positive analysis under Art. 53(3) as well. But also rejecting the PTC II's approach, it would be difficult to prevent a positive assessment of the interests of justice when challenging the Prosecutor's decision to the effect that an investigation or a prosecution is not in the interests of justice. Even limiting the challenge to demonstrating that the arguments of the Prosecutor are wrong, the effect would be the same. As noted by Judge Eboe-Osuji and Judge Ibáñez Carranza, it is often difficult to clearly distinguish between law and facts. With regards to the clearly 'non-discretionary factors' of the assessment under Art. 53 of the Statute the possible disagreement is technical. But as to the interests of justice, the possible disagreement makes it barely impossible to distinguish the law from the merit. If, on the one hand, the Prosecutor says that an investigation does not serve the interests of justice because it jeopardises a peace agreement and, on the other hand, the PTC identifies an error 'in law' in not including other specific factors in the interests of justice assessment and does not give effect to the Prosecutor's decision, it is apparent that the PTC believes that the investigation is in the interests of justice.[302]

3.4. The reviewing procedure

The Statute is silent as of the kind of review that the PTC is required to do under Art. 53(3). This problem was addressed in the *Registered Vessels situation*. The first time that the Comoros requested a review under Art. 53(3)(a), the Majority of PTC I expressly distinguished between the review to be applied when authorising the opening of an investigation from the

[302] As to gravity, is one should not accept its non-discretionary nature, the same reasoning should apply. Therefore, if the prosecutor concludes that the number of victims does not reach the gravity threshold and the PTC identifies an error 'in law' in the assessment of the scale of the crime it is tantamount as saying that the number of victims reaches the gravity threshold.

review under Art. 53(3)(a). It highlighted that the review under Art. 15 aims at 'compensat[ing] for the absence of a referring entity as a check on the powers of an independent Prosecutor', while the review under Art. 53(3)(a) 'is triggered only by the existence of a disagreement between the Prosecutor [...] and the referring entity [...] and is limited by the parameters of this disagreement'.[303] In the light of this difference the Majority declined its competence in conducting a whole review of the Prosecutor's assessment, limiting its analysis to the object of the disagreement, i.e. gravity. It further concluded that '[t]he role of the Chamber in the present proceedings is to exercise independent judicial oversight'.[304] In its activity of reviewing the correctness of the Prosecutor's assessment of the gravity criteria, the Chamber identified five errors, respectively on the personal element, the scale, the nature, the manner of commission and the impact of the crimes. In its view, these errors affected the assessment and therefore required the Prosecutor to reconsider her decision.

Judge Kovács appended a partially dissenting opinion predominantly moved by the different role of the PTC in the review of the Prosecutor's decision. This dissent is, under certain perspectives, surprising, because it anticipates of six months his separate opinion on the authorisation of the investigation in Georgia analysed above, where he stresses the importance of a full and proper review of the information in order to prevent abuses from the Prosecutor; states that the Chamber must reach its own conclusions with regards to the request; and even accuses the Prosecutor of sometimes lacking of consistency and objectivity in her assessment. In the dissenting opinion in the *Registered Vessels Situation*, Judge Kovács accuses the Majority of improperly applying the standard of review adopted by the AC in respect to the interlocutory appeals. He rejects the idea that 'the PTC is called upon to sit as a court of appeals with respect to the Prosecutor's decisions. The Pre-Trial Chamber is instead merely to make sure that the Prosecutor has not abused her discretion in arriving at her decision not to initiate an investigation on the basis of the criteria set out in article 53(1) of the Statute'.[305] The dissenting Judge goes further and argues that the 'stringent review' of the Majority 'clearly interferes with the Prosecutor's margin of discretion'.[306]

[303] ICC, PTC I, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia*, *Decision on the Request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation*, 16 Jul. 2015, ICC-01/13-34, para. 9.

[304] *Ibid*., para. 10.

[305] ICC, PTC I, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia*, *Partly Dissenting Opinion of Judge Peter Kovács*, annex to *Decision on the Request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation*, 16 Jul. 2015, ICC-01/13-34-Anx, paras 6-7.

[306] *Ibid*., para. 8.

His reasoning is twofold. First of all, in Judge Kovács' view, the review on the Prosecutor's decision includes all the parameters of Art. 53 and is not limited to the object of the disagreement between the Prosecutor and the referring entity. In second place, if in the decision concerning Georgia the Majority is accused of making a superficial assessment of the parameters, in this case the same Majority is accused of conducting a too stringent review of the parameters taken into consideration. With regards to the extension of the assessment to all the parameters set forth in Art. 53, Judge Kovács starts from the concept of 'decision' under Art. 53(3)(a) and notes that it can be interpreted in two different ways: (i) as encompassing both the outcome of the decision as well as the grounds founding the Prosecutor's determination; or (ii) as encompassing only the conclusion reached by the Prosecutor.[307] He rejects the first approach adopted by the Majority and adopts the second one. With regards to the kind of analysis, the dissenting Judge criticises the approach of his colleagues and conducts an assessment of gravity checking the reasonableness of the Prosecutor's conclusion. Nevertheless, when dealing with jurisdiction, his analysis seems to go beyond the simple assessment of the reasonableness of the Prosecutor's conclusion. He re-assesses the information and reaches his own conclusion that most of the acts referred to by the Prosecutor do not integrate the requirements of war crimes. Therefore, they would not fall within the jurisdiction of the Court even if an investigation had been opened. Judge Kovács seems to adopt the non-stringent approach with regards to the element of gravity, when he concurs with the Prosecutor, but a more stringent approach (coherently with his dissent to the decision on the authorisation in the situation in Georgia) with regards to jurisdiction, where he does not concur with the Prosecutor (but the disagreement is instrumental to corroborate his and the Prosecutor's conclusion). It is true that Judge Kovács expressly says that his analysis with regards to war crimes only aims at further supporting his conclusion that the investigation is not worthy, but the (sharable) reference to the duty of the PTC to reconsider the parameters of jurisdiction on the basis of the principle of the *compétence de la compétence* reveals quite an intrusive review of the Prosecutor's determination and more in general of the role of the PTC in this procedure. The identification of the scope of the review must be determined objectively and must be distinguished from the merit of the decision. It is not possible to apply different standards depending on whether the analysis of the single parameter leads the Chamber to the same conclusion reached by the Prosecutor or not. The same standard must be applied irrespective of the outcome of the Prosecutor's and the Chamber's determination.

[307] *Ibid*., para. 12.

The question on the kind of review which the PTC can conduct has been re-addressed by the Prosecutor in her second decision not to investigate into the *Registered Vessels situation*. In this decision, the Prosecutor harshly rejects the approach of the Majority, accusing it of conducting a *de novo* review[308] 'when this [is] neither permitted by the Statute nor indeed feasible without scrutinising the primary information gathered in the preliminary examination'.[309] She points out that there are two approaches to judicial review: (i) a *de novo* review where the reviewing body reassesses the same information and concludes whether it agrees or not with the scrutinised decision; and (ii) the error-based review, which does not enter into the merit of the decision but only assesses possible errors of the decision. This second approach usually 'emphasises the reasonableness' of the decision and affords 'at least *some deference* to the appreciation of the original decision-making body'.[310] In the light of the absence of any statutory indication of the applicable standard of review and of the need to assess the 'reasonable basis', the Prosecutor deems appropriate for the PTC to follow the second approach. The Prosecutor notes that, contrary to the review under Art. 15 of the Statute, in the review under Art. 53(3)(a) Rule 107 RPE does not include a duty for the Prosecutor to provide the Chambers with the information grounding her determination, unless requested. Since without the information the Chamber cannot conduct a *de novo* review, there is no room for applying the first approach.[311] She further highlights the difference between Art. 53(3)(a) and 53(3)(b) noting that in this second case the need for the Prosecutor's decision to be confirmed suggests the appropriateness of a *de novo* review. Lacking any reference to the 'confirmation procedure' under Art. 53(3)(a), the Prosecutor infers the error-based approach of the PTC's review. The Prosecutor seems particularly concerned that a *de novo* review would

[308] On the (in)appropriateness of this expression, see above p. 311. The same considerations made above with regard to the review in the authorisation procedure apply here to the review of the decision not to proceed. The PTC I later refers to a 'through' 'as opposed to cursory' review (ICC, PTC I, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia*, *Decision on the 'Application for Judicial Review by the Government of the Comoros'*, 16 Sep. 2020, ICC-01/13-111, para. 25). Nevertheless, since it is the Prosecutor who uses the expression '*de novo* review', it will be maintained througout the text as done by other authors (*see* MARINIELLO T., *Judicial Control over Prosecutorial Discretion at the International Criminal Court*, in *International Criminal Law Review*, 19, 2019, p. 979 at 1000).

[309] ICC, OTP, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia*, *Final decision of the Prosecution concerning the "Article 53(1) Report" (ICC-01/13-6-AnxA), dated 6 November 2014*, 29 Nov. 2017, ICC-01/13-57, para. 36. Heller notes that the contrast between the PTC and the Prosecutor following a complete re-assessment of the information, may lead the Prosecutor to fulfil her duty to reasoning in a much more limited way in the future, as done with regards to the situation in Iraq. HELLER K.J., *The Pre-Trial Chamber's Dangerous Comoros Review Decision*, in *Opinio Juris*, 17 Jul. 1015.

[310] ICC, OTP, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia*, *Final decision of the Prosecution concerning the "Article 53(1) Report" (ICC-01/13-6-AnxA), dated 6 November 2014*, 29 Nov. 2017, ICC-01/13-57, paras 41-41.

[311] *Ibid.*, para. 47.

compromise the perception of her independence and would suggest the arbitrariness of her previous decision.[312]

But also with regards to the error-based approach, the Prosecutor requires 'some margin of deference' to her decision.[313] She refers to the practice of the AC of non-interfering on the factual findings of the first-instance Chamber[314] and states that the need for deference is required at least in those cases where the Chamber did not review the information grounding the Prosecutor's decision. In conclusion, she concurs with Judge Kovács' reading with regard to the role of the PTC. Considering that Judge Kovács had criticised the Majority as it had acted as an appellate body, the system emerging from the Prosecutor's view is quite nebulous.[315]

The Prosecutor recognises that the Majority seems having applied an error-based approach, but also that its 'not unequivocal' view introduces a more intrusive review.[316] The interpretation suggested by the Prosecutor does not answer the question whether, should the PTC require the Prosecutor to provide information, it can conduct a *de novo* review or not. It seems unreasonable to let the kind of review depend from the request for information or not. At the same time, if the Chamber was prevented from conducting a *de novo* review of the information, there would be little reason for the Chamber to require it, since the reasonable assessment would be conducted on the reasoning that the Prosecutor has the duty to attach to the decision.[317] Further, as noted by Mariniello,[318] in the *Katanga and Ngudjolo Chui case* the TC II had already admitted an intrusive review of a discretionary decision even if of a non-judicial body when the LRV requested the TC to 'reconsider [a Registry's decision] *de*

[312] *Ibid.*, para. 51. In the same vein POLTRONERI ROSSETTI L., *The Pre-Trial Chamber's Afghanistan Decision*, in *Journal of International Criminal Justice*, 17, 2019, p. 608.

[313] *Ibid.*, paras 58 ff.

[314] The fact that this jurisprudence seems to be partially overcome by the practice of the AC in the Bemba case will not be used as counter-argument because of the many problems raised by that decision.

[315] This confusion is not surprising since these crticisms flourish in a system where the deference due by the AC to the first-instance Chamber is still debated, as the recent disagreement within the AC in the *Bemba case* testifies. *See* ICC, AC, *The Prosecutor v. Bemba, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute"*, 8 Jun. 2018, ICC-01/05-01/08-3636-Red A, paras 35 ff. and *Dissenting Opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmański*, ICC-01/05-01/08-3636-Anx1-Red, paras 2 ff.

[316] ICC, OTP, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia, Final decision of the Prosecution concerning the "Article 53(1) Report" (ICC-01/13-6-AnxA), dated 6 November 2014*, 29 Nov. 2017, ICC-01/13-57, para. 52.

[317] *See* MARINIELLO T., *Judicial Control over Prosecutorial Discretion at the International Criminal Court*, in *International Criminal Law Review*, 19, 2019, p. 979 at 1008.

[318] MARINIELLO T., *Judicial Control over Prosecutorial Discretion at the International Criminal Court*, in *International Criminal Law Review*, 19, 2019, p. 979 at 1001.

novo'.[319] The TC II did not dispute that the Registrar 'has a relatively wide margin of discretion' and limited its interference with this discretion 'when there are compelling reasons for doing so'.[320] In that case the TC II decided to assess (a) whether the Registrar had abused her discretion, (b) whether the Registrar's decision was affected by material error of law or fact, and (c) whether the Registrar's decision was manifestly unreasonable.[321]

In light of her disagreement with the request for review issued by the PTC, the Prosecutor filed her 'final decision' confirming that the standard applied in the first decision was correct and refusing to conduct a new assessment in the light of the request of the PTC. She therefore declared the closing of the preliminary examination expressly refusing to comply with the Chamber's request.[322]

Therefore, when the Comoros submitted a new request for review under Art. 53(3)(a) of the Statute[323] the main problem addressed by the Majority of the PTC I was the binding nature of the first request for review. In the view of the Majority, the statements of the Prosecutor 'strike at the very heart of the distribution of authority between the Pre-Trial Chamber and the OTP'.[324] The Majority recognises to the request for review the nature of 'decision' by referring to Rule 108(1) RPE, which refers to the need for reasoning; and to Art. 56(2)(a) and (e) and Art. 59(5) of the Statute which exceptionally limit the Chamber is power to render recommendations. Moreover, it notes that the Prosecutor herself sought to appeal the request for review, treating it as a decision.[325]

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[319] ICC, TC II, *The Prosecutor v. Katanga and Ngudjolo Chui*, *Decision on the Urgent Requests by the Legal Representative of Victims for Review of Registrar's Decision of 3 April 2012 regarding Legal Aid*, 23 April 2012, ICC-01/04-01/07-3277, para. 9.

[320] *Ibid*.

[321] *Ibid*. Mariniello also refers to an ICTY judgment noting that the purpose of the judicial review is not to establish whether the discretionary 'decision was correct, in the sense that the Appeals Chamber agrees with that decision, but rather whether the Trial Chamber has correctly exercised its discretion in reaching that decision.' *See* ICTY, AC, The Prosecutor v. Milosevic, Reasons for Decision on Prosecution Interlocutory Appeals from Refusal to Order Joinder, 18 Apr. 2002, IT-99-37-AR73, IT-01-50-AR73, IT-01-51-AR73, para. 4.

[322] ICC, OTP, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia*, *Final decision of the Prosecution concerning the "Article 53(1) Report" (ICC-01/13-6-AnxA), dated 6 November 2014*, 29 Nov. 2017, ICC-01/13-57.

[323] ICC, Rodney Dixon QC, and Stoke & White Ltd (London) on behalf of the Government of the Union of the Comoros, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia*, *Application for Judicial Review by the Government of the Union of the Comoros*, 23 Feb. 2018, ICC-01/13-58.

[324] ICC, PTC I, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia*, *Decision on the "Application for Judicial Review by the Government of the Union of the Comoros"*, 15 Nov. 2018, ICC-01/13-68, para. 86.

[325] *Ibid.*, paras 88-94. *See* also MARINIELLO T., *Judicial Control over Prosecutorial Discretion at the International Criminal Court*, in *International Criminal Law Review*, 19, 2019, p. 979 at 1007.

From this analysis the PTC infers three conclusions: (i) the Prosecutor has the duty to comply with the decision; (ii) the decision is the basis for the reconsideration of the Prosecutor; (iii) the second decision rendered by the Prosecutor is not final unless the Prosecutor complies with the PTC's request. The Majority highlights that the Prosecutor cannot act as an appellate body of the PTC's decision on the merits, because 'the authoritative interpretation of the applicable law is in the hands of the Chambers', irrespective of the stage of the proceedings.[326] Moreover, the mechanism provided for by Art. 53(3)(a) aims at giving the State Party the possibility to challenge the conclusion of the Prosecutor and this right would be jeopardised if the Chambers would not able to frame the scope of the Prosecutor's review.

The Majority even threatens the applicability to the Prosecutor of Art. 71(1), that provides the Court with the power to sanction 'persons present before it who commit misconducts, including deliberate refusal to comply with its directions'; and of Rule 171 RPE, which includes among the misconducts the deliberate refusal to comply with a written direction of the Court. Moreover, in the light of the jurisprudence of the TC V(B) and the AC, the Majority does not exclude the possibility to rule on any relevant matter in performing its duties.[327]

The Majority does not require the Prosecutor to reach the same conclusion of the request for review, but asks her to reassess the information in accordance with the Chamber's decision.[328] The need for such reconsideration would be confirmed by the statutory need for the Prosecutor to provide new reasoning under Rule 108(3) RPE: since Rule 105 already provided for the need for the Prosecutor to reason her first decision, the need for new reasoning cannot derive but from reassessing the information in accordance with the PTC's request for review.[329]

Partly dissenting Judge Kovács deems instead unnecessary to deal with the binding nature of the PTC's request for review, noting that the Comoros had simply submitted a *new* request for review, without highlighting the non-compliance of the Prosecutor to the PTC's directions. Even if he does not expressly use this expression it is apparent that Judge Kovács believes that the Majority acted *ultra petita.*[330] In his view the Chamber should have rejected the Comoros request *in limine* because Art. 53(3)(a) of the Statute gives the referring entity the

[326] *Ibid.*, paras 98-99.
[327] *Ibid.*, paras 102-103.
[328] *Ibid.*, para. 109.
[329] *Ibid.*, para 113.
[330] *Ibid.*, para. 8.

power to challenge only once the Prosecutor's decision not to initiate an investigation or a prosecution, to the point that her second decision is expressly named by the Statute 'final decision'.

The Prosecutor was partially granted leave to appeal[331] and the AC had therefore the chance to rule on this issue. With regards to the possibility for the PTC to review what the Prosecutor considers her final decision on whether initiating an investigation, the AC notes that Rule 108(3) RPE refers to the Prosecutor's decision as final only once she has conducted her reconsideration. Therefore, it agrees with the Majority of PTC I on the possibility for the PTC to review the 'final decision' in order to verify whether the Prosecutor has properly conducted the reconsideration. The power to request for reconsideration itself includes the power of the PTC to review once again the Prosecutor's decision following reconsideration.[332] Nevertheless, the Majority of the AC limits the Chamber's review to 'establishing whether the Prosecutor carried out the reconsideration in accordance with the Pre-Trial Chamber's request for reconsideration'.[333]

In the view of the Majority of the AC, the reviewing powers of the PTC under Art. 53(3)(a) are more limited than under Art. 53(3)(b). Therefore, the request for reconsideration cannot direct the Prosecutor to the result of the reconsideration. On the other hand, the Prosecutor 'must demonstrate how she addressed the relevant issues in light of the Pre-Trial Chamber's directions'.[334] If the Prosecutor maintains the power to decide on whether to initiate an investigation or not, the only authoritative interpretation of the relevant law is that provided by the Chamber. In case of disagreement on the interpretation of the law, the Prosecutor can always request the intervention of the AC.[335] Therefore, the PTC cannot direct the Prosecutor

[331] ICC, PTC I, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia*, *Decision on the Prosecutor's request for leave to appeal the "Decision on the 'Application for Judicial Review by the Government of the Union of the Comoros'"* 18 Jan. 2019, ICC-01/13-73.

[332] ICC, AC, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia*, *Judgment on the appeal of the Prosecutor against Pre-Trial Chamber I's 'Decision on the Prosecutor's request for leave to appeal the "Decision on the 'Application for Judicial Review by the Government of the Union of the Comoros'"*, 2 Sep. 2019, ICC-01/13-98 OA2, paras 57 ff.

[333] *Ibid.*, para. 60.

[334] *Ibid.*, para. 77. Borrowing the words of the PTC I, the PTC 'must not only ascertain whether the Prosecutor has reconsidered her decision, but whether she has done so *genuinely*.' Therefore the PTC's review 'must go beyond a mere 'box-ticking' or 'rubber-stamping' exercise and must be through, as opposed to cursory'. ICC, PTC I, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia*, *Decision on the 'Application for Judicial Review by the Government of the Comoros'*, 16 Sep. 2020, ICC-01/13-111, para. 25.

[335] On the possibility to recur to the AC, Judge Eboe-Osuji notes that the Majority fails to address how should the Prosecutor refer the matter to the AC. Following the precedent joint dissenting opinion of Judge Fernández de Gurmendi and Judge Van den Wyngaert, Judge Eboe-Osuji believes that

as to how to assess the information and to the result of the reconsideration, while the Prosecutor, as she had already noted on other occasions precisely with regards to Art. 53,[336] cannot ignore and is instead bound by the interpretation of the law provided by the Chamber and by its directions to consider certain available information.[337] As summarised by the PTC I: (i) with regards to questions of law the Prosecutor is bound to adopt the PTC's interpretation of the applicable law; (ii) with regards to the questions of fact the PTC may direct the Prosecutor to take into account certain available information but may not direct her as to how to evaluate the available information, what factual findings to make and how to apply the law to the facts; (iii) specifically with regards to the gravity assessment the PTC may direct the Prosecutor to take into account certain factors and/or information related thereto, but may not direct her as to what weight to assign to the different factors and what result to reach in the gravity assessment; and as to the final decision the PTC may not direct the Prosecutor as to the result of her reconsideration.[338]

Although Judge Eboe-Osuji and Judge Ibañez Carranza attached two opinions to the AC's judgment, their interpretations of the Art. 53(3)(a) mechanism are not too different.

Judge Eboe-Osuji focuses on the aptitude of Art. 53(3) to subject the Prosecutor's investigating authority to judicial control. In his view, the need for oversight on a decision of not initiating an investigation should not be less important than the need for judicial oversight

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the decision of the PTC should be appealable under Art. 82(1)(a), and not, as sustained by the Majority in that case under Art. 82(1)(d). Nevertheless, differently from her colleagues he believes that the matter should not be treated as a matter of admissibility, rather a matter of jurisdiction. Therefore, Judge Eboe-Osuji regrets that his colleagues did not clarify whether they departed or not from the Majority of the AC in the different composition which decided on the appealability of the request for review in the first occasion. ICC, AC, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia*, *Partly Dissenting Opinion of Judge Eboe-Osuji*, annexed to *Judgment on the appeal of the Prosecutor against Pre-Trial Chamber I's 'Decision on the Prosecutor's request for leave to appeal the "Decision on the 'Application for Judicial Review by the Government of the Union of the Comoros'"*, 2 Sep. 2019, ICC-01/13-98-Anx OA2, paras 12-27.

[336] ICC, OTP, *Situation in Uganda, OTP Submission Providing Information On Status of the Investigation In Anticipation of the Status Conference To Be Held on 13 January 2013*, 11 Jan. 2006, ICC-02/04-01/05-76, para. 2, explaining the meaning of a statement of the Prosecutor during a conference saying that 'the interpretation of Article 53 [...] involves the OTP and ultimately the judges'. The Prosecutor clarifies that 'as in relation to any article of the Statute, the judges must be involved in interpreting the provision'

[337] ICC, AC, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia*, *Judgment on the appeal of the Prosecutor against Pre-Trial Chamber I's 'Decision on the Prosecutor's request for leave to appeal the "Decision on the 'Application for Judicial Review by the Government of the Union of the Comoros'"*, 2 Sep. 2019, ICC-01/13-98 OA2, paras 78-82.

[338] ICC, PTC I, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia*, *Decision on the 'Application for Judicial Review by the Government of the Comoros'*, 16 Sep. 2020, ICC-01/13-111, para. 23.

in case of *proprio motu* decision of initiating an investigation.[339] He reframes the discussion keeping in mind the stage of the proceedings, i.e. the initiation of the investigation, explicitly suggesting to put aside the anxiety of the Prosecutor. In his view, Art. 53 should be read as an 'enabling' provision, authorising the Prosecutor to commence an investigation. Also in case of adoption of a decision not to initiate an investigation, the provision remains an enabling provision, since it introduces the mechanism under Art. 53(3), 'enabling' the Prosecutor to initiate an investigation after the intervention of the judiciary. For this reason, he does not concur with the Majority and with the previous jurisprudence of the AC with regards to the idea that the decision to initiate an investigation is ultimately for the Prosecutor.[340]

First, Judge Eboe-Osuji rejects the view of the Majority that the power of review under Art. 53(3)(b) is stricter than under Art. 53(3)(a) of the Statute. In his opinion the difference between the two procedures lays neither in the mechanism of the *request* for review nor in the *final* character of the Prosecutor's decision under Art. 53(3)(a), but only in the possibility for the PTC to autonomously review the Prosecutor's decision not to proceed adopted in the interests of justice.[341] He rejects the idea that the 'finality' of the decision of the Prosecutor may be opposed to the PTC, making it powerless to inquire whether the Prosecutor complained with its request for review. In his view, Rule 108(3) RPE merely rules the notification system of the decision adopted upon review, and it is in this context that the decision is termed 'final decision'. The term 'final' means 'eventual' as it follows the Chamber's request and can therefore be distinguished from the first decision. But the Rule does not provide that the "final decision" is *for* the Prosecutor' although the PTC's decision under Art. 53(3)(a) – effectively limits the powers of the PTC. This 'final decision' may therefore require judicial intervention. Any other interpretation would render the judicial review meaningless.[342] Ultimately, Judge Eboe-Osuji does not share the Majority's decision distinguishing between law and facts, because 'the law does not operate in a factual vacuum'. This clearly emerges in the gravity

[339] ICC, AC, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia*, *Partly Dissenting Opinion of Judge Eboe-Osuji*, annexed to *Judgment on the appeal of the Prosecutor against Pre-Trial Chamber I's 'Decision on the Prosecutor's request for leave to appeal the "Decision on the 'Application for Judicial Review by the Government of the Union of the Comoros'"*, 2 Sep. 2019, ICC-01/13-98-Anx OA2, para. 5.

[340] *Ibid.*, para. 8. Judge Eboe-Osuji put it as a matter of shared 'political responsibility' of both the Prosecutor and the PTC.

[341] ICC, AC, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia*, *Partly Dissenting Opinion of Judge Eboe-Osuji*, annexed to *Judgment on the appeal of the Prosecutor against Pre-Trial Chamber I's 'Decision on the Prosecutor's request for leave to appeal the "Decision on the 'Application for Judicial Review by the Government of the Union of the Comoros'"*, 2 Sep. 2019, ICC-01/13-98-Anx OA2, paras 33-34. *See* also *Separate and Partly Dissenting Opinion of Judge Luz del Carmen Ibáñez Carranza*, 1 Nov. 2019, ICC-01/13-98-AnxI OA2, para. 23.

[342] *Ibid.*, paras 30-34.

assessment, where gravity 'is a legal characterisation of a given circumstance on the basis of a set of facts'.[343]

In her separate and partly dissenting opinion Judge Ibáñez Carranza provides her own understanding of the relationship between the PTC and the Prosecutor and some paragraphs of her dissent contain sharable considerations in this regard.[344] It is regretful that the dissent expatiates upon some debatable and unnecessary arguments that would have driven her conclusions.[345] In her view, at this stage the Prosecutor is an administrative organ and her decision not to investigate is an administrative decision. With regards to this kind of decisions, Judge Ibáñez Carranza agrees that the Prosecutor has the final word.[346] Nevertheless, once the mechanism under Art. 53(3)(a) is triggered, and the PTC requires the Prosecutor to reconsider her decision, the Prosecutor becomes a party in a judicial proceedings, ending, as noted also by the Majority, with a judicial decision of the PTC.[347] Thus, the Chamber retains the inherent power to enforce the decision[348] and the Prosecutor must effectively comply with it.[349] She challenges the conclusions drawn by the Majority from the preparatory works on the power of the Prosecutor to maintain the last word on the decision, noting the partial references and in any event their inconclusiveness because of the many alternatives taken into consideration.[350] Similarly to Judge Eboe-Osuji, she deems that the adjective 'final' in Rule 108 RPE qualifying the Prosecutor's decision after the request for review only aims at ruling the end of the decision-making process of the Prosecutor and distinguishing it from the 'initial decision'.[351] The possibility that the decision of the Prosecutor is subject to judicial review does not affect her independence.[352]

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[343] *Ibid.*, para. 36-37.

[344] ICC, AC, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia*, *Separate and Partly Dissenting Opinion of Judge Luz del Carmen Ibáñez Carranza*, annexed to *Judgment on the appeal of the Prosecutor against Pre-Trial Chamber I's 'Decision on the Prosecutor's request for leave to appeal the "Decision on the 'Application for Judicial Review by the Government of the Union of the Comoros'"*, 1 Nov. 2019, ICC-01/13-98-AnxI OA2.

[345] These debatable arguments include: (i) the fact that the Court has been established to fight impunity for international crimes, basically implying that the Prosecutor's initial decision would have necessarily granted impunity; (ii) the fact that international human rights law includes rights such as access to justice and fair trial that would be violated if the Prosecutor would not follow the PTC's conclusion; (iii) that the interpretation of Article 53(3)(a) offered by the Majority and introducing an unwritten limitation to the authority of the PTC's decision leaving the Prosecutor free to reach a different conclusion would violate the principle of legality.

[346] *Ibid.*, paras 48, 60.

[347] *Ibid.*, para. 49.

[348] *Ibid.*, para. 23.

[349] *Ibid.*, paras 48, 70.

[350] *Ibid.*, paras. 49 ff.

[351] *Ibid.*, paras 57-58.

[352] *Ibid.*, para. 70.

She notes that the word 'reconsider' means 'to consider (a matter or thing) again', 'to consider (a decision […]) a second time, with a view to changing or amending it; to rescind, alter'.[353] Therefore, if the re-examination is not carried out 'in light of new circumstances, facts and legal interpretations that were not available prior to the Prosecutor rendering her first decision not to investigate' she concludes that 'there is no proper or effective reconsideration', only a mere 'reiteration of the original determination by the Prosecutor not to investigate'.[354]

In her view, and as recalled *passim* in Chapter II, 'judges have the exclusive power to dictate the law and adjudicate the matters submitted to the Court's jurisdiction', while '[t]he Prosecutor does not make or dictate law'.[355] She disagrees with the Majority with regards to the impossibility for the PTC to direct the Prosecutor as to the result of the reconsideration, denying that the Prosecutor retains ultimate discretion over how to proceed.[356] As Judge Eboe-Osuji, she criticises the excessively theoretical approach of the Majority as well when it states that the PTC cannot direct the Prosecutor to apply the law to the facts:[357] The legal interpretation of judges is not only legal abstractions[358] and the reasons provided by the PTC in its request of reassessment are a fundamental component of the decision (she refers to that as *ratio decidendi*). Through its reasons, the PTC identified the errors committed by the Prosecutor in her first decision.[359] Only if this new decision is based on 'new and different reasons or facts that were not previously known' the Prosecutor is allowed to reach a different conclusion from the one adopted by the PTC.[360]

The correctness of the reasoning of the dissenting Judges and the 'naïve' expectations of clarity in the distinction between the law and the facts at this stage[361] supported by the Majority can be inferred by the problems raised by the PTC I in the third review of the Prosecutor's decision not to investigate in the *Registered Vessels situation*.[362] In fact, the PTC I

[353] *Ibid.*, para. 27.
[354] *Ibid.*, para. 28.
[355] *Ibid.*, para. 61.
[356] *Ibid.*, para. 22.
[357] *Ibid.*, para. 85.
[358] *Ibid.*, para. 77.
[359] *Ibid.*, paras 79 and 80-86.
[360] *Ibid.*, para. 64.
[361] In the same vein *See* also MARINIELLO T., *Judicial Control over Prosecutorial Discretion at the International Criminal Court*, in *International Criminal Law Review*, 19, 2019, p. 979 at 1002, 1007-1008; with the Majority *see* CHAITIDOU E., *The Judiciary and Enhancement of Classification of Alleged Conduct*, in AGIRRE X., BERGSMO M., DE SMET S., STAHN C., (ed.), *Quality Control in Criminal Investigation*, Torkel Opsahl Academic EPublisher, 2020, p. 943 at 962.
[362] *See* ICC, OTP, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia, Final decision of the Prosecutor concerning the "Article 53(1) Report" (ICC-01/13-6-AnxA), dated 6 November 2014, as revised and refiled in accordance with the Pre-Trial Chamber's request of 15 November 2018 and the Appeals Chamber's*

tried to follow the jurisprudence of the AC, but noting that according to the AC the PTC could not bind the Prosecutor with regards to the application of the law to the available information, the way of analysis of the information and the different weight attached to each factor in the gravity determination, it decided not to request the Prosecutor to review once again the gravity of the situation. Although the PTC I identified further errors on the side of the Prosecutor in her determination of the gravity and deemed that the Prosecutor had not genuinely taken into account the relevant factors, the PTC I found it unclear in the jurisprudence of the AC whether and to what extent it may request the Prosecutor to correct her errors.[363]

3.5. The Prosecutor's autonomous reconsideration under Article 53(4)

Ultimately, Art. 53(4) states that the Prosecutor may, at any time, reconsider a decision on whether to initiate an investigation or prosecution based on new facts or information.

This provision has been treated only in the perspective of the reconsideration of a decision not to investigate or prosecute. In the *Registered Vessels situation*, when the PTC requested the Prosecutor to review her decision not to investigate, the Prosecutor not only reassessed the information available at the time of the submission of the decision not to open an investigation, but also assessed information received after that date and treated the review of this second kind of information as a review under Art. 53(4). In the light of the autonomous nature of this provision in respect to Art. 53(1), both the Majority of PTC I[364] and the partly dissenting Judge[365] excluded the possibility for the referring entity to require a review of a decision adopted under Art. 53(4) if the Prosecutor still denies the need for an investigation or a prosecution. Nevertheless, as noted by Judge Kovács, the autonomous power of review under Art. 53(4) does not mean that 'the Prosecutor has an unfettered right to abuse her discretion',

judgment of 2 September 2019, annexed to *Notice of the Prosecutor's Final Decision under rule 108(3), as revised and refiled in accordance with the Pre-Trial Chamber's request of 15 November 2018 and the Appeals Chamber's judgment of 2 September 2019*, 2 Dec. 2019, ICC-01/13-99-Anx1; and ICC, Rodney Dixon QC, and Stoke & White LLP (London) on behalf of the Government of the Union of the Comoros, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia*, *Application for Judicial Review by the Government of the Comoros*, 2 Mar. 2020, ICC-01/13-100.

[363] ICC, PTC I, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia*, *Decision on the 'Application for Judicial Review by the Government of the Comoros'*, 16 Sep. 2020, ICC-01/13-111, paras. 105-111.

[364] ICC, PTC I, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia*, *Decision on the "Application for Judicial Review by the Government of the Union of the Comoros"*, 15 Nov. 2018, ICC-01/13-68, para. 54.

[365] *Ibid.*, paras 25 ff.

since 'the margin of discretion [...] puts a higher burden of responsibility on her to act in good faith in carrying out the Art. 53(4) process'.[366]

This conclusion on to the impossibility to review a decision adopted under Art. 53(4) is debatable in the light of the possible consequences that it may have in scenarios different from those under the PTC I's scrutiny. In fact, nothing precludes the applicability of Art. 53(4) of the Statute for reconsidering a previous *decision to investigate or prosecute*. Moreover, the Chamber's conclusion does not take into account the distinction between the case where the Prosecutor assessing the new information under Art. 53(4) reaches the same conclusion of the first determination from the case where the Prosecutor reaches the opposite conclusion. Eventually it is necessary to take into account the different triggering mechanisms.

In the first scenario the Prosecutor adopts a decision not to investigate and, after having further assessed new information, adopts a second decision confirming her previous conclusion. At the stage of the investigation, in case of preliminary examination concerning a situation under Art. 15, the impossibility to ask for a review would not be problematic, since in the procedure under Art. 15 the PTC does not have overseeing powers before the submission of a request for authorisation to commence an investigation. In case of referral, following the reasoning of the PTC I in the *Registered Vessels situation*, the referring entity does not have the possibility to request the judicial review of this second decision. Although it is not probable that the Prosecutor adopts a second decision on the non-investigation after having successfully passed the mechanisms of control provided for by Art. 53 only to confirm her previous conclusion, the assessment under Art. 53(4) might be made in conjunction with a review under Art. 53(3)(a), as in the *Registered Vessels situation*. In this case, the control of the Chamber is still possible, but some limited perplexities may come from the impossibility for the referring entity to challenge the conclusion reached by the Prosecutor on the basis of new information not available at the time of the issuance of the first decision.

In the second scenario, the Prosecutor adopts a decision not to investigate or prosecute and after an assessment of new information under Art. 53(4) reaches the conclusion that the investigation is warranted, or the prosecution is necessary. The problem is not represented by the absence of control on the new positive decision, since presumably the referring entity does not have interest in opposing to the new decision and in case of investigation under Art. 15 the authorisation of the PTC is still necessary. Nevertheless, in case of adoption of a decision to investigate in case of referral and in case of adoption of a decision to prosecute, the problem is

[366] *Ibid.*, paras 30-31.

whether the Prosecutor has the authority to reconsider a decision not to investigate or prosecute after the approval of the PTC if the referring entity had challenged the first decision of the Prosecutor under Art. 53(3)(a) or (b). In order to admit this overruling, the reconsideration should be grounded on new information capable of overcoming the arguments that induced the PTC to confirm the Prosecutor's decision not to investigate or prosecute, in order not to undermine the PTC's oversight function. The original backing of the referring entity grants the legitimacy of the Prosecutor's further activities.

But Art. 53(4) of the Statute may also be applied in order to reconsider a decision to investigate or prosecute if the new assessment of the Prosecutor leads her to the conclusion that the investigation or the prosecution is not warranted. The doctrine[367] that takes this hypothesis into account mainly focuses on the prosecution stage and seem to treat this kind of reconsideration as a normal decision not to prosecute. The consequence of this approach is the necessity to coordinate it with the confirmation of the charges procedure. The problem is combining the Prosecutor's reconsideration with her right to amend the charges without any control before the confirmation and with the authorisation of the PTC after the confirmation. The control of the PTC appears to be always necessary because before the confirmation the Chamber needs to void the warrant of arrest previously issued, after the confirmation the control should be exercised according to Art. 61(9) and treated as a withdrawal of the charges. If the reconsideration occurs between the submission of the request for a warrant of arrest and before its issuance, denying the PTC the power to exercise its oversight control under Art. 53(3) would be tantamount to depriving the Chamber and the referring entity of the power the exercise their prerogatives.

But more interesting is the replacement of a decision to open an investigation with a decision not to investigate. If the Prosecutor was authorised by the PTC under Art. 15, the existence of a judicial authorisation may be problematic. Accepting the importance of the judicial control over the authorised investigation requires that the amendments of its scope are possible only under the control of the PTC. The reconsideration of the decision to investigate could be equated to an amendment of the scope of the investigation, and the closing of the investigation should be subordinated to a determination of the PTC that had authorised it. The Prosecutor should therefore share with the Chamber the information making her change her mind as to the need for investigation and the closing of the investigation would be subject to the agreement of the PTC. This solution has two problems (one practical and one technical)

[367] BITTI G., *Article 53*, in FERNANDEZ J., PACREAU X., *Statut de Rome de la Cour pénale internationale. Commentaire article par article*, Pedone, 2012, p. 1173 at 1224-1226.

that only arise in case of disagreement between the Prosecutor and the PTC. The practical problem is the limited supervisory powers of the PTC during the investigation stage, which does not grant the effectiveness of the PTC's decision. This problem can be overcome as in any case of compelled investigation under Art. 53(3). The technical problem is the inclusion of a new hypothesis of compelled investigation not included in the Statute. The consequence is that the compelled investigations would be possible not only if the Prosecutor's decision is adopted on the basis of the interests of justice clause, but also if it is adopted on jurisdiction or admissibility determinations. Nevertheless, excluding this possibility would be tantamount to giving the Prosecutor the last word as to the extent of the jurisdiction of the Court and on the admissibility of the cases in front of it despite the existence of a judicial decision.

The case of referral by a State or the UNSC is even more problematic. In this case, if a reconsideration under Art. 53(4) cannot be subject to review under Art. 53(3)(a), the referring entity is deprived of any chance for requesting a judicial control and the PTC could not exercise its reviewing power. A distort use of this mechanism could in theory push the Prosecutor to accept the referral and initiate an investigation and only later review the decision under Art. 53(4), with the sole purpose of avoiding the control under Art. 53(3). But even leaving aside these abuses, that Judge Kovács confidently prevents by relying on the *bona fides* of the Prosecutor, it would be impossible both for the referring entity and the Chamber to ascertain the *correctness* of the Prosecutor's assessment of the new information, with irreparable consequences for the possible investigation, which would be closed.

3.6. Concluding remarks

In conclusion, it is possible to distinguish between the procedure under Art. 53(3)(a) and 53(3)(b) of the Statute on the basis of two aspects: the first one is that under Art. 53(3)(a) the judicial control may only be triggered by a request of the referring entity, while under Art. 53(3)(b) the PTC may review the Prosecutor's decision *ex officio*. The second difference is that the Prosecutor's decision under Art. 53(3)(a) has immediate effect while the Prosecutor's decision under Art. 53(3)(b) is ineffective until confirmation of the PTC that may oblige the Prosecutor to initiate an investigation or a prosecution.

The application of different procedures must necessarily be rooted in the different nature of the criteria which lead to the Prosecutor's decision. Therefore, this consideration supports the idea that gravity, as all other parameters related to jurisdiction and admissibility,

must be considered objectively, while the interests of justice is the only criterion including a discretionary component.[368]

This conclusion further influences the problem of the reviewing power of the PTC. As to the kind of review, two approaches have been suggested: the *de novo* review of the information or the error-based approach. The Prosecutor herself admits that under Art. 53(3)(b) the PTC can conduct the former, i.e. the most intrusive kind of review. The question is therefore whether the review under Art. 53(3)(a) can be less intrusive or not.

As demonstrated by the dissenting opinion of Judge Kovács, when discussing technical aspects such as jurisdiction or admissibility under Art. 17(1)(a), (b) and (c) it is not really possible to avoid the so-called *de novo* review which on the other side cannot prescind from an assessment of the information that the Chamber must have the chance to analyse. The PTC considers the information and decides whether the alleged crimes fall within the Court's jurisdiction or not and whether the potential or actual cases would be or are admissible or not. Accepting the objective gravity notion, which justifies the application of the procedure under Art. 53(3)(a) to all grounds of admissibility, there is no reason for applying a different kind of review. Despite the lack of clarity, the recognition of the PTC's power to conduct a *de novo* review seems endorsed by the AC.

The problem of applying a *de novo* review under Art. 53(3)(a) is clearly that there would be little margin for the Prosecutor to depart from the PTC's determination. But this effect must be connected to the nature of the (legal) parameters rather than to the kind of review. Since the problem under Art. 53(3)(a) is determining the existence of the legal requirements for initiating an investigation or a prosecution, irrespective whether the PTC detects an error in the Prosecutor's assessment directly from its reasoning (error-based approach) or rather from the whole information put at its disposal (*de novo* review), the Prosecutor cannot challenge the determination of the Chamber, unless she appeals the decision. In this regard, it is regrettable that a narrow majority (three to two) of the members of the AC has denied appealability to the PTC's decision.[369] It is also regrettable that the AC

[368] See above, Chapter II, Section III, 2.4.1.4 Gravity: the 'selective approach' and the 'threshold approach'. This conclusion clearly cannot be shared by those scholars who point out that confining prosecutorial discretion to the decisions adopted under Art. 53(1)(c) (and 53(2)(c) of the Statute), which are subject to mandatory judicial control, means 'the "death" of prosecutorial discretion'. *See* VARAKI M., *Revisiting the 'Interest of Justice' Policy Paper*, in *Journal of International Criminal Justice*, 15, 2017, p. 455 at 466.

[369] When the PTC I, by majority, Judge Kovács partly dissenting, granted the first Comoros' request for review of the Prosecutor's decision not to open an investigation (ICC, PTC I, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of*

lacked the courage of requesting the Prosecutor to comply with the PTC's assessment in the request for review, leaving her an indeterminate margin of appreciation with regards to the interpretation and application of a legal statutory requirement, on the basis of the utopian idea that it is always possible to distinguish the application of the law from the facts. Even if this is true in principle, with regards to a parameter such as gravity, through the identification of material errors in the Prosecutor's assessment of the facts the PTC had provided with an interpretation of the gravity threshold required for admissibility. This approach led to a third report by the Prosecutor essentially repeating once again her reasons on the need to close the preliminary investigation without conducting an investigation[370] and to the submission of a third request for review by the Comoros accusing the Prosecutor of not having followed the PTC and AC's instructions and even requesting the Chamber to sanction the Prosecutor for misconduct.[371] It is now up to the PTC to decide whether the request for review is grounded ot not. As a mere matter of policy, although the referral does not exclude the need to verify the existence of the Art. 53 requirements, one may even wonder whether it makes sense for the Prosecutor to steadly increase the tension not only with sceptical States, but even with States

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Cambodia, *Decision on the Request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation*, 16 Jul. 2015, ICC-01/13-34.) the Prosecutor submitted a notice of appeal of the decision (ICC, OTP, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia*, *Notice of Appeal of "Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation" (ICC-01/13-34)*, 27 Jul. 2015, ICC-01/13-35). Nevertheless, upon request of the Comoros, the AC deemed it necessary to preliminarily decide on the admissibility of the appeal (ICC, AC, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia*, *Directions on the conduct of proceedings*, 6 Aug. 2015, ICC-01/13-42 OA). After having allowed the parties and participants to file submissions in this regard, the AC by majority, Judge Fernández de Gurmendi and Judge Van den Wyngaert dissenting, declared inadmissible the appeal of a request for review rendered under Art. 53(3)(a) (ICC, AC, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia*, *Decision on the admissibility of the Prosecutor's appeal against the 'Decision on the Request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation'*, 6 Nov. 2015, ICC-01/13-51 OA). In this regard, it is worth mentioning that the appealability of the decision would not automatically lead the Prosecutor to always appeal the decision of the PTC, because, if the AC should confirm the PTC's determination it would be even more complicated for the Prosecutor to depart from the request of the Judiciary. In the same vein *see* BITTI G., *Article 53*, in FERNANDEZ J., PACREAU X., *Statut de Rome de la Cour pénale internationale. Commentaire article par article*, Pedone, 2012, p. 1173 at 1216.

[370] ICC, OTP, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia*, *Final decision of the Prosecutor concerning the "Article 53(1) Report" (ICC-01/13-6-AnxA), dated 6 November 2014, as revised and refiled in accordance with the Pre-Trial Chamber's request of 15 November 2018 and the Appeals Chamber's judgment of 2 September 2019*, annexed to *Notice of the Prosecutor's Final Decision under rule 108(3), as revised and refiled in accordance with the Pre-Trial Chamber's request of 15 November 2018 and the Appeals Chamber's judgment of 2 September 2019*, 2 Dec. 2019, ICC-01/13-99-Anx1.

[371] ICC, Rodney Dixon QC, and Stoke & White LLP (London) on behalf of the Government of the Union of the Comoros, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia*, *Application for Judicial Review by the Government of the Comoros*, 2 Mar. 2020, ICC-01/13-100.

requesting her intervention despite a judicial decision interpreting a statutory provision and stating that the gravity threshold is met.

Conversely, the approach suggested by Judge Eboe-Osuji and Judge Ibáñez Carranza grants the uniform interpretation and application of the law within the Statutory framework, leaves the former in the hands of the judiciary and is further consistent with the mandatory nature of the prosecution once the legal requirements of Art. 53(1)(a) and (b) and 53(2)(a) and (b) are fulfilled, limiting the interests of justice as the only possible margin for prosecutorial discretion. This proposal does not equate the mechanism under Art. 53(3)(a) to the mechanism under Art. 53(3)(b) because only in the second case the investigation or the prosecution would be 'compelled'. Only under Art. 53(3)(b) the Prosecutor might be forced to commence an investigation despite not agreeing with the interpretation of a discretionary factor. Following the PTC's determination concerning non-discretionary factors such as jurisdiction and admissibility (including gravity) would mean to simply apply the legal statutory requirements as interpreted by the only subject allowed to authoritatively interpret them, i.e. the Chambers. This solution excludes the possibility that the Prosecutor might hide, behind a gravity determination, non-legal considerations, jeopardising the transparency of the decision.[372] In this way the Prosecutor is protected against any criticism of adopting politically motivated decisions. The correctness of the Prosecutor's determination in the only discretionary component of the assessment, i.e. the interests of justice, would instead be granted by the Chamber's confirmation. As to the review of a decision adopted on the basis of the interests of justice clause, since the disagreement between PTC and the Prosecutor may lead to the extreme solution of the compulsory investigation or prosecution, it is important to clearly limit the extent of the concept of interests of justice as suggested in Chapter II. In this case, despite the negative nature of the interests of justice requirement, it would be very difficult to challenge the Prosecutor's determination without enhancing the consistency of the investigation or the prosecution with the interests of justice.

4. The control during the investigations

As note by Kreß, [t]he interplay between the Prosecutor and the Pre-Trial Chamber at the early stages of the proceedings constitutes one of the most striking examples of the

[372] Similarly *see* MARINIELLO T., *Judicial Control over Prosecutorial Discretion at the International Criminal Court*, in *International Criminal Law Review*, 19, 2019, p. 979 at 1002, referring to the use of gravity as a 'fig leaf' covering forms of unaccountable discretion.

uniqueness of the ICC procedural law'.[373] Nevertheless, during the investigations the PTC has limited powers[374] of control on the Prosecutor. These powers are enshrined in Art. 57(3)(c). This provision states that where necessary, the PTC may provide for the protection and privacy of victims and witnesses, the preservation of evidence, the protection of persons who have been arrested or appeared in response to a summons, and the protection of national security information. This ruling is further integrated by Reg. 48 RegC. The functions of the Chamber are therefore strictly related to certain subjects and not to the investigations as such.

Nevertheless, Art. 57 has been used by PTC I in the situation in the Democratic Republic of the Congo since for seven months the Prosecutor had not provided the Chamber with information on the protection of the victims and the preservation of the evidence.[375] Also with regards to the situation in Darfur, the PTC I submitted a decision[376] under Art. 57(3)(c) requesting Louise Arbour, High Commissioner of the Office of the United Nations High Commissioner for Human Rights and Antonio Cassese, Chairperson of the International Commission of Inquiry on Darfur, Sudan, to submit observations on issues concerning the protection of victims and the preservation of evidence in Darfur, giving than the Prosecutor a time limit to respond. The decision basically aimed at obtaining information on the difficulties that the Prosecutor was facing in the region in conducting the investigations. It is significant that both the *Amici Curiae* Antonio Cassese and Louise Arbour were critical about the statement of the Prosecutor which appeared to have exaggerated the gravity of the situation and his impossibility to conduct investigations on the ground.[377]

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[373] KREß K., *The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise*, in *Journal of International Criminal Justice*, 1, 2003, p. 606.

[374] *Contra* Schabas, ho refers to 'a broad range of powers' of the PTC under Art. 57(3). SCHABAS W.A., *An Introduction to the International Criminal Court*, Cambridge University Press, 2020, p. 270.

[375] ICC, PTC I, *Situation in the Democratic Republic of the Congo, Decision to Convene a Status Conference*, 17 Feb. 2005, ICC-01/04-9.

[376] ICC, PTC I, *Situation in Darfur, Decision Inviting Observations in Application of Rule 103 of the Rules of Procedure and Evidence*, 24 Jul. 2006, ICC-02/05-10.

[377] ICC, Amicus Curiae Antonio Cassese, *Situation in Darfur, Sudan, Observations on Issues Concerning to the Protection of Witnesses and the Preservation of Evidence in the Proceedings on Darfur Pending before the ICC*, 25 Aug. 2006, ICC-02/05-14; ICC, Amicus Curiae Louise Arbour, *Situation in Darfur, Observations of the United Nations High Commissioner for Human Rights invited in Application of Rule 103 of the Rules of Procedure and Evidence*, 10 Oct. 2006, ICC-02/05-19; *See* also ICC, OTP, *Situation in Darfur, Sudan, Prosecutor's response to Cassese's observations on Issues Concerning to the Protection of Witnesses and the Preservation of Evidence in the Proceedings on Darfur Pending before the ICC*, 11 Sep. 2006, ICC-02/05-16; ICC, OTP, *Situation in Darfur, Sudan, Prosecutor's response to Arbour's observations of the United Nations High Commissioner for Human Rights invited in Application of Rule 103 of the Rules of Procedure and Evidence*, 19 Oct. 2006, ICC-02/05-21.

SECTION III

THE CONTROL OF THE JUDICIARY UNDER ARTICLE 58 OF THE STATUTE

Art. 58 of the Statute[378] rules the issuance by the PTC of a warrant of arrest or a summons to appear. The issuance requires the preliminary submission of an application by the Prosecutor, which can be done any time after the initiation of the investigation. The Chamber is required to examine the application and the evidence attached thereto and must be satisfied that there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court.

In order to issue the warrant of arrest the PTC must also be satisfied that the arrest appears necessary to ensure the person's appearance at trial, that the person does not obstruct or endanger the investigation or the Court proceedings; or to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.

Art. 58 also includes the minimum content of the Prosecutor's application: (a) the name of the person and any relevant information for the identification; (b) a specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed; (c) a concise statement of the facts which are alleged to constitute those crimes; (d) a summary of the evidence and any other information which establish reasonable grounds to believe that the person committed those crimes; (e) and the reason why the Prosecutor believes that the arrest of the person is necessary.[379] The first three elements must be included in the warrant of arrest and in the summons to appear, which must also contain the date on which the person is required to appear.

After the issuance the Prosecutor is allowed to request the PTC to amend the warrant of arrest or the summons to appear providing the necessary evidence. The PTC may modify it once it is satisfied under the required standard.

[378] For an overview *see* SAFFERLING C., *International Criminal Procedure*, Oxford University Press, 2012, pp. 291 ff.

[379] Regulations 53(1) Regulations of the OTP further states that 'in preparing an application for a warrant of arrest or summons to appear in a potential case, pursuant to Article 58, the Office shall clearly identify the crime(s) and mode(s) of liability alleged, based on solid factual and evidentiary foundations'.

Since the reasonable grounds to believe standard has already been analysed in Chapter II,[380] there is no need to further return of this topic.

[380] *See* above, Chapter II, Section I.

SECTION IV

THE CONTROL OF THE JUDICIARY UNDER ARTICLE 61 OF THE STATUTE

The procedure of the confirmation of charges was quite a novelty when it was introduced in the Rome Statute. The *ad hoc* Tribunals did not include this mechanism but only the confirmation of the indictments. The confirmation of the charges is ruled by Art. 61 of the Statute.[381] It is quite an articulated procedure and it would be too long to detailing all its aspects. Therefore, this section analyses only the relationship between the PTC and the Prosecutor during this procedure.

The *ad hoc* Tribunals did not include a procedure comparable to the confirmation proceedings of Art. 61. Art. 18 of the ICTY Statute and 17 of the ICTR Statute, provided for a duty for the Prosecutor to initiate investigations *ex-officio* or on the basis of information obtained.[382] According to the fourth paragraph of these two Articles, '[u]pon a determination that a *prima facie* case exists, the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute. The indictment shall be transmitted to a judge of the Trial Chamber.'

Art. 19 of the ICTY Statute and Art. 18 of the ICTR Statute ruled the review of the indictment by the Judge: '[i]f satisfied that a *prima facie* case has been established by the Prosecutor, he or she shall confirm the indictment. If not so satisfied, the indictment shall be dismissed'. The procedure for review was set forth in Rule 47 of both the ICTY and the ICTR RPE, and required the Judge to 'examine each of the counts in the indictment, and any supporting materials the Prosecutor may provide' to determine 'whether a case exists against the suspect'. The Rules went further identifying the alternatives available to the Judge in the reviewing process: (i) requesting the Prosecutor to present additional material in support of any or all counts, or to take any further measures which appear appropriate;[383] (ii) confirming each count; (iii) Dismissing each count; or (iv) adjourning the review so as to give the Prosecutor the opportunity to modify the indictment.

[381] BOURGUIBA L., *Article 61*, in FERNANDEZ J., PACREAU X., *Statut de Rome de la Cour pénale internationale. Commentaire article par article*, Pedone, 2012, pp. 1385 ff; SAFFERLING C., *International Criminal Procedure*, Oxford University Press, 2012, pp 316 ff.; SCHABAS W.A., *An Introduction to the International Criminal Court*, Cambridge University Press, 2020, pp. 284 ff.

[382] *See* Chapter I, Section III, 2. The Prosecutor of the *ad hoc* Tribunals. For a detailed comparative analysis of the system of the charges in various international criminal jurisdiction, *see* FRIMAN H., BRADY H., COSTI M., GUARIGLIA F., STUCKENBERG C.F., *Cherges*, in SLUITER G., FRIMAN H., LINTON S., VASILIEV S., ZAPPALÀ S. (eds), *International Criminal Procedure*, Oxford University Press, 2013, pp. 381 ff.

[383] This limb was deleted in Rule 47 ICTY RPE, while it remained in Rule 48 ICTR RPE.

Therefore, the Prosecutor's decision was subject to a judicial control that not even the Chief Prosecutor of the ICTR deemed inappropriate.[384] The confirmation of the indictment by an impartial Judge safeguarded the rights of the accused and prevented unjustified arrests of the Prosecutor.[385] Nevertheless, the reviewing Judge could not question the Prosecutor's assessment of the appropriateness of the prosecution, nor shaping the case directly amending the indictments.

Only in view of the completion strategy the ICTY (but not the ICTR) introduced Rule 28[386] RPE which gave to the Judiciary a partial control over the Prosecutor's choices.[387] It stated that on receipt of an indictment for review from the Prosecutor, the Registrar should consult with the President. The President should refer the matter to the Bureau which should determine whether the indictment, *prima facie*, concentrated on one or more of the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the Tribunal. If the Bureau determined that the indictment met this standard, the President designated one of the permanent TC Judges for the review of the indictment under Rule 47. Otherwise the President returned the indictment to the Registrar who had to communicate this finding to the Prosecutor.

The confirmation procedure is a peculiarity of the Rome Statute that was not even included in the Zutphen Draft and the confirmation of charges appeared for the first time in a document called 'Further Options for articles 58 to 61' drafted by the Preparatory Committee in spring 1998. The version of Art. 61 prepared by the Preparatory Committee was approved at the Rome Conference (except for new paras (8) and (11)) and was further discussed at the Preparatory Committee meetings in February 1999, on occasion of the drafting of the RPE.[388]

[384] JALLOW H.B., *Prosecutorial Discretion and International Criminal Justice*, in *Journal of International Criminal Justice*, 3, 1, 2005, p. 145 at 148.

[385] *See* BERGSMO M., CISSÉ C., STAKER C., *The Prosecutor of the International Criminal Tribunals: The Cases of the Nuremberg and Tokyo Tribunals, the ICTY and ICTR, and the ICC Compared*, in ARBOUR L., ESER A., AMBOS K., SANDERS A. (eds.), *The Prosecutor of a Permanent International Criminal Court, International Workshop in co-operation with the Office of the Prosecutor of the International Criminal Tribunals (ICTY and ICTR)*, Freiburg im Breisgau, May 1998, Edition Iuscrim, 2000, p. 121 at 136.

[386] Res 1534 SCOR 4935th meeting U.N. Doc. S/RES/1534, 2004.

[387] *See* WEBB P., *The ICC Prosecutor's Discretion Not to Proceed in the 'Interests of Justice'*, in *Criminal Law Quarterly*, 1 Jan. 2005, p. 305 at 322.

[388] *See* SCHABAS W.A., CHAITIDOU E., EL ZEIDY M.M., *Article 61*, in AMBOS K., *The Rome Statute of the International Criminal Court*, 4th ed., Beck/Hart/Nomos, 2021, mn. 2-3.

1. The concept of 'substantial grounds to believe'

Art. 61 requires the Prosecutor to satisfy the 'substantial grounds to believe standard' in order to commit the accused for trial. Once again, the PTC I delineated the standard of the substantial grounds to believe on the jurisprudence of the ECtHR,[389] noting that the Prosecutor is required to offer 'concrete and tangible proof demonstrating a clear line of reasoning underpinning its specific allegations'.[390] The same standard was also applied in the subsequent cases.[391] PTC II further specified the concept of 'substantial grounds to believe', focusing on the concept of 'substantial'[392] and further argued the applicability of the principle *in dubio pro reo* in the determination under Art. 61. In its view, being this principle a necessary component of the presumption of innocence, it must be applied at all the stages of the proceedings, including the pre-trial stage.[393] This interpretation was not shared by PTC I, which found that

[389] *See*, in particular, ECtHR, *Soering v. the United Kingdom*, *Judgement*, 7 Jul. 1989, Application No. 14038/88; ECtHR, GC, *Mamatkulov and Askarov v. Turkey*, *Judgement*, 4 Feb. 2005, Applications Nos. 46827/99 and 46951/99; ECtHR, *Chahal v. the United Kingdom*, *Judgement*, 15 Nov. 1996, Application No. 22141/93, para. 97.

[390] ICC, PTC I, *The Prosecutor v. Thomas Lubanga Dyilo*, *Decision on the confirmation of charges*, 29 Jan. 2007, ICC-01/04-01/06-803, para. 39.

[391] ICC, PTC I, *The Prosecutor v. Katanga and Ngudjolo Chui*, *Decision on the confirmation of charges*, 30 Sep. 2008, ICC-01/04-01/07-717, para. 65; ICC, PTC II, *The Prosecutor v. Bemba*, *Decision Pursuant to Article 61(/)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo*, 15 Jun. 2009, ICC-01/05-01/08-424, para. 29; ICC, PTC I, *The Prosecutor v. Abu Garda*, *Decision on the Confirmation of Charges*, 8 Feb. 2010, ICC-02/05-02/09-243, paras 36-37; ICC, PTC I, *The Prosecutor v. Mbarushimana*, *Decision on the confirmation of charges*, 16 Dec. 2011, ICC-01/04-01/10-465, para. 40; ICC, PTC II, *The Prosecutor v. Muthaura, Kenyatta and Hussein Ali*, *Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute*, 23 Jan., 2012, ICC-01/09-02/11-382, para. 52; ICC, PTC II, *The Prosecutor v. Ruto, Kosgey and Sang*, *Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute*, 23 Jan. 2012, ICC-01/09-01/11-373, para. 40; ICC, PTC I, The *Prosecutor v. Gbagbo*, *Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute*, 3 Jun. 2013, ICC-01/11-01/11-432, para. 17; ICC, PTC II, *The Prosecutor v. Ntaganda*, *Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda*, 9 Jun. 2014, ICC-01/04-02/06, para. 9; ICC, PTC II, *The Prosecutor v. Bemba, Kilolo, Mangenda, Babala and Arido*, *Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute*, 11 Nov. 2014, ICC-01/05-01/13-749, para. 25; ICC, PTC I, *The Prosecutor v. Gbagbo*, *Decision on the confirmation of charges against Laurent Gbagbo*, 12 Jun. 2014, ICC-02/11-01/11-186, para. 19; ICC, PTC I, *The Prosecutor v. Blé Goudé*, *Decision on the confirmation of charges against Charles Blé Goudé*, 11 Dec. 2014, ICC-02/11-02/11-186, para. 12; PTC II, *The Prosecutor v. Ongwen*, *Decision on the confirmation of charges against Dominic Ongwen*, 23 Mar. 2016, ICC-02/04-01/15-422, para. 17; ICC, PTC I, *The Prosecutor v. Al Mahdi*, *Decision on the confirmation of charges against Ahmad Al Faqui Al Mahdi*, 24 Mar. 2016, ICC-01/12-01/15-84, para. 18.

[392] ICC, PTC II, *The Prosecutor v. Bemba, Decision Pursuant to Article 61(/)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo*, 15 Jun. 2009, ICC-01/05-01/08-424, para. 29. *See* also ICC, PTC I, The *Prosecutor v. Gbagbo, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute*, 3 Jun. 2013, ICC-01/11-01/11-432, para. 17.

[393] ICC, PTC II, *The Prosecutor v. Bemba, Decision Pursuant to Article 61(/)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo*, 15 Jun. 2009, ICC-01/05-01/08-424, para. 31; ICC, PTC II, *The Prosecutor v. Muthaura, Kenyatta* and *Hussein Ali*, *Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute*, 23

the possible inconsistencies of the evidence may lead the PTC to the decision of declining to confirm the charges not because of the application of the principle *in dubio pro reo*, but rather if the evidence is insufficient to meet the standard provided for under Art. 61(7).[394] The AC seems to endorse this reading as it expressly authorises the PTC to evaluate ambiguities, inconsistencies and contradictions in the evidence or doubts as to the credibility of witnesses in order to prevent 'the risk of cases proceedings to trial although the evidence is so riddled with ambiguities, inconsistencies and contradictions or doubts as to the credibility that it is insufficient to establish substantial grounds to believe the person committed the crimes charged'.[395]

It is also worth mentioning that the PTC II in the *Yekaton and Ngaïssona case*, quoting the separate opinion in the *Abu Garda case*, notes the importance of establishing a link between the historical events and the alleged perpetrators for determining whether to send to trial an individual.[396]

A disagreement as to the interpretation of the applicable standard emerged in the *Gbagbo case* when the Majority deemed appropriate to adjourn the hearing in the light of the quality of the evidence brought by the Prosecutor. Although both the Majority and the dissenting Judge referred to the same principles set out above, Judge Fernández de Gurmendi criticised the 'expensive interpretation of the applicable evidentiary standard' made by the Majority. Further she noted that '[r]egardless of the desirability of the ideal that investigations

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Jan., 2012, ICC-01/09-02/11-382, para. 53; ICC, PTC II, *The Prosecutor v. Ruto, Kosgey and Sang, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute*, 23 Jan. 2012, ICC-01/09-01/11-373, para. 41.

[394] ICC, PTC I, *The Prosecutor v. Abu Garda, Decision on the Confirmation of Charges*, 8 Feb. 2010, ICC-02/05-02/09-243, para. 43.

[395] ICC, AC, *The Prosecutor v. Mbarushimana, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled 'Decision on the confirmation of charges'*, 30 May 2012, ICC-01/04-01/10-514, para. 46. Nevertheless, PTC, also following the AC's instructions (*Ibid.*, para. 48), are usually very cautious in determining issues relating the probative value of evidence, especially with regard to the credibility of witnessess' declarations. Therefore they tend to refrain from solving apparent contraddiction in the evidence, rather focusing on the existence of the required standard for each and every count. *See also* ICC, PTC I, *The Prosecutor v. Al Hassan, Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, 30 Sep. 2019, ICC-01/12-01/18-461-Corr-Red, paras 46, 63, 65, 66.

[396] ICC, PTC II, *The Prosecutor v. Yekatom and Ngaïssona, Corrected version of 'Decision on the confirmation of charges against Alfred Yekatom and Patrice-Eduard Ngaïssona'*, 11 Dec. 2019, ICC-01/14-01/18-403-Red-Corr., para. 57. As in the separate opinion in the *Abu Garda* case, the PTC II unanimously notes that if the evidence submitted does not allow the Chamber to establish the abovementioned link, the Chamber must 'refrain from delving into the legal analysis of the fact, including the correspondence between the objective features of the fact, on one hand, and the objective and subjective elements of a given crime, on the other'. This is necessary not only for judicial economy, but for avoiding pre-adjudication of of facts that might be the object of other cases within the same situation (*ibid.*, para. 59).

be largely completed before confirmation of charges', she found it problematic that 'a policy objective has been turned by the Majority into a legal requirement'.[397] She also noted that the Prosecutor does not have the legal duty to present the Chamber 'her strongest possible case' and states that there may be many reasons for not doing it.[398] In her view, since both the quantity and quality of the evidence received by the PTC may differ from the evidence that the Prosecutor intends to use in trial, 'it is not for the Chamber to speculate on whether it has received all the evidence or the "strongest possible" evidence, but solely to assess whether it has sufficient evidence to determine substantial grounds to believe that the person has committed the crimes charged'[399].

Despite these ambiguities as to the applicable standard required for the confirmation, Stegmiller[400] argues that irrespective of the different wording vis-à-vis the *prima facie* standard used by the *ad hoc* Tribunals, the test should not be higher. Nevertheless, the peculiarities of the confirmation of the charges procedure and in particular its relevance for the determination of the scope of the trial make it difficult to limit its extent to the mere assessment of the existence of a *prima facie* case.[401] Better said, without transforming the confirmation of the charges in a mini-trial that risks to violate the presumption of innocence, its function should be to demonstrate the existence of a clear case according to the substantial grounds standard, a case defined in all its aspects. It should rather refrain from a mere demonstration that a case against the accused appears to be substantiated by evidence and that the prosecution is not arbitrary.

2. The purpose of the confirmation of the charges

In the case-law of the Court, it is possible to identify two main functions of the confirmation of the charges. The first one is the traditional one, i.e. protecting the suspect from wrongful prosecution. The second and more interesting one is the determination of the scope of the trial.

[397] ICC, PTC I, The *Prosecutor v. Gbagbo*, *Dissenting opinion of Judge Silvia Fernández de Gurmendi*, annexed to *Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute*, 3 Jun. 2013, ICC-02/11-01/11-432, para. 15

[398] *Ibid*., paras 17-18.

[399] *Ibid.*, para. 22.

[400] STEGMILLER I., *Confirmation of Charges*, in STAHN C. (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015, p. 891 at 896.

[401] In the same vein, AMBOS, K., *Treatise on International Criminal Law, Vol. III: International Criminal Procedure*, Oxford University Press, 2016, p. 360-361.

2.1. The protection from wrongful charges

The PTC I, in the first decision on the confirmation of the charges against Mr Lubanga highlighted that the purpose of the whole procedure 'is limited to committing for trial only those persons against whom sufficiently compelling charges going beyond mere theory or suspicion have been brought'.[402] The perspective of the Chamber is therefore that of protecting the rights of the Defence 'against wrongful and wholly unfounded charges'.[403] The PTC II rephrased the concept referring to the need to protect the suspect against 'wrongful prosecution' but also introduced a reference to the need for judicial economy, 'distinguishing between cases that should go to trial from those that should not'[404].

It is apparent that for some Judges the function of the PTC should stop here. For example, in her abovementioned dissent, Judge Fernández de Gurmendi stated that the PTC only has a 'gatekeeper function' which must be exercised 'with the utmost prudence taking into account the limited purpose of the confirmation hearing'.[405] In her view '[a]n expansive interpretation of their role is not only unsupported by law' but 'affects the entire architecture of the procedural system of the Court and may, as a consequence, encroach upon the functions of

[402] ICC, PTC I, *The Prosecutor v. Lubanga*, *Decision on the confirmation of charges*, 29 Jan. 2007, ICC-01/04-01/06-803, para. 37. *See* also ICC, PTC II, *The Prosecutor v. Yekatom and Ngaïssona*, *Corrected version of 'Decision on the confirmation of charges against Alfred Yekatom and Patrice-Eduard Ngaïssona*, 11 Dec. 2019, ICC-01/14-01/18-403-Red-Corr, para. 14; ICC, PTC I, *The Prosecutor v. Al Hassan*, *Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, 30 Sep. 2019, ICC-01/12-01/18-461-Corr-Red, para. 42.

[403] *Ibid*., para. 37. *See* also ICC, PTC I, *The Prosecutor v. Katanga and Ngudjolo Chui*, *Decision on the confirmation of charges*, 30 Sep. 2008, ICC-01/04-01/07-717, para. 63; ICC, PTC I, *The Prosecutor v. Abu Garda*, *Decision on the Confirmation of Charges*, 8 Feb. 2010, ICC-02/05-02/09-243, para. 39; ICC, PTC II, *The Prosecutor v. Ongwen*, *Separate opinion of Judge Marc Perrin de Brichambaut*, annexed to *Decision on the confirmation of charges against Dominic Ongwen*, 23 Mar. 2016, ICC-02/04-01/15-422-Anx, para. 3; ICC, PTC II, *The Prosecutor v. Yekatom and Ngaïssona*, *Corrected version of 'Decision on the confirmation of charges against Alfred Yekatom and Patrice-Eduard Ngaïssona*, 11 Dec. 2019, ICC-01/14-01/18-403-Red-Corr, para. 14.

[404] ICC, PTC II, *The Prosecutor v. Bemba*, *Decision Pursuant to Article 61(/)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo*, 15 Jun. 2009, ICC-01/05-01/08-424, para. 28. *See* also ICC, PTC I, *The Prosecutor v. Mbarushimana*, *Decision on the confirmation of charges*, 16 Dec. 2011, ICC-01/04-01/10-465, para. 41; ICC, PTC II, *The Prosecutor v. Muthaura, Kenyatta, Hussein Ali*, *Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute*, 23 Jan., 2012, ICC-01/09-02/11-382, para. 52; ICC, PTC II, *The Prosecutor v. Ruto, Kosgey and Sang*, *Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute*, 23 Jan. 2012, ICC-01/09-01/11-373, para. 40; ICC, PTC I, The *Prosecutor v. Gbagbo*, *Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute*, 3 Jun. 2013, ICC-01/11-01/11-432, para. 18; ICC, PTC II, *The Prosecutor v. Ongwen*, *Decision on the confirmation of charges against Dominic Ongwen*, 23 Mar. 2016, ICC-02/04-01/15-422, para. 14; ICC, PTC I, *The Prosecutor v. Al Mahdi*, *Decision on the confirmation of charges against Ahmad Al Faqui Al Mahdi*, 24 Mar. 2016, ICC-01/12-01/15-84, para. 15.

[405] ICC, PTC I, The *Prosecutor v. Gbagbo*, *Dissenting opinion of Judge Silvia Fernández de Gurmendi*, annexed to *Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute*, 3 Jun. 2013, ICC-02/11-01/11-432, in particular para. 26.

trial Judges, generate duplications, and end up frustrating the judicial efficiency that Pre-Trial Chambers are called to ensure'.[406] The PTC I in a different composition deemed it important to stress that the confirmation proceedings must not go beyond its function and therefore must never enter into a 'premature in-depth analysis of guilt' of the suspected person. Consequently, the Chamber is prevented from making any assessment with the purpose of determining the sufficiency of the evidence for sustaining a conviction.[407] This jurisprudence clearly follows that of the *Katanga and Ngudolo Chui case*, where the PTC I highlighted that the confirmation of the charges procedure must not be considered a 'mini-trial' or a 'trial before the trial'.[408]

2.2. The determination of the scope of the trial

But since the *Lubanga case* the TC I made it also clear that: '[t]he power to frame the charges lies at the heart of the Pre-Trial Chamber's functions' and that the TC 'has no authority to ignore, strike down or declare null and void the charges as confirmed by the Pre-Trial Chamber'.[409] The Chamber further highlighted that the PTC and the TC have different functions and that the latter does not have appellate jurisdiction over the decision of the former and 'most particularly the Trial Chamber has not been given a power to review the only decision of the Pre-Trial Chamber that is definitely binding on the Trial Chamber: the Decision on the confirmation of charges. […] [T]he Trial Chamber has severely limited authority as regards the content of the charges'.[410] The Chamber further stressed that if the TC could interfere on the charges, there would be two independent routes for challenging the decision on the confirmation of the charges, namely appealing the decision and requesting the TC to strike down part or all the confirmation decision. Conversely, the only means available to the TC are authorising the withdrawal of the charges requested by the Prosecutor and legally recharacterise the facts under Reg. 55 RegC.[411]

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[406] *Ibid*.

[407] ICC, PTC I, *The Prosecutor v. Abu Garda, Decision on the Confirmation of Charges*, 8 Feb. 2010, ICC-02/05-02/09-243, para. 40.

[408] ICC, PTC I, *The Prosecutor v. Katanga and Ngudjolo Chui, Decision on the confirmation of charges*, 30 Sep. 2008, ICC-01/04-01/07-717, para. 64. *See* also ICC, PTC I, *The Prosecutor v. Abu Garda, Decision on the Confirmation of Charges*, 8 Feb. 2010, ICC-02/05-02/09-243, para. 39.

[409] ICC, TC I, *The Prosecutor v. Lubanga, Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted*, 13 Dec. 2007, ICC-01/04-01/06-1084, para. 39.

[410] *Ibid*., para. 43.

[411] *Ibid*., para. 44 ff.

The PTC I, in a different composition, later endorsed by PTC II,[412] clarified the relationship existing between the pre-trial and the trial stage. In its view, the relationship between the two stages goes beyond the filtering of cases.[413] According to the PTC I, this emerges from the wording of both Art. 74(2) and Reg. 55 RegC. According to the former, the decision at trial shall not exceed the facts and circumstances described in the charges and any amendments to the charges', while according to the latter the TC may recharacterise the facts 'without exceeding the facts and circumstances described in the charges and any amendments to the charges'.[414] In light of the content of these two provisions, the PTC I infers that only the facts and circumstances confirmed in the proceedings under Art. 61 determine 'the factual ambit of the case for the purpose of the trial and circumscribe it by preventing the Trial Chamber from exceeding the factual ambit'.[415] As further clarified by PTC II, confirming the charges 'fix and delimit, to a certain extent, the scope of the case for the purposes of the subsequent trial'.[416] Notwithstanding this, according to PTC I, the wording of the provisions makes it also clear that the confirmation of charges limits only the factual but not the legal characterisation of the trial. The possible legal recharacterisation under Reg. 55 would confirm this interpretation.[417]

The PTC II returned on the importance of the confirmation for 'settling the parameters of the case for trial in making sure that the charges are clear and not deficient in form'.[418] Further it stated that:

> 'In sum, the purpose of the pre-trial proceedings is to make sure that only charges which are sufficiently supported by the available evidence and which are clear and

[412] ICC, PTC II, *The Prosecutor v. Muthaura, Kenyatta, Hussein Ali, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute*, 23 Jan., 2012, ICC-01/09-02/11-382, paras 56 ff; ICC, PTC II, *The Prosecutor v. Ruto, Kosgey and Sang, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute*, 23 Jan. 2012, ICC-01/09-01/11-373, paras 44 ff.

[413] ICC, PTC I, *The Prosecutor v. Banda and Jerbo, Decision on Confirmation of Charges*, 7 Mar. 2011, ICC-02/05-03/09-121, para. 32.

[414] *Ibid*., para. 33.

[415] *Ibid*., para. 34.

[416] ICC, PTC II, *The Prosecutor v. Muthaura, Kenyatta, Hussein Ali, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute*, 23 Jan., 2012, ICC-01/09-02/11-382, para. 56; ICC, PTC II, *The Prosecutor v. Ruto, Kosgey and Sang, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute*, 23 Jan. 2012, ICC-01/09-01/11-373, para. 44.

[417] ICC, PTC I, *The Prosecutor v. Banda and Jerbo Jamus, Decision on Confirmation of Charges*, 7 Mar. 2011, ICC-02/05-03/09-121, para. 34.

[418] ICC, PTC II, *The Prosecutor v. Ongwen, Decision on the confirmation of charges against Dominic Ongwen*, 23 Mar. 2016, ICC-02/04-01/15-422, para. 15. *See* also ICC, PTC II, *The Prosecutor v. Yekatom and Ngaïssona, Corrected version of 'Decision on the confirmation of charges against Alfred Yekatom and Patrice-Eduard Ngaïssona*, 11 Dec. 2019, ICC-01/14-01/18-403-Red-Corr, para. 15.

> properly formulated, in their factual and legal aspects, be submitted to a Trial Chamber for its determination'[419]

The PTC II in a different composition returned on this issue when deciding on the Prosecutor's request to add a charge.[420] The Chamber noted that the PTC has a 'critical' filtering role ensuring the possibility for the accused to clearly understand the charges[421] Therefore the prerogatives set forth in article 61(9) and allowing the Prosecutor to amend the charges cannot be 'generously read', otherwise 'the delicate balance between the pre-trial and the trial phase of the proceedings' risks to be altered.[422]

It is therefore clear that, once the Prosecutor has presented her case to the PTC for the confirmaton, it is up to the PTC to determine the elements that the Prosecutor proved to the required standard and those which she did not. Therefore, if before the confirmation the Prosecutor enjoys broad discretion in structuring the case, deciding the individuals to charge, the charges, the modes of liability, the evidence used to support her allegations, it is the confirmation decision which definitively fixes the features of the case to be dealt with in trial.[423] After the confirmation there is no more the '*case of the Prosecutor*', an expression typical of the common law tradition that does not fit with the duty to research the truth incumbent on the Prosecutor of the Court, but only the case that, according to the PTC, the Prosecutor was able to prove to the standard set forth in Art. 61(7) and that in trial she is required to prove beyond reasonable doubt.[424]

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[419] *Ibid*., para. 16. *See* also ICC, PTC I, *The Prosecutor v. Al Mahdi*, *Decision on the confirmation of charges against Ahmad Al Faqui Al Mahdi*, 24 Mar. 2016, ICC-01/12-01/15-84, para.17; ICC, PTC II, *The Prosecutor v. Yekatom and Ngaïssona*, *Corrected version of 'Decision on the confirmation of charges against Alfred Yekatom and Patrice-Eduard Ngaïssona*, 11 Dec. 2019, ICC-01/14-01/18-403-Red-Corr, para. 16.

[420] As it will be see below, the Prosecutor requested an amendment of a confimed count, but the Chamber deemed that the requested amounted to the inclusion of a new charge.

[421] ICC, PTC II, *The Prosecutor v. Yekatom and Ngaïssona*, *Decision on the 'Prosecution's Request to Amend Charges pursuant to Article 61(9) and for Correction of the Decision on the Confirmation of Charges, and Notice of Intention to Add Additional Charges'*, 14 May 2020, ICC-01/14-01/18-517, para. 24.

[422] *Ibid.*, para. 26.

[423] On the framing function of the confirmation procedure *see* SCHABAS W.A., *An Introduction to the International Criminal Court*, Cambridge University Press, 2020, p. 285.

[424] CHAITIDOU E., *The Judiciary and Enhancement of Classification of Alleged Conduct*, in AGIRRE X., BERGSMO M., DE SMET S., STAHN C., (ed.), *Quality Control in Criminal Investigation*, Torkel Opsahl Academic EPublisher, 2020, p. 943 at 986. On the inappropriateness of the expression 'case of the Prosecutor' in the statutory system *see* also VASILIEV S., *The Role and Legal Statuts of the Prosecutor in International Criminal Trials*, 25 Nov. 2010, available at SSRN: https://ssrn.com/abstract=1715465, pp.82-84 where he refers to the regime introduced at the Court and preventing the preparation of the witnesses by the calling party, as instead typical in the common law trial. He further notes the consequences that this decision, not adequately compensated by a managerial role of the Chambers in the supervision of the evidence, may jeopardise the strength of the

It is also worth mentioning that the PTC may also decide to confirm only part of the charges and decline to confirm others. For example, in the *Muthaura case*[425] and in the *Ruto and Sang case*[426] the PTC II had reduced both the time period and the geographical areas of the alleged relevant crimes, excluding the relevance of generic expressions which could have authorised the Prosecutor to introduce evidence concerning other unspecified crimes.

Conversely, the PTC cannot confirm beyond the Prosecutor's request. In the *Lubanga case* the TC I faced the problem of determining whether a reference to an international armed conflict associated with three charges not mentioned by the Prosecutor in the request had to be considered a 'necessary ingredient of the charges which must be established [...] or whether it simply provides a legal context without changing the elements of the alleged crime which the prosecution is obliged to prove'.[427] Eventually, TC I has clarified that the PTC has only the power to consider the crimes charged rather than reformulate them *proprio motu*, because it does not have the power to 'amend the legal characterisation or to expand the factual basis of the charges advanced by the prosecution'[428]

One additional note. It has been said that before the confirmation of the charges the Prosecutor shall be granted broad discretion in structuring her case. Similarly, she should be granted the discretion of presenting her case as she deems appropriate. The practice of some PTCs to request the Prosecutor to provide documents such as in-depth analysis charts is hardly compatible with this discretion. The in-depth analysis chart is – as described by Judge Tarfusser – 'a creature of judicial practice',[429] or – borrowing the words of PTC III – 'a summary table' showing 'the relevance of the evidence presented in relation to the constituent elements of the crimes with which the person is charged'.[430] After its use by the PTC III in the

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cases. *See* also WERLE G., JESSBERGER F., *Principles of International Criminal Law*, 4th ed., Oxford University Press, 2020, p. 127.

[425] ICC, PTC II, *The Prosecutor v. Muthaura, Kenyatta and Hussein Ali*, *Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute*, 23 Jan. 2012, ICC-01/09-02/11-382.

[426] ICC, PTC II, *The Prosecutor v. Ruto, Kosgey and Sang*, *Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute*, 23 Jan. 2012, ICC-01/09-01/11-373.

[427] ICC, TC I, *The Prosecutor v. Lubanga, Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted*, 13 Dec. 2007, ICC-01/04-01/06-1084, para. 25.

[428] *Ibid.*, para. 26.

[429] ICC, PTC II, *The Prosecutor v. Bemba et al.*, *Decision on the 'Defence request for an in-depth analysis chart' submitted by the Defence for Mr Jean-Pierre Bemba Gombo*, 28 Jan. 2014, ICC-01/05-01/13-134, para. 5.

[430] ICC, PTC III, *The Prosecutor v. Bemba*, *Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties*, 31 Jul. 2008, ICC-01/05-01/08-55, para. 70. *See* SCHABAS W.A., *An Introduction to the International Criminal Court*, Cambridge University Press, 2020, p. 288.

Bemba case, Judge Trendafilova acting as Single Judge on behalf of PTC II, made large use of this practice in the *Muthaura et al. case*,[431] in the *Ruto et al. case*[432] and in the *Ongwen case*.[433] Upon request of the Prosecutor, in the *Ongwen case* the AC did not found any limitation in the Statute or in the RPE to the power of the PTC to request the production and submission of aids or tools such as the in-depth analysis chart and has granted to the PTC the discretion to issue orders to ensure that the disclosure procedure takes place under satisfactory conditions.[434] However, it has at least admitted these requests under the caveat that the circumstances of each individual case are considered and that the parties have the possibility to submit their observations.[435]

Even if this Chapter has repeatedly highlighted the important role of the PTC in assisting the Prosecutor to focus her cases, it is not the PTC's duty to ensure that the case submitted to its attention by the Prosecutor is well structured or adequately supported. If the PTC shall be granted the power to delimit the scope of the investigations and of the cases under certain conditions, it should not be required to assist the Prosecutor in reaching the evidentiary threshold required by the confirmation procedure. The possible deficiencies of the case must be detected by the PTC during the confirmation procedure. The PTC cannot place on the Prosecutor the burden of presenting the evidence in a manner that it deems appropriate for simplifying its job in the assessment of the reasonable grounds to believe test. In fact, since its initial use, it was apparent that the purpose of the request for in-depth analysis chart was basically to facilitate the PTC's analysis under Art. 58. Despite the specious references to the rights of the accused, the purpose of the chart as an aid for the Chamber itself rather than the Defence clearly emerges from the statement of the PTC III to the effect that '[the chart] should enable *the Chamber* to verify that for each constituent elements, as well as for each constituent element of the mode of participation in the offence with which he or she is charges, there are one or more corresponding pieces of evidence, either incriminatory or exculpatory, which *the Chamber* must assess in light of the criteria set under article 61(7) of the Statute'.[436] The

[431] ICC, PTC II, *The Prosecutor v. Muthaura et al., Decision Setting the Regime for Evidence Disclosure and Other Related Matters*, 6 Apr. 2011, ICC-01/09-02/11-48, paras. 22-23.

[432] ICC, PTC II, *The Prosecutor v. Ruto et al., Decision Setting the Regime for Evidence Disclosure and Other Related Matters*, 6 Apr. 2011, ICC-01/09-01/11-44, paras. 21-22.

[433] ICC, PTC II, *The Prosecutor v. Ongwen, Decision Setting the Regime for Evidence Disclosure and Other Related Matters*, 27 Feb. 2015, ICC-02/04-01/15-203, paras. 37-42.

[434] ICC, AC, *The Prosecutor v. Ongwen, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II entitled 'Decision Setting the Regime for Evidence Disclosure and Other Related Matters'*, 17 Jun. 2015, ICC-02/04-01/15-251 OA3, para. 33.

[435] *Ibid.*, para. 41.

[436] ICC, PTC III, *The Prosecutor v. Bemba, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties*, 31 Jul. 2008, ICC-01/05-01/08-55, para. 70 (*emphasis added*).

requests for similar documents in trial in the *Katanga case* and in the *Bemba case* reinforce this conclusion: according to TC II and TC III, the purpose of in-depth analysis chart is not only to provide the Defence with adequate facilities for the preparation of their defence, but also to let the Chamber appreciate the amount of evidence with a structured preliminary analysis elaborated by the Prosecutor. Further, they add that this kind of table is 'nothing more than a procedural tool to make clear and accessible to the Defence and the Chamber the exact evidentiary basis of the Prosecution's case' and 'a tool to structure the presentation of the evidence and to ensure that the Prosecution's evidentiary case is easily accessible and comprehensible'.[437] Eventually the two TCs remark that the Prosecutor 'remains the master of its case and has full control over the selection and presentation of evidence in the Table'.[438] Judge Tarfusser is therefore right when in the *Bemba et al. case*, acting as Single Judge on behalf of PTC II, notes that the PTC cannot issue binding directions 'as to the particular *format* in which the parties shall present their evidence or argue their case'[439] and 'cannot but take note of these submissions and defer to the Prosecutor's professional judgment'. In his view:

> '[i]t is for the parties only to identify, in light of the features of any given case, their preferred method and format of presentation, or line of arguing, selecting such method or format as might be more suitable to effectively convey the points they wish to make before the bench. This discretion is to be regarded as an integral and critical part of the professional duties of both the Prosecutor and the defence; its exercise should be ultimately guided by the paramount need for exhaustiveness, clarity, thoroughness, factual and legal accuracy which should characterise all judicial submissions, in the interest of both the relevant party and, more significantly, the overall efficiency of judicial proceedings.[440]

[437] ICC, TC II, *The Prosecutor v. Katanga and Ngudjolo Chui*, *Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol*, 13 Mar. 2009, ICC-01/04-01/07-956, para. 12; ICC, TC III, *The Prosecutor v. Bemba*, *Decision on the 'Prosecutor's Submissions on the Trial Chamber's 8 December 2009 Oral Order Requesting Updating of the In-Depth-Analysis Chart'*, 29 Jan. 2010, ICC-01/05-01/08-682, para. 23.

[438] ICC, TC II, *The Prosecutor v. Katanga and Ngudjolo Chui*, *Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol*, 13 Mar. 2009, ICC-01/04-01/07-956, para. 12; ICC, TC III, *The Prosecutor v. Bemba*, *Decision on the 'Prosecutor's Submissions on the Trial Chamber's 8 December 2009 Oral Order Requesting Updating of the In-Depth-Analysis Chart'*, 29 Jan. 2010, ICC-01/05-01/08-682, para. 22.

[439] ICC, PTC II, *The Prosecutor v. Bemba et al.*, *Decision on the 'Defence request for an in-depth analysis chart' submitted by the Defence for Mr Jean-Pierre Bemba Gombo*, 28 Jan. 2014, ICC-01/05-01/13-134, para. 6.

[440] *Ibid*., para. 8. *See* also ICC, TC I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, *Opinion of Judge Cuno Tarfusser*, 16 Jul. 2019, ICC-02/11-01/15-1263-AnxA, annex to *Reasons for oral decision of 15 January 2019 on the Requête de la Défense de Laurent Gbagbo afin qu'un jugement d'acquittement portant sur toutes les charges soit prononcé en faveur de Laurent Gbagbo et que sa mise en liberté immédiate soit ordonnée, and on the Blé Goudé Defence no case to answer motion*, para. 22.

It will be in the Prosecutor's interest to organise the evidence in a way that allows her to prove each and every aspect of the case.[441] If she is not able to do so, her case will be partially or entirely dropped by the PTC. Since the submission of this kind of tool is left to the discretion of the PTC, it cannot be argued that the in-depth analysis chart is essential for the rights of the Defence and that excluding it is to the detriment of the accused. It is therefore to welcome the recent tendency of avoiding orders requesting the Prosecutor to provide in-depth analysis charts.[442]

2.2.1. The concept of charge

In the light of the role that the confirmation decision plays with regards to the determination of the boundaries of the case, it is appropriate to recall that: (i) neither the Statute nor the RPE provide for a definition of 'charge'; and (ii) a clarification of the concept of 'facts and circumstances' used at Art. 74 is required in order to trace the boundaries of the trial.

Art. 61(3) requires the suspect to be provided before the confirmation hearing with a copy of the document containing the charges on which the Prosecutor intends to bring the person to trial; and be informed on the evidence on which the Prosecutor intends to rely at the hearing. But this obvious distinction between evidence and charge does not add anything to the notion of charge. Reg. 52 RegC states that the document containing the charges shall include: (a) the full name of the person; (b) a statement of the facts, including the time and place of the alleged crimes, which provides a sufficient legal and factual basis to bring the person or persons to trial, including relevant facts for the exercise of jurisdiction by the Court; (c) a legal

[441] *See* STAHN C., *From Preliminary Examination to Investigation: Rethinking the Connection*, in AGIRRE X., BERGSMO M., DE SMET S., STAHN C., (ed.), *Quality Control in Criminal Investigation*, Torkel Opsahl Academic EPublisher, 2020, p. 37 at 53; BERGSMO M., BEKOU O., *The In-depth Evidence Analysis Charts at the International Criminal Court*, in BERGSMO M. (ed.), *Active Complementarity: Legal Information Transfer*, Torkel Opsahl Academic EPublisher, 2011, p. 313 at 324.

[442] ICC, PTC I, *The Prosecutor v. Al-Hassan, Decision on the In-Depth Analysis Chart of Disclosed Evidence*, 29 Jun. 2018, ICC-01/12-01/18-61-tENG, paras 21-23; ICC, PTC II, *The Prosecutor v. Yekatom and Ngaïssona, Second Decision on Disclosure and Related Matters*, 4 Apr. 2019, ICC-01/14-01/18-163, paras 23-24. In the *Abd-Al-Rahman case*, without even taking into account the submission of an in-depth analysis chart, the PTC II has only requested the Prosecutor to identify in the metadata of each item of evidence (i.e. the data already digitally available to the parties and the Chambers concerning each item of evidence) the relevant sections of documents, statements and transcripts, the relevant time intervals for audio and video material and possibly add some comments in case of visual evidence if the relevance and significance is not immediately apparent from the exhibit. ICC, PTC II, *The Prosecutor v. Abd-Al-Rahman, Second Order on disclosure and Related Matters*, 2 Oct. 2020, ICC-02/05-01/20-169, paras. 23-24. *Contra* CHAITIDOU E., *The Judiciary and Enhancement of Classification of Alleged Conduct*, in AGIRRE X., BERGSMO M., DE SMET S., STAHN C., (ed.), *Quality Control in Criminal Investigation*, Torkel Opsahl Academic EPublisher, 2020, p. 943 at 980-982 arguing the need for an in-depth-analysis chart.

characterisation of the facts according to both the crimes under Arts 6, 7 or 8 and the precise form of participation under Arts 25 and 28.

Mainly on the basis of these provisions, scholars tried to provide a definition of charge. For example, it has been defined as 'the formal allegation that the person concerned at a specific time and place has committed a certain act directed against a certain object (factual aspect) which fulfils a specific crime or several crimes under the [Rome Statute]'.[443] Referring to Art. 67(1)(a), stating that the accused has the right 'to be informed promptly and in detail of the nature, cause and content of the charge' these scholars argue that 'nature' refers to the specific offence (i.e. the legal characterisation); that 'cause' consists of the relevant material facts; and that the content is instead the evidentiary material supporting the allegation.[444] The charge would include only the first two components. Scholars are not unanimous as to the inclusion within the legal characterisation of the mode of liability in addition to the definition of the crime.[445]

As seen above, the case law has not yet properly filled this gap, even if, as recently recalled by PTC II, 'it seems to be beyond controversy that both the facts and their legal

[443] SAFFERLING C., *International Criminal Procedure*, Oxford University Press, 2012, p. 249; AMBOS, K., *Treatise on International Criminal Law, Vol. III: International Criminal Procedure*, Oxford University Press, 2016, pp. 345-346; FRY E., *Legal Recharacterization and the Materiality of Facts at the International Criminal Court: Which Changes are Permissible?*, in *Leiden Journal of International Law*, 29, 2016 p. 577 at 580; JACOBS D., *A Shifting Scale of Power: Who is in Charge of the Charges at the International Criminal Court and the Uses of Regulation 55*, in SCHABAS W.A:, HAYES N., MCDERMOTT Y. (eds.), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives*, Ashgate, 2013; BITTI G., *Quality Control in Case Preparation and the Role of the Judiciary of the International Criminal Court*, in AGIRRE X., BERGSMO M., DE SMET S., STAHN C., (ed.), *Quality Control in Criminal Investigation*, Torkel Opsahl Academic EPublisher, 2020, p. 905 at 926-928; CHAITIDOU E., *The Judiciary and Enhancement of Classification of Alleged Conduct*, in AGIRRE X., BERGSMO M., DE SMET S., STAHN C., (ed.), *Quality Control in Criminal Investigation*, Torkel Opsahl Academic EPublisher, 2020, p. 943 at 971.

[444] SAFFERLING C., *International Criminal Procedure*, Oxford University Press, 2012, p. 249. According to Fry content and cause basically have the same object. *See* FRY E., *Legal Recharacterization and the Materiality of Facts at the International Criminal Court: Which Changes are Permissible?*, in *Leiden Journal of International Law*, 29, 2016 p. 577 at 580.

[445] Another problematic aspect is the determination of the source of the charges that will not be addressed here. It is enough to recall that the discussion among scholars includes various alternatives: the document containing the charges, the decision confirming the charges – which is usually less detailed than the document – or the possible amended document containing the charges prepared by the Prosecutor – which could therefore 'interpret' the confirmation decision in her favour. In this regard *see* AMBOS, K., *Treatise on International Criminal Law, Vol. III: International Criminal Procedure*, Oxford University Press, 2016, p. 349-351, 420; FRIMAN H., *Trial Procedures – With a Particular focus on the Relationship between the Proceedings of the Pre-Trial and Trial Chambers*, in STAHN C. (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015, p. 909 at 920; SCHABAS W.A., *An Introduction to the International Criminal Court*, Cambridge University Press, 2020, pp. 287-288.

characterisation concur to make a charge'.[446] The controversies concerning the latter will be discussed below analysing Reg. 55 RegC.

2.2.2. The facts and circumstances, the subsidiary facts and the evidence

Beside the facts and circumstances and the evidence, the case-law has further identified an additional category of facts, the so-called subsidiary facts. The first Chamber to address the issue was the PTC I in the *Banda and Jerbo case*. After having recalled a passage in a footnote of the AC which had rapidly introduced the matter, the PTC I engaged in a distinction between the 'facts and circumstances described in the charges' and the 'subsidiary facts'.[447] This distinction may be integrated by the 'evidence put forward by the Prosecutor at the confirmation hearing to support the charge' provided for under article 61(5) of the Statute' and that the AC felt compelled to further isolate.[448]

The problem of this distinction is determining what is included within the subsidiary facts.[449] According to the PTC I, they are facts capable of providing background information

[446] ICC, PTC II, *The Prosecutor v. Yekatom and Ngaïssona*, *Decision on the 'Prosecution's Request to Amend Charges pursuant to Article 61(9) and for Correction of the Decision on the Confirmation of Charges, and Notice of Intention to Add Additional Charges'*, 14 May 2020, ICC-01/14-01/18-517, para. 18. Recently, *see* also ICC, PTC I, *The Prosecutor v. Al Hassan*, *Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, 30 Sep. 2019, ICC-01/12-01/18-461-Corr-Red, para. 43: '*En résumé, la procédure préliminaire permet de 43. veiller à ce que seules soient soumises à l'examen de la chambre de première instance les charges qui sont suffisamment étayées par les éléments de preuve disponibles et qui sont clairement et dûment formulées d'un point de vue factuel et juridique*'.

[447] ICC, PTC I, *The Prosecutor v. Banda and Jerbo*, *Decision on Confirmation of Charges*, 7 Mar. 2011, ICC-02/05-03/09-121, para. 36. On this issue, *see* FRY E., *Legal Recharacterization and the Materiality of Facts at the International Criminal Court: Which Changes Are Permissible?*, in *Leiden Journal of International Criminal Justice*, 29, 2016, p. 577.

[448] According to the AC, 'the term 'facts' refers to the factual allegations which support each of the legal elements of the crime charged. These factual allegations must be distinguished from the evidence put forward by the Prosecutor at the confirmation hearing to support a charge (Art. 61(5)), as well as from background or other information that, although contained in the document containing the charges or the confirmation decision, does not support the legal elements of the crime charged. The AC emphasises that in the confirmation process, the facts, as defined above, must be identified with sufficient clarity and detail, meeting the standard in Article 67(I)(a) of the Statute.' ICC, AC, *The Prosecutor v. Lubanga, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court"*, 8 Dec. 2009, ICC-01/04-01/06 OA 15 OA 16, fn. 163. On this topic *see* BITTI G., *Quality Control in Case Preparation and the Role of the Judiciary of the International Criminal Court*, in AGIRRE X., BERGSMO M., DE SMET S., STAHN C., (ed.), *Quality Control in Criminal Investigation*, Torkel Opsahl Academic EPublisher, 2020, p. 905 at 928 ff.

[449] Also the doctrine seems to agree on the unclear distinction between material and subsidiary facts and on the impact of this distinction on the confirmation of the charges. *See* AMBOS K., *Treatise on International Criminal Law, Vol. III: International Criminal Procedure*, Oxford University Press, 2016, p. 428; SCHABAS W.A., CHAITIDOU E., EL ZEIDY M.M., *Article 61*, in AMBOS K., *The Rome Statute of the International Criminal Court*, 4th ed., Beck/Hart/Nomos, 2021, mn. 32-33.

and which may allow to infer the proof of material facts.[450] In the opinion of the Chamber these subsidiary facts may be useful to the PTC in order to determine whether the Prosecutor has presented evidence satisfying the standard of proof required by Art. 61(7) of the Statute, but, 'in principle', must only be considered as 'background information or indirect proof of material facts, and as such, are deprived of any limiting power *vis-à-vis* the TC pursuant to Art. 74(2) of the Statute and Reg. 55(1) RegC.[451] The same distinction between material and subsidiary facts was followed by the PTC II, which expressly stated that it analysed subsidiary facts only to the extent that it was necessary but this does not prevent the Prosecutor from relying on other subsidiary facts as she is not precluded from relying on new or additional evidence.[452]

The incidents required in order to determine the existence of the contextual element of the crimes were clearly the never mentioned stone guests in the debate. In fact, the structure of the international crimes poses a significant challenge to the Prosecutor. In addition to the charged single acts, the Prosecutor must prove the contextual element. This duty presents two problems to the Prosecutor: first, the identification of the incidents demonstrating the contextual elements; second, the standard of proof to be applied to these incidents. In other words, the problem is to determine whether the information from which the Prosecutor infers the existence of an attack, a policy or a large-scale commission of crimes and confirmed during the confirmation proceedings are binding for the TC or not. The potential problem is determined by the possibility that the nature of the information used at the pre-trial stage could suffice for reaching the substantial grounds standard at the confirmation of the charges but are insufficient at the trial stage. The consequence would be the impossibility to prove the crime for insufficiency of evidence on the contextual element. On the same time, if the core of the problem is proving an essential element of the international crime, it is apparent that accepting the abovementioned distinction between material and subsidiary facts the contextual incidents should be considered material facts.

An analysis of the *Gbagbo and Blé Goudé case* allows to appreciate the magnitude of this problem. Before addressing it, it is probably worth noting that the AC in the *Katanga case*, seems having subsequently reduced, if not even denied the distinction between material and

[450] ICC, PTC I, *The Prosecutor v. Banda and Jerbo*, *Decision on Confirmation of Charges*, 7 Mar. 2011, ICC-02/05-03/09-121, para. 36.

[451] *Ibid*., para. 37.

[452] ICC, PTC II, *The Prosecutor v. Muthaura, Kenyatta, Hussein Ali, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute*, 23 Jan., 2012, ICC-01/09-02/11-382, para. 60; ICC, PTC II, *The Prosecutor v. Ruto, Kosgey and Sang*, *Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute*, 23 Jan. 2012, ICC-01/09-01/11-373, para. 48.

subsidiary facts. When the TC III decided to use its power to recharacterise the facts pursuant to Reg. 55, Judge Van den Wyngaert appended a dissenting opinion stressing on the failure of the Majority to distinguish between material and subsidiary facts and that therefore it had exceeded the limit of Reg. 55 recharachterising the facts on the basis of subsidiary facts not contained in the charges.[453] On this issue, the AC found that '[t]here is no indication of any such limitation in the text of Art. 74 (2) of the Statute or Reg. 55 (1) RegC. Rather, those provisions stipulate that any change cannot exceed the 'facts and circumstances'. Therefore, probably finding it difficult to better explain its previous statement contained in the footnote in the *Lubanga case*, it concluded by stating:

> 'the Appeals Chamber notes that it did not determine in that judgment how narrowly or how broadly the term "facts and circumstances described in the charges" as a whole should be understood. The Appeals Chamber will not, in the abstract, address this matter any further.'[454]

Coming back to the *Gbagbo and Blé Goudé case*, the Prosecutor hardly provided a clear and definitive picture of the incidents she intended to rely on during the trial in order to prove the contextual elements of the crimes against humanity. Moreover, she pretended to apply to those incidents also a lower standard of proof.

In the request for authorisation of an investigation in Côte d'Ivoire pursuant to Art. 15 of the Statute, the Prosecutor refers to incidents concentrated in five dates[455] and then broadly refers to other incidents: eight incidents are identifiable.[456] Only three of the five incidents later charged appear in the request, highlighting the discrepancy between the information upon which the PTC had conceded the authorisation and the object of the Prosecutor's investigations. In addition, in another section of the request, the Prosecutor further describes the crimes allegedly committed during the crisis. She mostly provides only general information and rarely gives the date, time and modality of specific crimes. The request is nevertheless accompanied by a confidential list of incidents that (in theory) could have provided the Chamber with more detailed information.

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[453] ICC, TC III, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, *Dissenting opinion of Judge Christine Van den Wyngaert*, annexed to *Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons*, 21 Nov. 2012, ICC-01/04-01/07-3319, paras 14 ff.

[454] ICC, AC, *The Prosecutor v. Katanga, Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled "Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons"*, 27 Mar. 2013, ICC-01/04-01/07-3363, para. 50.

[455] ICC, OTP, *Situation in Côte d'Ivoire, Request for authorisation of an investigation pursuant to article 15*, 23 Jun. 2011, ICC-02/11-3, paras 79 ff.

[456] *Ibid*., paras 108-114.

As already mentioned, the PTC III noted the 'absence of sufficient information on specific events' and the insufficiency of the supporting material 'in relation to the contextual elements and underlying acts of the crimes within the jurisdiction of the Court' only with regards to the crimes committed before 2010.[457]Therefore, this request highlights the importance for the Chamber to be provided with sufficient information also with regards to the contextual element in order to authorise an investigation or not.

With regards to the incidents occurred in the post-electoral crisis of 2010, which constitute the focus of her investigation against Mr Gbagbo and Mr Blé Goudé, the Prosecutor is often inaccurate. In the application pursuant to Art. 58 against the two accused the Prosecutor provides a 'non-exhaustive' description of the incidents and does not clarify the specific number of incidents.[458] In the decision under Art. 58 of the Statute, the PTC refers to the non-exhaustive description made by the Prosecutor only in general terms and does provide a list of incidents either.[459] In the procedure for the confirmation of the charges, the Prosecutor

[457] ICC, PTC III, *Situation in Côte d'Ivoire, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation in the Republic of Côte d'Ivoire*, 3 Oct. 2011, ICC-02/11-14, paras 184-185.

[458] ICC, OTP, *Situation in the Republic of Côte d'Ivoire, Prosecutor's Application Pursuant to article 58 as to LK Gbagbo*, 25 Oct. 2011, ICC-02/11-01/11-87, paras 44 ff.; ICC, OTP, *Situation in the Republic of Côte d'Ivoire, The Prosecutor's application pursuant to article 58 as to Charles Blé Goudé*, 9 Dec. 2011, ICC-02/11/02/11-60, which expressly refers to the *Prosecutor's application pursuant to article 58 as to LK Gbagbo*, including paras 44 ff. The Prosecutor provides a non-exhaustive description of the 'Coordinated attacks by pro-Gbagbo forces against civilians perceived to support Ouattara, whose pattern and means demonstrate that the attacks were organised and implemented in a coordinate manner by the forces subordinated to Gbagbo and his inner circle' (para. 39). The Prosecutor does not expressly provide the number of these incidents, but she describes them in paras 43 ff. distinguishing between: 'Attacks in November', 'Attacks in December', 'Attacks in Jan.-Feb. 2011', 'Attacks in March 2011' and 'Attacks in May 2011'. The four main incidents which constitute the charges are described in a different section entitled 'specific crimes underlying the charges of this Application' (paras 55 ff.). The Prosecutor seems to take into consideration all these crimes in her assessment of the widespread and systematic nature of the attacks (paras 89 ff.), in particular when she infers the widespread nature from the fact that the attacks 'cover a period of over five months (28 Nov. 2010 until 8 May 2011)' and caused a 'large number of victims (at least 1350)'. Other two relevant elements are 'the significant number of individual incidents and the fact that the attacks geographically extended to the densely populated area of Abidjan and numerous locations in the West of Côte d'Ivoire (such as Bedi-Goazon, Bloléquin, Duékoué and Gagnoa), as well as the coastal areas on the country (such as the department of Sassandra)' (para. 90). Under the heading 'Specific crimes underlying the charges of this application', the Prosecutor describes the 'attack related to the RTI demonstrations from 16 to 19 December 2010', the 'attack on a women's demonstration in Abobo on 3 March 2011', the 'Abobo market shelling on 17 March 2011' and the 'Yopougon massacre on 12 Apr. 2011'.

[459] ICC, PTC III, *Situation in the Republic of Côte d'Ivoire, Decision on the Prosecutor's Application Pursuant to Article 58 for a warrant of arrest against Laurent Koudou Gbagbo*, ICC-02/11-01/11-9, 30 Nov. 2011, paras 30-36. Moreover, 'the large number of victims (at least 1350)' and 'the significant number of separate incidents' (para. 50) are used by the PTC to conclude the widespread and systematic nature of the attack (para. 54). While describing Count 3, persecution constituting crimes against humanity committed in the context of the widespread and systematic attack, the PTC says that in addition to the conduct of the crime of persecution encompassing the conduct referred to under other counts, 'there are reasonable grounds to believe that in the aftermath of the presidential elections in Côte d'Ivoire pro Gbagbo forces attacked the civilian population in Abidjan and in the west of the country,

refers to the incidents in the Document Containing the Charges. There is no numbered list, but from their description they appear to be less than thirty.[460] Nevertheless, in courtroom the Prosecutor declared that she would have relied on forty-five incidents.[461] It is significant that after the confirmation hearing, the Prosecutor, probably aware of the problems which would have been raised by the Chamber's decision, felt compelled to address the Chamber by saying that

> 'the four charged incidents alone, in and of themselves, are sufficient to establish the existence of a widespread or systematic attack against the civilian population because, *inter alia*, their intensity was very important, they caused an important number of victims, they were spread out over 5 months, there was an organisational policy behind them, they were coordinated by [the suspect] and his inner circle, the [military units] were involved, and the victims were targeted.'[462]

It is at this point that the PTC I in a different composition, by majority, returned on the distinction between facts and circumstances and subsidiary facts and expressly referred to the contextual incidents. It clarified that if the contextual incidents are used by the Prosecutor in order to prove the contextual element of the crimes, they belong to the category of 'facts and circumstance' rather than subsidiary facts, therefore they must be proven with the same standard required for the charges. The Majority further stressed that the difference between these incidents and the charged incidents is that only the former must be personally linked to the suspect, while the others do not require the individualised link.[463]

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from 28 Nov. 2010 onwards'. The reference to these temporal and spatial borders suggests that the PTC did not consider only the four main incidents.

[460] ICC, OTP, *the Prosecutor v. Gbagbo*, *Annex 1 Document de notification des charges*, 16 May 2012, ICC-02/11-01/11-124-Anx1, paras 20 ff.

[461] ICC, *Transcripts*, ICC-02/11-01/11-T-15-Red-ENG, p. 36, line 10 to p. 45, line 17.

[462] ICC, OTP, *The Prosecutor v. Gbagbo*, *Prosecution's submission on issues discussed during the Confirmation Hearing*, 21 Mar. 2013, ICC-02/11-01/11-420, para. 30. The Prosecutor further reiterate this reading in the Pre-Trial Brief. ICC, OTP, *Situation in the Republic of Côte d'Ivoire*, *Pre Trial Brief*, ICC-02/11-01/15-148-Anx1, 16 Jul. 2015. The Prosecutor highlights the common features of all 38 the incidents. (para.288 ff.) She also adds that the five main incidents "are sufficient in and of themselves to constitute an attack. Even so the Prosecutor relies upon acts committed in the context of a total of 38 incidents (including the charged incidents), as described insectionIV.A.1.as constituting the "attack" within the meaning of article 7("Attack")" (paras. 359 ff.).

[463] ICC, PTC I, The *Prosecutor v. Gbagbo*, *Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute*, 3 Jun. 2013, ICC-01/11-01/11-432, paras 19-23. At para. 22 it states that 'the Chamber sees no reason to apply a more lenient standard in relation to the incidents purportedly constituting the contextual element of an "attack" for the purposes of establishing the existence of crimes against humanity than the standard applied in relation to other alleged facts and circumstances in the case. Accordingly, each incident underlying the contextual elements must be proved to the same threshold that is applicable to all other facts. This is not to say that there is no difference between crimes that underlie a suspect's individual criminal responsibility and crimes being committed as part of incidents which only establish the relevant context. The crimes which are alleged to prove the suspect's individual criminal responsibility must be linked to the suspect personally, whereas incidents proving the contextual circumstances do not require such an individualised link. As such, the former set of crimes will inevitably need to be proven in greater detail

Conversely, dissenting Judge Fernández de Gurmendi, endorsing the distinction between material and subsidiary facts, supported the idea that while the contextual element of the crime must be proved to the standard required by Art. 61(7) of the Statute, the single contextual incidents, which constitute subsidiary facts, do not. She reproached the Majority for having considered the forty-five incidents which do not even correspond to those contained in the Documents Containing the Charges and having pretended that they constitute the contextual element of the attack. In her opinion, the Chamber should have instead only determined whether the Prosecutor had proved the existence of an attack to the required standard.[464]

When the Prosecutor appealed the decision adjourning the hearing, the AC had the chance to address the issue. After having raised the problem in the abovementioned footnote, this time the AC rejected the distinction between material and subsidiary facts.[465] Furthermore, noting that according to the Prosecutor the charged incidents were committed as part of a widespread and systematic attack, it raised the problem of determining the content of the attack as encompassing not only the charges but also other incidents.[466] The AC also noted the contradiction in the Prosecutor's arguments, which on one side referred to the 'other incidents' alongside the charged ones and on the other side pretended to apply a different standard of proof. Rejecting the Prosecutor's theory, the AC required the Prosecutor to prove them to the required standard because they 'describe a series of separate events'. It further stressed that it is up to the PTC to decide whether the number of incidents proved by the Prosecutor may constitute an attack or not.[467]

But the clarification of the AC does not seem to have been fully appreciated in the subsequent practice. In the Decision on the confirmation of charges against Mr. Gbagbo the PTC fails to identify a specific number of incidents, but describes some of them and states that

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than the latter. Indeed, in order to be considered relevant as proof of the contextual elements, the information needed may be less specific than what is needed for the crimes charged but is still required to be sufficiently probative and specific so as to support the existence of an "attack" against a civilian population. The information needed must include, for example, details such as the identity of the perpetrators, or at least information as to the group they belonged to, as well as the identity of the victims, or at least information as to their real or perceived political, ethnic, religious or national allegiance(s).'

[464] ICC, PTC I, The *Prosecutor v. Gbagbo*, *Dissenting opinion of Judge Silvia Fernández de Gurmendi*, annexed to *Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute*, 3 Jun. 2013, ICC-02/11-01/11-432, in particular paras 29-48.

[465] ICC, AC, *The Prosecutor v. Gbagbo*, *Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 June 2013 entitled "Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute"*, 16 Dec. 2013, ICC-02/11-01/11-572, para. 37.

[466] *Ibid*., paras 43 ff.

[467] *Ibid*., paras 46-48.

they are substantiated by 'evidence with a sufficient level of specificity'.[468] In the Decision on the Confirmation of Charges against Mr. Blé Goudé, the Chamber refers to thirty-eight incidents as suggested by the Prosecutor,[469] but then seems to describe only thirty-six incidents (including the charges).[470] The question is therefore the relevance of the PTC's determination. In the light of the function of the Chamber and of the determination of the AC it seems appropriate to consider the decision as binding. Therefore, the decision would define the scope of the trial not only with regard to the charges but also to the other constitutive elements of the crime, including the incidents composing the contextual element.

In the case concerning Mr. Gbagbo and in the case concerning Mr. Blé Goudé the non-correspondence of all the incidents is significant. The number of incidents seems to find a definitive and clear number only in a non-statutory document, the Pre-Trial Brief, where the Prosecutor provides a numbered list of incidents, including the charges.[471] The number of incidents upon which the Prosecutor intends to rely on decreased during the trial,[472] and it was

[468] ICC, PTC III, *Situation in the Republic of Côte d'Ivoire*, *Decision on the confirmation of charges against Laurent Gbagbo*, 12 Jun. 2014, ICC-02/11-01/11-656, paras 73 ff. The Chamber enumerates the incidents in the section entitled "Analysis of the evidence", sub-section "Other acts". The Decision does not expressly explain the function of these episodes in its overall assessment. Paras 211-212, dealing with 'course of conduct' and the 'attack against the civilian population' requirements, and paras 222 ff., on the widespread and systematic character of the attack, do not distinguish between "main incidents" and 'other acts'. The decision to charge only four incidents and para. 275 suggest that the 'other acts' were only useful in the assessment of the abovementioned requirements.

[469] ICC, OTP, *Situation in the Republic of Côte d'Ivoire*, *Document de notification des charges of Blé Goudé*, 27 Aug. 2014, ICC-02/11-02/11-124-Anxl, paras 83 ff.

[470] ICC, PTC III, *Situation in the Republic of Côte d'Ivoire*, *Decision on the confirmation of charges against Charles Blé Goudé*, 11 Dec. 2014, ICC-02/11-02/11-186.

[471] ICC, OTP, *Situation in the Republic of Côte d'Ivoire*, *Pre Trial Brief*, ICC-02/11-01/15-148-Anx1, 16 Jul. 2015. In the Pre Trial Brief, under the heading 'Crimes committed in the execution of the common plan' – 'multiple criminal acts', the Prosecutor expressly refers to 38 incidents (including the main five incidents) and explains that they constitute a course of conduct which amounts to an 'attack' within the meaning of art. 7 St. The Prosecutor highlights the common features of all 38 the incidents. (para.288 ff.) She also adds that the five main incidents "are sufficient in and of themselves to constitute an attack. Even so the Prosecutor relies upon acts committed in the context of a total of 38 incidents (including the charged incidents), as described insection IV.A.1. as constituting the "attack" within the meaning of article 7 ("Attack")" (paras. 359 ff.). The 38 incidents are also expressly taken into consideration in order to assess the requirement of the 'against the civilian population' (para.367) and the widespread and systematic nature of the attack (paras 368 ff.). At para. 370 it emerges that the charged incidents constitute 'a part of' a larger Attack of 38 incidents.

[472] ICC, OTP, *Situation in the Republic of Côte d'Ivoire*, *Trial Brief*, 19 Mar. 2018, ICC-02/11-01/15-1136. Under the heading 'Attack directed against the civilian population' – 'course of conduct involving the multiple commission of acts referred to in article 7(1)' the Prosecutor states that the charged incidents 'are sufficient in and of themselves to constitute a course of conduct involving the multiple commission of crimes against a civilian population within the meaning of art 7(2)(a) of the Statute. This notwithstanding the Prosecution relies upon evidence of acts committed in the context of 34 incidents (including the charged incidents) […]' (para.152). She highlights the common features of these incidents (targets, place, time). The list of crimes provided at para.155 corresponds to the list of the Pre-Trial Brief but for four incidents that are not mentioned.

almost halved at the closing of the presentation of the evidence by the Prosecutor.[473] Despite the wording of the AC as to the applicable standard of proof, the Prosecutor further tried to apply a more lenient standard to the contextual incidents. When discussing on the possible conclusion of the trial after the closing of the presentation of her evidence, she claimed that:

> '[…] it is the existence of a course of conduct involving the multiple commission of article 7(1) acts, sometimes referred to as a "campaign or operation", that needs to be established to the required standard. The individual acts themselves, do not need to be established to this standard, and indeed less so the incidents within which they were committed. The Prosecution addresses below where relevant Mr Gbagbo's challenges to the evidence in support of article 7(1) acts committed during the 20 other incidents. It does so in order to demonstrate that this evidence is consistent with and can be used to support the existence of the material fact of a course of conduct involving the multiple commission of article 7(1) acts, as it is not necessary to demonstrate the existence to the required standard of the acts or incidents themselves. […] The totality of the Prosecution evidence taken together demonstrates the material fact of the course of conduct. The Chamber could also decide that part of it suffices to prove it. In particular, evidence of the article 7(1) acts committed during the five charged incidents, including evidence of the context and manner in which they were committed, is of itself sufficient to demonstrate to the required standard the material fact of the existence of a course of conduct. The Trial Chamber does not need to be satisfied of the responsibility of the Accused for the crimes committed during the five charged incidents in order to find that evidence of these acts sufficiently demonstrates the existence of a course of conduct for the purpose of the contextual element of crimes against humanity.'[474]

In the decision to acquit adopted by the TC I, Judge Henderson engaged in a one-by-one analysis of the twenty other incidents maintained by the Prosecutor in order to determine the sufficiency of the evidence. Conversely, Judge Tarfusser decided that it was unnecessary to address the issue, since the Prosecutor had decided to leave them out of the charges. He further regretted that the original TC in charge during the preparation of the trial (which he was not part of) did not address the issue clarifying that, in the light of the extraneousness of the incidents to the charges, they should not be considered in trial.[475]

This articulated analysis demonstrates the importance of clearly defining the boundaries of the case since the Pre-Trial stage. While the distinction between material and

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[473] ICC, OTP, *Situation in the Republic of Côte d'Ivoire*, *Prosecution's Consolidated response to the defence no case to answer*, 10 Sep. 2018, ICC-02/11-01/15-1207-Anx1. At para. 183 the Prosecutor informs the Chamber that she no longer relies on evidence specifically relevant to 14 incidents for the purpose of demonstrating the commission of multiple article 7(1) acts.

[474] ICC, OTP, *Situation in the Republic of Côte d'Ivoire*, *Prosecution's Consolidated response to the defence no case to answer*, 10 Sep. 2018, ICC-02/11-01/15-1207-Anx1, para. 233-234.

[475] ICC, TC I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, *Opinion of Judge Cuno Tarfusser*, 16 Jul. 2019, ICC-02/11-01/15-1263-AnxA, annex to *Reasons for oral decision of 15 January 2019 on the Requête de la Défense de Laurent Gbagbo afin qu'un jugement d'acquittement portant sur toutes les charges soit prononcé en faveur de Laurent Gbagbo et que sa mise en liberté immédiate soit ordonnée, and on the Blé Goudé Defence no case to answer motion*, paras 41-49.

subsidiary facts may have some relevance in cases whose origin is rooted in the past, it is crucial not to abuse of this distinction in order to dilute the safeguards of the criminal trial. All aspects of the crime including those defining the contextual element belong to the material facts. The category of subsidiary facts, if necessary, must be limited to facts that are really 'subsidiary' to the material ones and their inclusion in the trial may be useful for pursuing purposes such as a more comprehensive historical record of the case. The most recent approach of the AC is therefore to welcome.

3. The decision declining to confirm the charges and the decision adjourning the hearing

If the evidence brought by the Prosecutor does not reach the required standard set out above for the confirmation, the PTC does not confirm the charges against the suspect. Alternatively, if the evidence does not allow to confirm the charges but the PTC believes that the Prosecutor could re-consider part of her arguments and submit additional evidence, the PTC may adjourn the hearing.

With regards to the decision declining to confirm the charges, it is enough to remember that various PTCs rejected the arguments of the Defence aiming at obtaining a declaration by the PTC on the failure of the Prosecutor to respect the obligation imposed by Art. 54(1)(a) to investigate equally both incriminating and exonerating circumstances.[476] Even if this kind of failure may affect the strength of the case, the procedure under Art. 61 only requires the PTC to assess whether the evidence brought by the Prosecutor meets the standard of the substantial grounds to believe or not.

Heller[477] accuses some Chambers of having refused to confirm the charges for reasons other than the insufficiency of the evidence. He brings the *Bemba case* as example, were the PTC II refused to confirm the cumulative charges, that, in his view, was a detrimental practice for the rights of the Defence.[478] The PTC's reference to the possible recharacterisation in trial

[476] ICC, PTC I, *The Prosecutor v. Abu Garda*, *Decision on the Confirmation of Charges*, 8 Feb. 2010, ICC-02/05-02/09-243, para. 48; ICC, PTC II, *The Prosecutor v. Muthaura, Kenyatta, Hussein Ali*, *Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute*, 23 Jan., 2012, ICC-01/09-02/11-382, paras 61-65; ICC, PTC II, *The Prosecutor v. Ruto, Kosgey and Sang*, *Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute*, 23 Jan. 2012, ICC-01/09-01/11-373, paras 49-53.

[477] HELLER K.J., *'A Stick to Hit the Accused With'. The Legal Recharacterization of Facts under Regulation 55*, in STAHN C. (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015, p. 981 at 991.

[478] ICC, PTC II, *The Prosecutor v. Bemba*, *Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo*, 15 Jun. 2009, ICC-

thanks to Reg. 55 was probably not a good argument, either for reassuring the Prosecutor of the possibility to maintain the solidity of her case, nor for protecting the Defence, because a late recharacterisation could go to the detriment of the Defence that the Chamber was supposed to protect through its decision. Nevertheless, Heller goes too far by stating that the Chamber refused to confirm these charges 'because it prefer[red] a different interpretation', since it rather refused to confirm those charges that would have imported the adherence to a mechanism (the cumulative charges) that the Chamber found inconsistent with the Statute. In light of the problems that the use of cumulative charges poses with regards to the *ne bis in idem* principle, the criticisms to this decision seem therefore too harsh and should not be interpreted as encompassing additional reasons for rejecting the confirmation.

As to the decision adjourning the hearing, Art. 61(7)(c) distinguishes between the case where the Chamber requires the Prosecutor to consider providing further evidence or conducting further investigations; and the case where the Chamber requires the Prosecutor to consider an amendment of the charge because the evidence submitted appears to establish a different crime. As mentioned, the first alternative was used in the *Gbagbo case*,[479] and requires the evidence to be 'not irrelevant and insufficient to a degree that merits declining to confirm the charges'.[480] The second one was used by the PTC III in the *Bemba case*. On this occasion the Chamber found that the 'appearance standard' identifies a lower standard than the substantial grounds to believe one[481] and it is enough for the Chamber 'to rather make a *prima facie* finding that it has doubts as to the legal characterisation of the facts as reflected in the document containing the charges'.[482] Moreover, it deemed necessary to specify that Art. 61(7)(c)(ii) may be used also in order to suggest the Prosecutor to reconsider not only the crime, but also the mode of liability.[483]

01/05-01/08-424, paras 202-203. The practice of the cumulative charges is rejected also by authoritative scholars, but in specific circumstances. Even more problematic would be instead the alternative charges, that leaves the Defence in the dark as to the charge to rebut. *See* AMBOS, K., *Treatise on International Criminal Law, Vol. III: International Criminal Procedure*, Oxford University Press, 2016, p. 421. In favour, *see* CHAITIDOU E., *The Judiciary and Enhancement of Classification of Alleged Conduct*, in AGIRRE X., BERGSMO M., DE SMET S., STAHN C., (ed.), *Quality Control in Criminal Investigation*, Torkel Opsahl Academic EPublisher, 2020, p. 943 at 990.

[479] ICC, PTC I, The *Prosecutor v. Gbagbo*, *Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute*, 3 Jun. 2013, ICC-01/11-01/11-432.

[480] ICC, PTC III, *The Prosecutor v. Bemba*, *Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute*, 3 Mar. 2009, ICC-01/05-01/08-388, para. 16.

[481] *Ibid*., para. 17.

[482] *Ibid*., para. 25.

[483] It is worth recalling that the PTC does not have the power to amend the charges by itself. For this reason, it is debated among scholars whether the PTC III, by requesting the Prosecutor to amend the charges without adjourning the hearing, circumvented or not this prohibition. *See* AMBOS K., *Critical Issues in the* Bemba *Confirmation Decision*, in *Leiden Journal of International Law*, 22, 2009, p. 715 at

The system of the adjournment of the hearing may be seen from two different perspectives. The first one is that endorsed by Judge Fernández de Gurmendi, who, interpreting the applicable standard in a low way and significantly reducing the role of the PTC in the whole procedure, basically limits its application. This interpretation clearly interprets the mechanism as an intrusion in the discretion of the Prosecutor to shape the case as she deems more appropriate and must therefore be limited. This restrictive understanding of the PTC's role also emerges from her criticism to the Chamber's request to the Prosecutor to file an amended Document Containing the Charges including the abovementioned 'other incidents' within the contextual element of the crimes against humanity associated with a request for reconsideration under Art. 61(7)(c)(i). She notes that this kind of request could possibly be done only under Art. 61(7)(c)(ii) of the Statute but also in this case, the provision does not allow the Chamber 'to involve itself in the Prosecutor's selection of which facts to charge' because 'it is for the Prosecutor and not for the Chamber to select her case and its factual parameters'. She eventually stresses that '[t]he Pre-Trial Chamber is not an investigative chamber and does not have the mandate to direct the investigations of the Prosecutor'.[484]

On the other side, the mechanism could be seen under the perspective of an aid to the Prosecutor in concentrating her resources on those cases which have the chance to satisfy the burden of proof. This seems the approach followed by PTC III in the *Bemba case*.[485] In the light of the role of the confirmation of the charges *vis-à-vis* the whole trial, and keeping in mind the power of the TC under Reg. 55, it is possible to read the procedure as a preliminary chance for the Prosecutor to better shape her case.[486] Accompanying this mechanism with a rigorous standard of proof it is possible to find a good balance between the need to safeguard the investigations and the rights of the Defence. A clear (and possibly more focused) case from the preliminary stage of the proceedings allows also the Defence to reduce its work and to focus on a reduced number of charges or modes of liability.

724; STEGMILLER I., *Confirmation of Charges*, in STAHN C. (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015, p. 891 at 900-901.

[484] ICC, PTC I, The *Prosecutor v. Gbagbo*, *Dissenting opinion of Judge Silvia Fernández de Gurmendi*, annexed to *Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute*, 3 Jun. 2013, ICC-02/11-01/11-432, in particular para. 51.

[485] ICC, PTC III, *The Prosecutor v. Bemba*, *Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute*, 3 Mar. 2009, ICC-01/05-01/08-388.

[486] On the importance of the Judges in ensuring focused charges, *see* BERGSMO M., TOCHILOVSKY V., *Measures Available to the International Criminal Court to Reduce the Length of Proceedings*, in BERGSMO M., RACKWITZ K., TYANING S. (eds.), *Historical Origin of International Criminal Law: Volume 5*, Torkel Opsahl Academic EPublishers, Brussels, 2017, p. 651 at 656 and attached *Expert Group Report on Measures Available to the International Criminal Court to Reduce the Length of Proceedings*, p. 664 at 675 ff.

4. The continuation of the investigations after the confirmation

When discussing the distinction between situation and case, it has been said that it does not necessarily correspond to the distinction between investigation and prosecution. The practice of the OTP testifies the tendency to continue the investigations not only after the issuance of a warrant of arrest or a summons to appear but even after the confirmation of the charges. This tendency is comprehensible within a certain limit and may also be considered as part of the duty of the Prosecutor to search for the truth. In this regard, in the *Lubanga case* the AC notes that 'the duty to establish truth is not limited to the time before the confirmation hearing'[487] and that the possibility to amend the charges after the confirmation decision under Art. 61(9) is an additional evidence of this.[488] Further, the AC infers form the absence of any reference to the investigative powers of the Prosecutor under Art. 61(9) that they are not affected by the confirmation decision.[489] Even in the AC's view, 'ideally, it would be desirable for the investigation to be complete by the time of the confirmation hearing'[490] but it is prone to admit further investigation 'in certain circumstances' such as if the Court would be deprived of 'significant and relevant evidence, including potentially exonerating evidence - particularly in situations where the ongoing nature of the conflict results in more compelling evidence becoming available for the first time after the confirmation hearing'.[491] The AC further stresses that post-confirmation investigation is not necessarily to the detriment of the accused, since the disclosure obligation still applies.[492]

Nevertheless, the Prosecutor cannot abuse of this power. If the Prosecutor requires the confirmation of the charges without the necessary evidence to support her case in trial because she expects to collect additional evidence in a subsequent phase, she risks that the case

[487] ICC, AC, *The Prosecutor v. Lubanga, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence"*, 13 Oct. 2006, ICC-01/04-01/06-568 OA3, para. 52.

[488] *Ibid.*

[489] *Ibid.*, para. 53.

[490] *Ibid.*, para. 54. *See* also AMBOS, K., *Treatise on International Criminal Law, Vol. III: International Criminal Procedure*, Oxford University Press, 2016, p. 416., who deems that even if the conclusion of the investigation before the end of the confirmation procedure is desirable, it should not be transformed into a legal requirement.

[491] ICC, AC, *The Prosecutor v. Lubanga, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence"*, 13 Oct. 2006, ICC-01/04-01/06-568 OA3, para. 54.

[492] *Ibid.*, para. 55.

collapses in trial if her expectations are not confirmed. But even in less dramatic scenarios, a premature action prevents her from correctly and clearly framing the features of the case.[493]

The problem of the continuation of the investigations after the confirmation of the charges was raised on various occasions by the Defence, contesting the use in trial of a completely different evidence from that grounding the confirmation of the charges. Even if the Chambers never declared the illegitimacy of the continuation of the investigations, they expressed their concern. For example, in the *Mbarushimana case* the Defence requested the Chamber to struck out of the Documents Containing the Charges expressions like 'these locations include but are not limited to'; 'neighbouring villages' 'and surrounding villages' 'the village of W673 and W674 [...] in Masisi territory in the second part of 2009'. The Chamber expressed therefore its concern for the Prosecutor's attempt

> 'to keep the parameters of its case as broad and general as possible, without providing any reasons as to why other locations where the alleged crimes were perpetrated cannot be specifically pleaded and without providing any evidence to support the existence of broader charges, seemingly in order to allow it to incorporate new evidence relating to other factual allegations at a later date without following the procedure established under article 61(9) of the Statute'.[494]

The Chamber goes on giving for granted that the Prosecutor 'must know the scope of [her] case as well as the material facts underlying the charges that it seeks to prove, and must be in possession of the evidence necessary to prove those charges to the requisite level in advance of the confirmation hearing'.[495] Therefore, it deems the general expressions as meaningless and relies only on the precise information contained in the Document.

Similarly, in the *Kenyatta case* Judge Trendafilova, acting as Single Judge on behalf of the PTC II, despite noting that the Prosecutor is not barred from continuing investigations after the confirmation hearing 'when there is a genuine need to pursue certain investigative

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[493] *See* HARMON M.B., *Preparation of Draft Indictments and Effective Indictment Review*, in BERGSMO M., RACKWITZ K., TYANING S. (eds.), *Historical Origin of International Criminal Law: Volume 5*, Torkel Opsahl Academic EPublishers, Brussels, 2017, p. 385 at 387 notes that it is 'imprudent to rely on an indictment that is merely supported by *prima facie* evidence'; BITTI G., *Quality Control in Case Preparation and the Role of the Judiciary of the International Criminal Court*, in AGIRRE X., BERGSMO M., DE SMET S., STAHN C., (ed.), *Quality Control in Criminal Investigation*, Torkel Opsahl Academic EPublisher, 2020, p. 905 at 920 ff.; CHAITIDOU E., *The Judiciary and Enhancement of Classification of Alleged Conduct*, in AGIRRE X., BERGSMO M., DE SMET S., STAHN C., (ed.), *Quality Control in Criminal Investigation*, Torkel Opsahl Academic EPublisher, 2020, p. 943 at 976.

[494] ICC, PTC I, *The Prosecutor v. Mbarushimana*, *Decision on the confirmation of charges*, 16 Dec. 2011, ICC-01/04-01/10-465, para. 82.

[495] *Ibid*.

activities crucial for her case and for the principal goal of determining the truth'[496] expressed her concern about a too broad approach. Referring to the *Lubanga case*, the Single Judge noted that the AC limited the purpose of further investigations after the confirmation to the necessity of establishing the truth and to 'certain circumstances',[497] concluding therefore that they 'cannot be the rule, but rather the exception, and should be justified on a case-by-case basis' and that 'the Prosecutor is not granted *carte blanche* to conduct her investigation after the confirmation hearing with a view towards bringing further evidence in order to amend the charges, unless she shows that it "is necessary in order to establish the truth" or "certain circumstances" exist that justify doing so.'[498] She further added that:

> 'The underlying *rationale* is that the continued investigation should be related only to such essential pieces of evidence which were not known or available to the Office of the Prosecutor prior to the confirmation hearing or could not have been collected for any other reason, except at a later stage. In these circumstances, the Prosecutor is expected to provide a proper justification to that effect in order for the Chamber to arrive at a fair and sound judgment regarding any request for amendment put before it.'[499]

In the same case, the TC V was worried about 'the substantial volume of new evidence' collected by the Prosecutor and disclosed to the Defence after the confirmation of the Charges.[500] In the view of the Majority composed by Judge Ozaki and Judge Van den Wyngaert, the Prosecutor is expected to have 'largely completed' the investigations prior to the confirmation hearing.[501] In particular, the Majority excludes that the Prosecutor should be allowed to collect evidence which she could have reasonably obtained before the confirmation, even threatening to sanction the Prosecutor with the inadmissibility of the evidence which should not meet this requirement.[502] Judge Van den Wyngaert further reproached the Prosecutor stating that she had failed to properly investigate the case against the accused prior to confirmation in accordance with its statutory obligations under Article 54(1)(a) of the

[496] ICC, PTC II, *The Prosecutor v. Kenyatta, Decision on the "Prosecution's Request to Amend the Final Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute"* , 21 Mar. 2013, ICC-01/09-02/11-700, para. 35.

[497] *Ibid.*, para. 36.

[498] *Ibid.*, para. 35. She nevertheless noted that '[t]he justification should not be construed to mean that the Prosecutor must obtain prior permission from the relevant PTC to continue her investigation post confirmation of charges. Rather, when applying for an amendment of one or more of the charges under article 61(9) of the Statute, the relevant Pre-Trial Chamber might require some explanations for the purposes of its final determination.' *Ibid.*, para. 35.

[499] *Ibid.*, para. 37.

[500] ICC, TC V, *The Prosecutor v. Kenyatta, Decision on defence application pursuant to Article 64(4) and related requests*, 26 Apr. 2013, ICC-01/09-02/11-728, para. 112; 118.

[501] *Ibid*., para. 119.

[502] *Ibid*., para. 121.

Statute.[503] Judge Eboe-Osuji does not join the Majority in this regard and since post-confirmation investigation would not prejudice the rights of the accused which could also benefit from the collected exculpatory evidence, he does not see any reason for allowing them only in exceptional circumstances.[504]

As pointed out by Judge Kaul in his dissenting opinions to the confirmation of charges in the *Muthaura et al. case* and in the *Ruto et al. case* it is unadvisable for the Prosecutor to request the confirmation of the charges taking advantage of the lower standard required under Art. 61(7).[505] Art. 61(7) refers to the 'sufficiency of evidence' in order to meet the reasonable grounds to believe standards. The Prosecutor should refrain from requesting the confirmation without possessing sufficient evidence allowing her to meet the 'beyond reasonable doubt standard' in trial, hoping to collect additional evidence after the confirmation in order to satisfy the highest test. If after the confirmation the Prosecutor is not able to gather other evidence, the consequences are serious as the probability for the case to collapse are significant, undermining the credibility of the Court and compromising the interests of the victims.[506] In his view 'it is therefore the duty of the Prosecutor to conduct any investigation *ab initio* as effectively as possible with the unequivocal aim to assemble as expeditiously as possible relevant and convincing evidence which will ultimately enable the TC to consider whether criminal responsibility is proven 'beyond reasonable doubt'.[507]

[503] ICC, TC V, *The Prosecutor v. Kenyatta, Concurring Opinion of Judge Christine Van den Wyngaert*, annexed to *Decision on defence application pursuant to Article 64(4) and related requests*, 26 Apr. 2013, ICC-01/09-02/11-728, para. 5.

[504] *Ibid.*, paras 86 ff.

[505] In both the cases the Majority refrain from addressing the matter of the compliance of the Prosecutor to her duties under Article 54(1) of the Statute because this matter does not fall within the scope of the decision under Article 61(7) of the Statute. Similarly VASILIEV S., *The Role and Legal Statuts of the Prosecutor in International Criminal Trials*, 25 Nov. 2010, available at SSRN: https://ssrn.com/abstract=1715465, p. 63, where the reference to the *ad hoc* Tribunals can be easily applied to the ICC.

[506] ICC, PTC II, *The Prosecutor v. Muthaura, Kenyatta and Hussein Ali*, *Dissenting Opinion of Judge Hans-Peter Kaul*, annexed to *Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute*, 23 Jan. 2012, ICC-01/09-02/11-382, para. 52; ICC, PTC II, *The Prosecutor v. Ruto, Kosgey and Sang*, *Dissenting Opinion of Judge Hans-Peter Kaul*, annexed to *Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute*, 23 Jan. 2012, ICC-01/09-01/11-373, para. 47.

[507] ICC, PTC II, *The Prosecutor v. Muthaura, Kenyatta and Hussein Ali*, *Dissenting Opinion of Judge Hans-Peter Kaul*, annexed to *Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute*, 23 Jan. 2012, ICC-01/09-02/11-382, para. 53; ICC, PTC II, *The Prosecutor v. Ruto, Kosgey and Sang*, *Dissenting Opinion of Judge Hans-Peter Kaul*, annexed to *Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute*, 23 Jan. 2012, ICC-01/09-01/11-373, para. 48. *See* also STAHN C., *From Preliminary Examination to Investigation: Rethinking the Connection*, in AGIRRE X., BERGSMO M., DE SMET S., STAHN C., (ed.), *Quality Control in Criminal Investigation*, Torkel Opsahl Academic EPublisher, 2020, p. 37 at 50.

Recently, the PTC II in a decision rejecting the Prosecutor's request to amend the charges agreed with the cautious jurisprudence concerning the continuation of the investigation after the confirmation of the charges[508] and rejected the request of the Prosecutor to re-introduce a charge that the PTC had not find supported by adequate evidence in the confirmation decision on the basis of new and, in the opinion of the Prosecutor, more adequate evidence. According to the Chamber, including a charge relating to facts for which she could only rely on indirect evidence, the Prosecutor took the risk that the evidence would be found inadequate to meet the relevant standard. Since the Prosecutor adopted additional investigative steps for gathering better evidence only when this risk materialised, 'the right to request amendments and additional charges, whilst sanctioned by article 61(9) of the Statute, cannot be construed in such a way as to allow the Prosecutor to "remedy" evidentiary lacunae which might affect part of an otherwise confirmed case: besides the uncertainty and precariousness which this would add to the contours of each confirmed case, this would be tantamount to making the rejection of one or more charges virtually meaningless.'[509]

5. The amendment and the withdrawal of the charges

The system of the *ad hoc* Tribunals included some provisions allowing the Prosecutor to amend or withdraw the charges. While, according to the Rules of both the Tribunals, the Prosecutor might amend (Rule 50 of both the ICTY and ICTR RPE) or withdraw (Rule 51 of both the ICTY and ICTR RPE) the indictment at any time before the confirmation, after the confirmation amendments were subordinated to the leave of the Judge who had confirmed it. After the initial appearance of the accused, the amendment required instead the leave of the TC in charge of conducting the trial. It has been noted[510] that in the system of the *ad-hoc* Tribunals there was no provision allowing the Chambers to oversee the decision of the Prosecutor not to prosecute.

As far as the amendment of the charges is concerned, the ICTR had the chance to be quite specific as to what the Prosecutor was allowed to do and what she was not. In the *Karemera et al*. *case*, when the TC III of the ICTR rejected the Prosecutor's request to amend

[508] ICC, PTC II, *The Prosecutor v. Yekatom and Ngaïssona*, *Decision on the 'Prosecution's Request to Amend Charges pursuant to Article 61(9) and for Correction of the Decision on the Confirmation of Charges, and Notice of Intention to Add Additional Charges'*, 14 May 2020, ICC-01/14-01/18-517, paras 22, 25.

[509] *Ibid.*, para. 31

[510] NSEREKO D.D.N., *Prosecutorial Discretion Before National Courts and International Tribunals*, in *Journal of International Criminal Justice*, 3, 1, 2005, p. 124 at 137.

the indictment because the Defence would have been deprived of adequate time to prepare itself, the AC expressly stated that:

> 'The Prosecution is entitled to decide that its theory of the accused's criminal liability would be better expressed by amending indictment. Even if the trial can proceed on the basis of the Current Indictment, the Prosecution is not thereby precluded from seeking to amend it'[511]

It further distinguished between amendments that do not cause any significant delay (such as completing the parts devoted to the historical context or dropping some charges) and those adding specific allegations of fact. These amendments were considered useful in the case but had to be balanced by granting to the accused additional time in order to the prepare their defence. Only if the Chamber identifies a misconduct of the Prosecutor aiming at obtaining an undue advantage over the Defence, the Prosecutor's request can be rejected on the ground of the abuse of process.

In the Rome Statute the relevant provisions are paras (4) and (9) of Art. 61. If, before the confirmation of the charges, the Prosecutor has utmost discretion in amending and withdrawing the charges contained in the Document Containing the Charges,[512] with the only limit of notifying the PTC the reason for the withdrawal, after the confirmation of the charges this liberty is subject to significant limitations. In fact, after the confirmation of the charges the Prosecutor may amend or withdraw the charges only with the permission of the PTC. The authorisation of the Chamber has been defined by the PTC II as a *conditio sine qua non*.[513] Therefore, the Chamber further argues that in order to release the authorisation it must assess all the relevant circumstances surrounding the case, including 'consideration of the Prosecutor's Request and an evaluation of other relevant information which the PTC could seek if necessary for the purposes of its final decision'.[514]

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[511] ICTR, AC, *The Prosecutor v. Karemera, Ngirumpatse, Nzizorera, Rwamakuba, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 Oct. 2003 Denying Leave to File an Amended Indictment*, 19 Dec. 2003, ICTR-98-44-AR73, para. 12.

[512] On the importance of the reviewing process *see* HARMON M.B., *Preparation of Draft Indictments and Effective Indictment Review*, in BERGSMO M., RACKWITZ K., TYANING S. (eds.), *Historical Origin of International Criminal Law: Volume 5*, Torkel Opsahl Academic EPublishers, Brussels, 2017, p. 385 at 388 ff.

[513] ICC, PTC II, *The Prosecutor v. Kenyatta, Decision on the 'Prosecution's Request to Amend the Final Updated Containing the Charges Pursuant to Article 61(9) of the Statute*, 21 Mar. 2013, ICC-01/09-02/11-700, para. 19. *See* also ICC, AC, *The Prosecutor v. Lubanga, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence'"*, 13 Oct. 2006, ICC-01/04- 01/06-568, para. 53.

[514] ICC, PTC II, *The Prosecutor v. Kenyatta, Decision on the 'Prosecution's Request to Amend the Final Updated Containing the Charges Pursuant to Article 61(9) of the Statute*, 21 Mar. 2013, ICC-01/09-02/11-700, para. 21.

With regards to the amendment of the charges after the confirmation decision, the Prosecutor needs the authorisation of the PTC. According to the jurisprudence of the AC, for the application of the procedure of amendment under Art. 61(9) it is necessary that the whole procedure is concluded before the commencement of the trial, in order to let the parameters of the trial to be clear.[515] The release of the authorisation is subject to an assessment of the various interests at stake, necessarily including the prompt initiation of the trial: the case-law of the Court shows that the unjustified delay of the Prosecutor in the submission of the request is a good reason for rejecting it.[516]

Recently, in the *Al Hassan case* the Prosecutor submitted a request containing a significant number of amendments. In the first part the Prosecutor requested to correct or amend the confirmed charges on the basis of specific information provided by the Prosecutor in the request and concerning factual allegations and a mode of liability 'in the interest of clarity and expediency'.[517] In the second part the Prosecutor requested the PTC to reconsider and correct or amend the mode of liability of some confirmed charges on the basis of information containing in the Document Containing the Charges. In her view, the Chamber overlooked some information of the Document that, had the Chamber considered them, would have led it to a different result.[518] In the third part the Prosecutor asked the PTC the authorisation for including additional factual allegations under some confirmed charges. Since the Chamber for crimes committed against a group of individuals had requested the Prosecutor to specify the identity of the victims 'as far as possible' for clarity and expediency the Prosecutor requested the Chamber to add the information obtained after the confirmation.[519]

The PTC rejected the first and the second part of the request stressing that Art. 61(9) does not allow the Chamber to adjudicate twice the facts or their legal characterisation and to 'correct' the previous assessment, irrespective whether the 'error' is the Prosecutor's or the Chamber's responsibility.[520] The Chamber even notes that the Prosecutor's request for

[515] ICC, AC, *The Prosecutor v. Ruto, Kosgey and Sang*, *Decision on the Prosecutor's appeal against the 'Decision on the Prosecution's Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute'*, 13 Dec. 2013, ICC-01/09-01/11-1123, para. 29.

[516] ICC, PTC II, *The Prosecutor v. Ruto and Sang*, *Decision on the 'Prosecution's Request to Amend the Updated Document Containing the Charges to Article 61(9) of the Statute'*, 16 Aug. 2013, ICC-01/09-01/11-859.

[517] ICC, OTP, *The Prosecutor v. Al Hassan*, *Public redacted version of "Prosecution Request for corrections and amendments concerning the Confirmation Decision", 30 January 2020, ICC-01/12-01/18-568-Conf*, 30 Jan. 2020, ICC-01/12-01/18-568-Red, para. 5.

[518] *Ibid.*, para. 15.

[519] *Ibid.*, paras 24-26.

[520] ICC, PTC I, *The Prosecutor v. Al Hassan*, *Décision sur la procédure applicable suite au dépôt par le Procureur de sa requête pour corrections et modifications de la Décision de confirmation des charges*, 21 Feb. 2020, ICC-01/12-01/18-608-Red, para. 44.

reconsideration does not have statutory basis[521] and that, recalls that even if the Trial Camber is not allowed to go beyond the limits of the facts and circumstances as confirmed by the PTC, it is free to evaluate them differently.[522] Thus, in the view of the Chamber, if errors exist, they may be discussed and corrected in trial.[523]

As to the third part, the Chamber preliminarily analysed the reasons why the information was not contained in the Document Containing the Charges. Only after having ascertained that the reasons could be traced back to lack of cooperation, security concerns, incident concerning the intimidation of witnesses or difficulty in approaching insider witnesses (all reasons already used in the case-law of the Court)[524] the Chamber moved to the assessment of the information in order to establish whether the required threshold for the confirmation was met and therefore amend the charges. As the amendment did not concern the inclusion of new charges, but only the amendment of already confirmed ones, the Chamber did not find it necessary to hold a new hearing. In conclusion, since the procedure for amendment did not impact the timing of the commencement of the trial and the amendment was limited the Chamber did not find reasons for rejecting the third part of the request.[525]

In the *Yekatom and Ngaïssona case* the PTC had the chance to better shape the features of this procedure. After the confirmation of the charges and the order to the Registrar to transmit the confirmation decision to the Precidency for the constitution of the TC, the Prosecutor submitted a request for amendment of the charges. More specifically, the Prosecutor requested the PTC II to amend two counts of rape in the light of new evidence obtained after the issuance of the confirmation decision and concerning the rape of an additional victim. As mentioned above, the PTC II noted that, despite an unclear statutory definition, it is apparent that the charge encompasses both the facts and the legal characterisation.[526] It found therefore incorrect to qualify the inclusion of the rape of a new victim occurred in different circumstances from those grounding the confirmed count as an *amendment* of the charges rather than an *addition* of a new charge. To corroborate its view the

[521] *Ibid.*, para. 48.
[522] *Ibid.*, paras 45-47.
[523] *Ibid.*, para. 45.
[524] ICC, PTC I, *The Prosecutor v. Al Hassan*, *Version publique expurgée du Rectificatif de la Décision portant modification des charges confirmées le 30 septembre 2019 à l'encontre d'Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, 23 Apr. 2020, ICC-01/12-01/18-767-Conf, 23 Apr. 2020, para. 24.
[525] *Ibid.*, paras 31-33.
[526] ICC, PTC II, *The Prosecutor v. Yekatom and Ngaïssona*, *Decision on the 'Prosecution's Request to Amend Charges pursuant to Article 61(9) and for Correction of the Decision on the Confirmation of Charges, and Notice of Intention to Add Additional Charges'*, 14 May 2020, ICC-01/14-01/18-517, para. 18.

Chamber notes that 'if the charge of rape […] as confirmed were to be withdrawn, the allegations supporting the Request for Amendment would *per se* be grounds for confirmation and then for conviction, if found substantiated to the respectively relevant evidentiary threshold'.[527] Since, differently from a mere amendment of the charges, the addition of new charges requires a new confirmation hearing, the Chamber highlighted the need to adopt even a more cautious approach than the one adopted in the case of amendment of the charges, because of the delay that a new confirmation hearing causes to the proceedings [528]

As to the withdrawal of the charges, Reg. 60 RegOTP states that if, at any stage of the proceedings, the Office considers that the evidence available, including both incriminating and exonerating evidence, does not support an element of the charges pleaded or supports a different charge, or that any charge pleaded otherwise cannot be pursued, in particular due to the individual circumstances of the accused, the Office shall promptly seek to either (a) amend or withdraw the charges pursuant to Art. 61(4) and (9); or (b) submit the matter for consideration to the TC in the light of its powers under Reg. 55 RegC. The Reg. therefore identifies in the lack of adequate supporting evidence the only reason for the withdrawal of the charges. Nevertheless, it is not possible to exclude that the Prosecutor may decide to withdraw the charges under the same circumstances which allow her to decide not to prosecute.[529]

The Prosecutor notified the withdrawal of the charges twice: against Mr Muthaura and against Mr Kenyatta.[530] In the notification the Prosecutor highlighted her discretion in withdrawing the charges in light of the fact that the opening statements had not yet taken place. Nevertheless, she concluded requesting permission for withdrawal if the Chamber deemed that the trial had already commenced. The discussion on the exact moment determining the initiation of the trial will be left aside. It is enough to note that in the Muthaura case the Majority considered that the trial had already commenced and authorised the withdrawal,[531]

[527] *Ibid.*, para. 20.

[528] *Ibid.*, paras 21-22.

[529] *See* BOLOGNARI M., *Il withdrawal of the charges nel processo di fronte alla Corte penale internazionale*, in *Diritto Penale Contemporaneo Rivista Trimestrale*, 3, 2016, p. 51 ff. If the Prosecutor is allowed to withdraw the charges before the initiation of the trial adopting a decision under Art. 53(2)(c) of the Statute, the PTC should be allowed to oversight the Prosecutor's decision under Article 53(3)(b) of the Statute. After the initiation of the trial the need for the need for the Chamber's authorisation does not pose this problem. Also AMBOS, K., *Treatise on International Criminal Law, Vol. III: International Criminal Procedure*, Oxford University Press, 2016, p. 419 includes the prosecutorial strategy among those reasons leading the Prosecutor to adopt a decision to withdraw the charges.

[530] ICC, OTP, *The Prosecutor v. Muthaura and Kenyatta, Prosecution notification of withdrawal of the charges against Francis Kirimi Muthaura*, 11 Mar. 2013, ICC-01/09-02/11-687.

[531] ICC, TC V, *The Prosecutor v. Muthaura and Kenyatta, Decision on the withdrawal of charges against Mr Muthaura*, 18 Mar. 2013, ICC-01/09-02/11-696. *See* also ICC, TC V, *The*

while Judge Ozaki deemed the authorisation unnecessary.[532] With regards to the *Kenyatta case*, the Prosecutor was instead forced by the TC to withdraw the charges. The delay in the investigations, which, according to the Prosecutor, were determined by the lack of cooperation of the Kenyan Government, induced the TC to request the Prosecutor to initiate the prosecution or withdraw the charges.[533] The Prosecutor eventually filed the notice of withdrawal[534] and the TC issued its decision upon it.[535]

5.1. Regulation 55 of the Regulations of the Court

The binding nature of the confirmation decision poses the problem whether an amendment of the charges during the trial is possible. It has already been mentioned that Reg. 55 RegC rules the power of the Chamber to modify the legal characterisation of the facts.

Reg. 55 is twofold. Para. (1) states that in the decision under Art. 74 of the Statute the Chamber may change the legal characterisation of facts in order to accord the crimes or the form of participation of the accused without exceeding the facts and circumstances described in the charges and any amendments to the charges. Paras (2) and (3) refer instead to the modification of the legal characterisation of the facts 'at any time during the trial'. In this case, the Chamber is required to give notice to the participants of this possibility and, having heard the evidence, shall at any stage of the proceedings, give the participants the opportunity to make oral or written submissions. The Chamber must ensure that the accused have adequate time and facilities for effectively preparing her defence and possibly give the Defence the opportunity to examine again, or have examined again, a previous witness, to call a new witness or to present other evidence.

Despite its collocation in the RegC, the applicability of this provision is of particular importance for many reasons. The provision is usually analysed under the perspective of the

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Prosecutor v. Muthaura and Kenyatta, *Concurring separate opinion of Judge Eboe-Osuji*, annexed to *Decision on the withdrawal of charges against Mr Muthaura*, 19 Mar. 2013, ICC-01/09-02/11-698.

[532] ICC, TC V, *The Prosecutor v. Muthaura and Kenyatta*, *Partly dissenting opinion of Judge Ozaki*, annexed to *Decision on the withdrawal of charges against Mr Muthaura*, 19 Mar. 2013, ICC-01/09-02/11-698

[533] ICC, TC V(B), *The Prosecutor v. Kenyatta*, *Decision on Prosecution's application for a further adjournment*, 3 Dec. 2014, ICC-01/09-02/11-981.

[534] ICC, OTP, *The Prosecutor v. Kenyatta*, *Notice of withdrawal of the charges against Uhuru Muigai Kenyatta*, 5 Dec. 2014, ICC-01/09-02/11-983.

[535] ICC, TC V(B), *The Prosecutor v. Kenyatta*, *Decision on the withdrawal of charges against Mr Kenyatta*, 13 Mar. 2015, ICC-01/09-02/11-100. The withdrawal of the charges after the assignment but before the proper commencement of the trial poses other problems with regards to the principle of the *ne bis in idem*.

rights of the Defence.[536] Also the Court has abundantly written on the issue both with regards to the timing of the notice and to the consequences on the charges. In this paragraph, Reg. 55 will be considered with regard to the relationship between the charges as confirmed in pre-trial and recharacterised in trial; and of the relationship between the Prosecutor and the TC.

5.1.1. The recharacterisation vis-à-vis *the charges*

In the *Lubanga case*, the PTC confirmed the charges for enlisting and conscripting children under the age of fifteen in an international armed conflict up to a certain date, and in a non-international armed conflict after that date, even if the Prosecutor had not made such distinction.[537]

Still before the commencement of the trial, in the same decision ruling on the relationship between the confirmation decision and the trial analysed above, the TC I addressed the problem of the legal recharacterisation.[538] The question was whether the contextual element as introduced by the PTC and not required by the Prosecutor had to be proved or not in trial. In light of the abovementioned interpretation of the relationship between the PTC and the TC, the TC I noted that the determination of the conflict made by the PTC I is an essential element of the charges and that therefore has to be proved. Therefore, it informed the parties that they could have been required to discuss the recharacterisation of the nature of the conflict if the Prosecutor was not able to prove the international nature of the conflict. But more importantly, it specified that 'the scheme of Regulation 55' suggests its use at a later stage of the proceedings rather than at the initiation of the trial. Being a 'fact-dependent

[536] Despite this tendency, there are also works focusing on the aspects that will be discussed also here. Some authors also address additional problematics. For example, Heller offers a detailed analysis of the provision, arguing, among others, that the Judges acted *ultra vires* when adopted Regulation 55. In his view, the Regulation does not involve a 'routine function' a feature required for the adoption of the regulations. HELLER K.J., *'A Stick to Hit the Accused With'. The Legal Recharacterization of Facts under Regulation 55*, in STAHN C. (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015, p. 981.

[537] This approach was criticised by scholars who found that the decision of the PTC was not allowed by the Statute as Art. 61 only includes three possible options, namely the confirmation, the denial of the confirmation and the adjournment of the hearing. Therefore, the Chamber 'by giving itself the power to amend the charges directly, changed the distribution of competences foreseen by the drafters'. JACOBS D., *A Shifting Scale of Power: Who is in Charge of the Charges at the International Criminal Court and the Uses of Regulation 55*, in SCHABAS W.A:, HAYES N., MCDERMOTT Y. (eds.), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives*, Ashgate, 2013; FRIMAN H., *Trial Procedures – With a Particular focus on the Relationship between the Proceedings of the Pre-Trial and Trial Chambers*, in STAHN C. (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015, p. 909 at 918.

[538] ICC, TC I, *The Prosecutor v. Lubanga, Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted*, 13 Dec. 2007, ICC-01/04-01/06-1084, paras 20 ff.

decision', 'it would be against the interests of justice to attempt indicate in advance of the trial what the conclusion may be once the Bench has heard the evidence and any submissions on this issue'.[539] It deemed that 'it is clear' that it is only after the conclusion of the evidence that the Chamber may modify the characterisation of the facts (and, in the specific case, delete the reference to the international armed conflict in favour to the non-international armed conflict).[540]

After the presentation of the evidence, on the request of the LRV, the TC decided by Majority, Judge Fulford dissenting, to notify the parties the possible legal recharacterisation of the facts under Reg. 55 RegC in order to include other crimes.

In its analysis of the provision, the Majority stresses the twofold structure of the regulation and points out that only Sub-Reg. (1) limits the modification within the boundaries of the facts and circumstances described in the charges. Conversely, the procedure under Sub-Regs (2) and (3) does not include any limitation of that kind despite being limited under other aspects in order to safeguard the rights of the Defence.[541] As the Defence is allowed not only to examine or have examined again previous witnesses, but also to call new witnesses or to present new evidence, the Majority argues that 'a new factual basis has been established'[542] and that the limitation to the facts and circumstances set forth in Sub-Reg. (1) is not applicable.[543]

In his dissenting opinion, Judge Fulford argues instead that the Reg. 55 creates 'an indivisible or singular process'.[544] First of all he enhances the role of the PTC in the confirmation of the charges and the 'inevitable consequence' for the TC to be limited in its power to modify the legal characterisation within the boundaries of the facts and circumstances confirmed.[545] He further notes that the applicability of Reg. 55 is further restrained by Art. 61(9) which grants exclusively to the PTC 'the power to frame and alter the charges'[546]. After the commencement of the trial, the TC has only the power to authorise the Prosecutor to

[539] *Ibid*., para. 48.
[540] *Ibid*., paras 48-50.
[541] ICC, TC I, *The Prosecutor v. Lubanga, Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court*, 14 Jul. 2009, ICC-01/04-01/06-2049, paras 27-30.
[542] *Ibid*., para. 31.
[543] *Ibid*., para. 32.
[544] ICC, TC I, *The Prosecutor v. Lubanga, Minority opinion on the "Decision giving notice to the parties and participants that the legal characterisation of facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court"*, 17 Jul. 2009, ICC-01/04-01/06-2054, para. 4.
[545] *Ibid*., para. 10.
[546] *Ibid*., para. 12.

withdraw the charges, or modify the legal characterisation, but the relationship with Art. 61(9) of the Statute necessary limits the power of the modification of the TC to the determination of the PTC.[547] Moreover, Judge Fulford points out that the charge is composed by a statement of facts (Reg. 52(b) RegC) and the legal characterisation (Reg. 52(c) RegC). Therefore, he notes that modifying the latter automatically means amending the charge. The problem is distinguishing between amending charges, adding charges or substituting more serious charges, on the one hand, and modifying the legal characterisation of the facts, on the other. He admits not being able to solve the problem at this stage and only raises the question whether Reg. 55 could be found incompatible with Art. 61(9). In his view its applicability seems limited to the reclassification of mode of liability and to the application of a 'lesser "included offence"' [548] Eventually he notes that separating Sub-Reg. (1) from Sub-Regs (2) and (3) would deprive the accused of the safeguards provided in paras (2) and (3) in case of application of Sub-Reg. (1) and that it would be incompatible with the jurisprudence of the ECtHR.[549] Vice-versa, separating the two provisions implies the inapplicability of the safeguard provided for under Sub-Reg. (1) in case of modification incurred during the trial. In his view, the approach of the Majority violates the rights of the Defence as reflected under Art. 61(9) of the Statute. Therefore, in his opinion, 'a Decision convicting the accused on the basis of a charge which includes a legal re-characterisation of facts, whenever the modification is made, would be unlawful, if it exceeds the facts and circumstances described in the charges'.[550]

The discussion continued in appeal, and the AC felt primarily necessary to address the compatibility of Reg. 55 with the Statute and the general principles of international law. Premising that the AC rejected the Defence's objections on this topic, it is only worth mentioning its statement with regards to the relationship between the Reg. and Art. 61(9).

First of all, the AC notes that the purpose of the two provisions is different. Art. 61(9) addresses the power of the Prosecutor to seek amendment but does not exclude the power of the Chamber to modify the legal characterisation of the facts after the initiation of the trial. The possibility for the Chamber to modify it derives from the different standard applicable at the stage of the confirmation of the charges and at the end of the trial. Secondly, the AC notes that the purpose of Reg. 55 'is 'to close accountability gaps' in order to reach the objective of fighting against impunity as enshrined in the preamble of the Statute. This justifies the

[547] *Ibid*., paras 14-18.
[548] *Ibid*., paras 19-20.
[549] *Ibid*., paras 21-27.
[550] *Ibid*., para. 29.

mechanism under Reg. 55, avoiding the risk of acquittal as a mere consequence of the incorrect legal qualification given in pre-trial with a lower applicable standard.[551]

After having declared the legality of Reg. 55, the AC turns to determining whether it contains two distinct procedures for changing the legal characterisation of the facts and whether 'under Reg. 55(2) and (3) a TC may change the legal characterisation of the charges based on facts and circumstances that, although not contained in the charges and any amendments thereto, build a procedural unity with the latter and are established by the evidence at trial'.[552]

With regards to the first problem, the AC rejects the Majority's opinion that Sub-Regs (2) and (3) allow the Chamber to exceed the facts and circumstances described in the charges. Allowing it would contravene Art. 74, since the Chamber would in the end be allowed to decide exceeding the facts and circumstances described in the charges as it could also rely upon additional facts introduced through Reg. 55.[553] But the interpretation of Reg. 55 given by the Majority is also in contrast with Art. 61(9) of the Statute. The AC argues that new facts and circumstances may only be added following the procedure under Art. 61(9) of the Statute and that the Prosecutor is the subject in charge of investigating the crimes and proffer charges. 'To give the Trial Chamber the power to extend *proprio motu* the scope of a trial to facts and

[551] ICC, AC, *The Prosecutor v. Lubanga, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court"*, 8 Dec. 2009, ICC-01/04-01/06-2205 OA15 OA16, para. 77. Despite this interpretation, some scholars remain sceptical about the legality of Regulation 55 since a modification of the crime would actually determine an amendment of the charges. JACOBS D., *A Shifting Scale of Power: Who is in Charge of the Charges at the International Criminal Court and the Uses of Regulation 55*, in SCHABAS W.A:, HAYES N., MCDERMOTT Y. (eds.), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives*, Ashgate, 2013. Heller further notes that recharacterisation is made before the Defence has been given the chance to address the issue as recharacterised by the Chamber, and that therefore what seemed proved before the challenging of the Defence can fall in front of the evidence brought by it. The arguments to the effect that the recharacterisation *proprio motu* is more suitable to the power of an investigative Judge and violates the right to a fair and impartial judge are not convincing, since the recharacterisation is based on the evidence that the parties put at the disposal of the Chamber. HELLER K.J., *'A Stick to Hit the Accused With'. The Legal Recharacterization of Facts under Regulation 55*, in STAHN C. (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015, p. 981 at 1004.

[552] ICC, AC, *The Prosecutor v. Lubanga, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court"*, 8 Dec. 2009, ICC-01/04-01/06-2205 OA15 OA16, para. 37.

[553] *Ibid*., paras 88-93.

circumstances not alleged by the Prosecutor would be contrary to the distribution of powers under the Statute'.[554]

The AC further notes the distinction between facts and legal characterisation set forth respectively at Reg. 52(b) and (c) and on this ground notes that Reg. 55 only allows a recharacterisation of the former but does not allow any amendment of the latter. Nevertheless, the AC does not address the problematic raised by Judge Fulford about the inevitable consequence that a modification of the legal characterisation determines with regards to the amendment of the charge. In this regard, it rejects *in limine* the Defence argument to the effect that Reg. 55 'only allows recharacterisation of facts "to lesser included offences", but does not allow for the addition of new offences to those listed in the charges, even if they are based on the facts and circumstances described in the charges; nor does Reg. 55 allow that the legal characterisation be modified to a more serious offence'.[555] The AC rejects this argument because it deems that the scope of the appeal is only determining whether Reg. 55 might be used to include additional facts and circumstances not described in the charges. Nevertheless, even if it does not engage in further discussion, the Chamber adds that 'the text of Reg. 55 does not stipulate, beyond what is contained in Sub-Reg. 1, what changes in the legal characterisation may be permissible'.[556]

In the *Bemba case*, after having heard the evidence, the TC III gave notice to the parties of the possible recharacterisation of the facts in order to consider the responsibility of the accused under Art. 28 including the 'should have known' alternative which had not been considered in the confirmation of the charges.[557] The Prosecutor did not oppose since she deemed that the possible recharacterisation did not affect her case.[558] Responding to requests of the Defence, the Chamber further stressed that the recharacterisation did not affect and was limited to the facts and circumstances described in the confirmation decision.[559]

In the *Katanga case* the TC III, upon examination of the evidence, found, by majority, Judge Van den Wyngaert dissenting, that, with regard to Mr Katanga, it was possible to take

[554] *Ibid*., para. 94.
[555] *Ibid*., para. 99.
[556] *Ibid*., para. 100.
[557] ICC, TC III, *The Prosecutor v. Bemba*, *Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court*, 21 Sep. 2012, ICC-01/05-01/08-2324.
[558] ICC, OTP, *The Prosecutor v. Bemba*, *Prosecution's Submissions on the Procedural Impact of Trial Chamber's Notification pursuant to Regulation 55(2) of the Regulations of the Court*, 8 Oct. 2012, ICC-01/05-01/08-2334.
[559] ICC, TC III, *The Prosecutor v. Bemba*, *Decision on Defence Request for Notice*, 12 Jun. 2014, ICC-01/05-01/08-3089.

into consideration a mode of liability which was not included in the confirmation of the charges. In its decision, recalling the principles set forth by the AC in the *Lubanga case*, the Majority states that it is for each Chamber, 'guided by the sole concern of determining the truth of the charges referred to them, having considered the evidence admitted into the record of the case, to reach a decision on the guilt of the accused, without necessarily restricting themselves to the characterisation employed by the Pre-Trial Chamber and on which the Prosecutor has elaborated during the trial'.[560]

The dissenting Judge notes instead the unfairness towards the accused of the use of Reg. 55 as made by the Majority, because it allows a recharacterisation of the form of liability from Art. 25(3)(a) to 25(3)(d)(ii) (a completely different form of liability), even if under the former the accused would have been acquitted.[561] Leaving aside the problems related to the rights of the Accused Judge Van den Wyngaert notes that the Majority goes beyond the limits provided by Reg. 55 as it relies on subsidiary facts[562] and modifies the description of the facts supporting the charges in a significant way, exceeding the facts and circumstances described in the charges.[563]

When the decision was appealed, the AC was, *inter alia*, required to decide on the scope of the envisaged change in the legal characterisation. In this regard, and as already mentioned, the AC found that both material and subsidiary facts may be subject to legal recharacterisation if they do not exceed the facts and circumstances.[564] The AC also notes that a changing in the narrative following the recharacterisation is to some extent inevitable, and that the only relevant thing is that the recharacterisation does not exceed the facts and circumstances as described in the charges.[565]

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[560] ICC, TC III, *The Prosecutor v. Katanga and Ngudjolo Chui*, *Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons*, 21 Nov. 2012, ICC-01/04-01/07-3319, para. 8

[561] ICC, TC III, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, *Dissenting opinion of Judge Christine Van den Wyngaert*, annexed to *Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons*, 21 Nov. 2012, ICC-01/04-01/07-3319, para. 2.

[562] *Ibid*., para. 14.

[563] *Ibid*., paras 18 ff. *See* AMBOS K., *Treatise on International Criminal Law, Vol. III: International Criminal Procedure*, Oxford University Press, 2016, pp. 428-429 who notes that 'the fine distinction between an admissible, purely legal re-characterization of the facts and their inadmissible modification as a result of the re-characterization depends on the concrete circumstances of each case'.

[564] ICC, AC, *The Prosecutor v. Germain Katanga*, *Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled "Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons"*, 27 Mar. 2013, ICC-01/04-01/07-3363, para. 50.

[565] *Ibid*., para. 58.

Judge Tarfusser in his dissenting opinion proposes some relevant arguments for the present discussion. He stresses the need to read Reg. 55 in light of the tension existing between the duty to provide full information to the accused on the one hand and the necessary expeditiousness of the trial on the other.[566] Therefore, he states that:

> The notion of modification of the legal characterisation of facts cannot be read as if it were to encompass any change brought to the initial accusation, because this would be tantamount to obliterating the right of the accused to be tried expeditiously. Rather, it must be qualified and tailored in order to ensure that the right to be tried without undue delay be curtailed only to the extent that it is necessary, with a view to preserving the right to an effective defence. Accordingly, it should be read so as to encompass only those modifications which, being significant, are suitable to have a meaningful impact on the "nature, cause and content" of the charges.'[567].

In his view, the determination must be done on a case-by-case basis. Furthermore, in Judge Tarfusser's opinion, Reg. 55 must be used only for shifting from Art. 25 to Art. 28 of the Statute and *vice-versa*, but not for changing mode of liability within Art. 25 or 28 of the Statue.[568] Ultimately, Judge Tarfusser notes that a restrictive interpretation of Reg. 55 limiting its applicability to exceptional circumstances may be an incentive for the PTCs to modify their praxis of not addressing the mode of liability proposed by the Prosecutor in light of the possibility to recur to Reg. 55 in trial.[569] This approach, may nevertheless induce both the Prosecutor and the PTC not to focus on a specific modes of liability, giving for granted the possibility to recur to any other mode depending on the direction of the evidence.

The PTC II returns to the issue in more general terms in the *Yekatom and Ngaïssona case*, stressing that Art. 25 and Art. 28 establish two deeply different modes of liability. Therefore, noting that both the narrative of the events made by the Prosecutor and the available evidence are consistent with modes of liability included in Art. 25, it refuses to address the allegation of command responsibility and to retain for the relevant confirmed counts the cumulative mode of liability under Art. 28.[570]

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[566] ICC, AC, *The Prosecutor v. Germain Katanga, Dissenting Opinion of Judge Cuno Tarfusser*, annexed to *Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled "Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons"*, 27 Mar. 2013, ICC-01/04-01/07-3363, para. 7.

[567] *Ibid*., para. 8.

[568] *Ibid*., paras 10 ff. Judge Tarfusser notes the debate among scholars and within the Court's case-law with regards to the interpretation of Art. 25 of the Statute, part of which does not exclude that the forms of liability under Art. 25 are not mutually exclusive nor hierarchically ranked.

[569] *Ibid*., para. 21.

[570] ICC, PTC II, *The Prosecutor v. Yekatom and Ngaïssona, Corrected version of 'Decision on the confirmation of charges against Alfred Yekatom and Patrice-Eduard Ngaïssona'*, 11 Dec. 2019, ICC-01/14-01/18-403-Red-Corr., para. 58. As clarified in the decision of the Prosecutor's request for

The debate among scholars as to the consistency of Reg. 55 with the Statute is widespread and articulated and is often rooted in the differences between civil law and common law traditions.[571] While in the first case the principle *iura novit curia* applies, in the second case the prosecutor is the only responsible for the charges, including the legal recharacterisation, and the judge may only confirm or reject the prosecutor's case in trial. Therefore, while common law countries use cumulative and alternative charges in order to avoid loops in the case and give the judge the possibility to confirm at least part of the charges, civil law systems simply allow the judge to recharacterise the charge if she deems it necessary.

Part of the doctrine[572] admits the use of Reg. 55 as the safeguards granted by Sub-Regs (2) and (3) adequately protect the rights of the Defence, even if it still welcomes the interpretation offered by some Judges of limiting its application to exceptional circumstances. According to these scholars, Reg. 55 maintains the TC free to apply the *iura novit curia* principle preventing it to be bound by the legal characterisation made by the PTC. This understanding of the Reg. is therefore linked to a limited interpretation of the function of the confirmation of the charges procedure.[573] This interpretation clearly implies the rejection of the practice of the cumulative charges but in exceptional circumstances.

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reconsideration or leave to appeal the confirmation decision, the Chamber specifies that the PTC's decision to confirm only one form of liability results from the analysis of the evidence and not from the failure to address the evidence that, according to the Prosecutor, would support this mode of liability. ICC, PTC II, *The Prosecutor v. Yekatom and Ngaïssona*, *Decision on the Prosecutor's request for reconsideration or, in the alternative, leave to appeal the 'Decsion on the confirmation of charges against Alfred Yekatom and Patrice-Eduard* Ngaïssona', 11 Mar. 2020, ICC-01/14-01/18-447, para. 19.

[571] AMBOS, K., *Treatise on International Criminal Law, Vol. III: International Criminal Procedure*, Oxford University Press, 2016, p. 420 ff; FRY E., *Legal Recharacterization and the Materiality of Facts at the International Criminal Court: Which Changes Are Permissible?*, in *Leiden Journal of International Criminal Justice*, 29, 2016, p. 577 at 585; FRIMAN H., BRADY H., COSTI M., GUARIGLIA F., STUCKENBERG C.F., *Cherges*, in SLUITER G., FRIMAN H., LINTON S., VASILIEV S., ZAPPALÀ S. (eds), *International Criminal Procedure*, Oxford University Press, 2013, p. 381 at 487.

[572] *See* AMBOS, K., *Treatise on International Criminal Law, Vol. III: International Criminal Procedure*, Oxford University Press, 2016, p. 424-425; STEGMILLER I., *Confirmation of Charges*, in STAHN C. (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015, p. 891 at 903 ff.; FRIMAN H., *Trial Procedures – With a Particular focus on the Relationship between the Proceedings of the Pre-Trial and Trial Chambers*, in STAHN C. (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015, p. 909 at 919-920; FRIMAN H., BRADY H., COSTI M., GUARIGLIA F., STUCKENBERG C.F., *Cherges*, in SLUITER G., FRIMAN H., LINTON S., VASILIEV S., ZAPPALÀ S. (eds), *International Criminal Procedure*, Oxford University Press, 2013, p. 381 at 460.

[573] After a careful analysis, Stegmiller summarises this procedure in the following terms: '[t]he main purpose of the confirmation decision is thus to determine whether a case should be sent to trial and to filter the prosecution's allegations. Important objectives such as trial preparation, disclosure obligations, and procedural economy also play an important role at the confirmation hearing, but if conflicts arise, the objective "check and balances" of charges prevail'. STEGMILLER I., *Confirmation of Charges*, in STAHN C. (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015, p. 891 at 908. Similarly FRIMAN H., *Trial Procedures – With a Particular focus on the Relationship between the Proceedings of the Pre-Trial and Trial Chambers*, in STAHN C. (ed.),

Other scholars believe instead that Reg. 55 is incompatible with the ruling of the amendment of the charges described by the Statute as it allows the TC to alter the charges as confirmed by the PTC, while according to Art. 61(9), during the trial, only the Prosecutor would be allowed to amend the charges.[574] First of all, they challenge the AC determination to the effect that Art. 61(9) of the Statute, despite referring to the power of the Prosecutor to amend the charges, does not prohibit the TC to do the same. The main argument comes from the joint reading of Art. 61(11) and 61(9), since under para. (11) the TC, 'subject to paragraph 9' (which gives the PTC the power to authorise the Prosecutor to amend the charges and the TC only the power to give permission to the withdrawal of the charges), 'may exercise any function of the Pre-Trial Chamber that is relevant and capable of application'. This approach is further supported by the arguments raised by Judge Fulford as to the necessary 'amendment of the charges' caused by the legal recharacterisation, if the latter is part of the charge, as the content of the Document Containing the Charges seems to suggest. Ultimately, the reference Art. 61(9) to the need for holding a hearing if the Prosecutor seeks to substitute a charge with a more serious one proves that the legal characterisation is part of the charges, and that therefore also the TC must be bound by the decision on confirmation of the charges in this regard. Eventually, other authors[575] criticise the Reg. in light of its inquisitorial nature.

Reg. 55 is clearly a problematic provision in light of the regime for amendment of the charges foreseen by the Statute. Nevertheless, its purpose is worthy as it allows the Chamber to adopt the decision that better mirrors the state of the case. Since also the objective of the action of the Prosecutor is searching for truth, a recharacterisation on the basis of the evidence that the Prosecutor brought to the Chamber should not be seen as an inacceptable interference into the domain of the Prosecutor. Since its deletion is hardly imaginable, it is probably more realistic to accept its existence in the statutory framework, and rather overcome its problematic trying to limit its application as much as possible. The built of focused and solid cases since the Pre-Trial stage is clearly the most efficient way for preventing the TC to recur to Reg. 55 but in exceptional circumstances.

The Law and Practice of the International Criminal Court, Oxford University Press, 2015, p. 909 at 919, noting that 'the legal factual findings at the confirmation stage can only be preliminary in nature and cannot prevent different conclusions at trial'.

[574] HELLER K.J., *'A Stick to Hit the Accused With'. The Legal Recharacterization of Facts under Regulation 55*, in STAHN C. (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015, p. 981 at 984 ff.

[575] JACOBS D., *A Shifting Scale of Power: Who is in Charge of the Charges at the International Criminal Court and the Uses of Regulation 55*, in SCHABAS W.A:, HAYES N., MCDERMOTT Y. (eds.), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives*, Ashgate, 2013.

5.1.2. The role of the Prosecutor in the recharacterisation

As to the role of the Prosecutor, some scholars argue that Reg. 55 is inconsistent with the independence of the Prosecutor in particular from two cases of recharacterisation occurred during the pre-trial stage, i.e. during the confirmation procedure, and one case occurred in trial.[576] The first two cases are the *Bemba case* (where the PTC II refused to confirm cumulative charges) and the *Lubanga case* (where the PTC recharacterised the nature of the conflict from international to non-international).

As to the *Bemba case*, the decision not to confirm some charges for inconsistency of the mechanism of cumulative charges with the Statute does not seem to have a direct link with the recharacterisation under Reg. 55. As to the *Lubanga case*, the recharacterisation has instead an effect on the case, that, in light of the relationship between the confirmation decision and the trial, is required to prove her case within the limits of the decision. Nevertheless, a legal recharacterisation does not affect the *independence* of the Prosecutor. At best, it requires the Prosecutor additional work in order to ensure that the TC will be convinced beyond reasonable doubt of a fact that she had not foreseen in the request for confirmation. Besides, the recharacterisation made by the PTC is always based on the material put at the disposal of the Chamber by the Prosecutor herself. The problem is rather that instead of requesting the Prosecutor to amend the charges, as provided by Art. 61(7), the Chamber did it itself *proprio motu*. But the effect of recharacterising *proprio motu* does not affect the Prosecutor's independence more than a request to amend the charges.

The third case of recharacterisation mentioned by scholars occurred in trial in the *Lubanga case* concerns the inclusion of sexual violence among the crimes. Even in this case, the recharacterisation does not seem to affect the independence of the Prosecutor. The possible organisational disruptions and the additional required work do not concern the independence of the Prosecutor, even in light of the fact that once again the recharacterisation is made on the basis of the evidence brought by the Prosecutor in trial. The fact that the Chamber's recharacterisation occurs in trial, after the presentation of the evidence, where the Chamber is required to issue its judgment, makes the concern for possible subordination of the Prosecutor even odder.

[576] HELLER K.J., *'A Stick to Hit the Accused With'. The Legal Recharacterization of Facts under Regulation 55*, in STAHN C. (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015, p. 981 at 994-995.

This seems confirmed by the attitude of the Prosecutor when the Chambers contemplated the possible recharacterisation of the facts. For example, in the *Bemba case*, when the TC gave notice for recharacterisation *proprio motu*, the Prosecutor simply filed a submission containing an analysis of the impact of the recharacterisation on the case as presented in Court without claiming the violation of her prerogatives.[577]

But, in light of the abovementioned Reg. 60 RegOTP, the Prosecutor has also frequently submitted requests stimulating the intervention of the TC in order to obtain a recharacterisation of the facts, and in particular in order to introduce alternative modes of liability.

First, she submitted these requests in the cases related to the situation in Kenya, namely in the *Kenyatta case*[578] and in the *Ruto and Sang case*.[579] In both cases the Prosecutor requested the TC to give notice of recharacterisation with regard to the mode of liability on or before the first day of trial.

In the *Ruto and Sang case*, TC V(A) found that the information which may induce the Chamber to give notice under Reg. 55 is that offered by the evidence in trial but 'facts and circumstances pleaded in the charging document can also sufficiently inform the Chamber as to the apparent possibility of an eventual change in legal characterisation'.[580] As to the difference between the amendment of the charges and the legal recharacterisation, the TC V(A) took note that the PTC had refused to confirm other modes of liability and that the Prosecutor had not sought to amend the charges under Art. 61(9) of the Statute. Nevertheless, it found that the attempt use of Art. 61(9) of the Statute by the Prosecutor is not a prerequisite for the applicability of Reg. 55.[581] In this analysis the Chamber failed to properly address the strict link between the charges as confirmed by the PTC and the scope of the trial.

[577] *See* ICC, OTP, *The Prosecutor v. Bemba*, *Prosecution's Submissions on the Procedural Impact of Trial Chamber's Notification pursuant to Regulation 55(2) of the Regulations of the Court*, 8 Oct. 2012, ICC-01/05-01/08-2334.

[578] ICC, OTP, *The Prosecutor v. Muthaura and Kenyatta*, *Prosecution's Submissions on the law of indirect co-perpetration under Article 25(3)(a) of the Statute and application for notice to be given under Regulation 55(2) with respect to the accuseds' individual criminal responsibility*, 3 Jul. 2012, ICC-01/09-02/11-444.

[579] ICC, OTP, *The Prosecutor v. Ruto and Sang*, *Prosecution's Submissions on the law of indirect co-perpetration under Article 25(3)(a) of the Statute and application for notice to be given under Regulation 55(2) with respect to William Samoei Ruto's individual criminal responsibility*, 3 Jul. 2012, ICC-01/09-01/11-433, para. 24.

[580] ICC, TC V(A), *The Prosecutor v. Ruto and Sang*, *Decision on Applications for Notice of Possibility of Variation of Legal Characterisation*, 12 Dec. 2013, ICC-01/09-01/11-1122, para. 24.

[581] *Ibid*., para. 39.

In the *Banda case* the Prosecutor filed a request for recharacterisation of the modes of liability before the initiation of the trial in order to include also Art. 25(3)(b), (c), (d) and Art. 28 of the Statute. Even if the PTC had confirmed the charges only under Art. 25(3)(a) and (f), the Prosecutor stressed that 'it [was] clear from the record now before the Chamber that there are multiple ways to characterise the Accused's alleged criminal responsibility under the Statute'[582].

In the *Ntaganda case* as well, the Prosecutor submitted two requests for recharacterisation under Reg. 55 to the TC in order to include the modes of liability that the PTC had rejected to confirm.[583]

In the *Gbagbo case* the PTC I rejected the Prosecutor's request to confirm the charges against Mr Gbagbo under both Art. 25 and Art. 28 of the Statute.[584] The PTC, which expressly admitted the possibility to confirm the charges of alternative modes of liability, firmly rejected the possibility to confirm command responsibility. The PTC noted that it had confirmed responsibility under Art. 25(3)(a), (b) or (d), and that especially Art. 25(3)(a) included a form of responsibility significantly different from that described under Art. 28 of the Statute. Even if it did not exclude the possibility that evidence in trial might lead to a different legal characterisation, the PTC found that, on the basis of information available, 'the narrative of the facts, as established by the evidence' pointed towards the responsibility of the accused as described under Art. 25 of the Statute.[585] It added that 'the consideration of Laurent Gbagbo's responsibility under Art. 28 of the Statute would require the Chamber to depart significantly from its understanding of how events unfolded in Cote d'Ivoire during the post-electoral crisis and Laurent Gbagbo's involvement therein'.[586]

Despite this reasoned decision, after the assignation of the case to trial, the Prosecutor requested the TC to file a notice under Reg. 55,[587] in order to include also command responsibility among the possible modes of liability. The TC, immediately noted that the Prosecutor seemed having 'bypassed other statutory remedies', such as seeking leaving to

[582] ICC, OTP, *The Prosecutor v. Banda, Prosecution request for notice to be given of a possible recharacterisation under Regulation 55*, 28 Mar. 2014, ICC-02/05-03/09-549, para. 2.

[583] ICC, OTP, *The Prosecutor v. Ntaganda, Prosecution request for notice to be given of a possible recharacterisation pursuant to regulation 55(2)*, 9 Mar. 2015, ICC-01/04-02/06-501; ICC, OTP, *The Prosecutor v. Ntaganda, Prosecution second request for notice to be given of a possible recharacterisation pursuant to regulation 55(2)*, 15 Jun. 2015, ICC-01/04-02/06-646.

[584] ICC, PTC I, *The Prosecutor v. Gbagbo, Decision on the confirmation of charges against Laurent Gbagbo*, 12 Jun. 2014, ICC-02/11-01/11-186, paras 252 ff.

[585] *Ibid*., para. 263.

[586] *Ibid*., para. 265.

[587] ICC, OTP, *The Prosecutor v. Gbagbo and Blé Goudé, Prosecution request for notice to be given of a possible recharacterisation pursuant to regulation 55(2)*, 24 Apr. 2015, ICC-02/11-01/15-43.

appeal the confirmation decision or submitting a request under Art. 61(9) of the Statute to the Pre-Trial, but also admitted that the existence of Reg. 55 itself makes it unnecessary to use other available instruments in order to reach the result of a modification of the legal characterisation. The TC I, referring to the statements of the PTC on the possible subsequent recharacterisation and of the dissenting Judge who admitted that she could have in principle envisaged to confirm the charges under Art. 28 of the Statute, decided to grant the Prosecutor's request.[588] The TC deemed that the evidence of the Prosecution could support this form of liability and, giving that the recharacterisation did not exceed the facts and circumstances of the confirmation decision, authorised the Prosecutor to file an amended document containing the charges.[589] The Defence for Mr Gbagbo appealed the decision and the AC, among others, decided on whether a TC may recharacterise facts and circumstances to include a mode of liability considered, but not confirmed by the PTC. The AC gave a positive answer to the question, under the caveat that the Chamber's determination must remain within the facts and circumstances as confirmed by the PTC.[590]

The only different approach with regards to the Prosecutor's request for notice under Reg. 55 can be found in the *Article 70 case*. The TC VII notes that prior to the commencement of the trial, the Prosecutor had submitted a request under Reg. 55 in order to include modes of liability which she had included in the document containing the charges, but which had been rejected during confirmation. Since the Prosecutor did not sought to appeal the decision and had not requested an amendment of the charges under Art. 61(9) of the Statute, the TC rejects the Prosecutor's request which would be tantamount to 'question the findings of the Pre-Trial Chamber', 'providing the Prosecution with an opportunity to *de facto* appeal of the decision on the confirmation of the charges'.[591] Further, the Chamber excludes that Reg. 55 may be transformed in a mechanism allowing the Prosecutor to 'immediately seek to start a procedure which aims at modifying the legal characterisation of the confirmed charges and reintroduces modes of liability which were just rejected by the Pre-Trial Chamber' unless exceptional circumstances occur.[592]

[588] ICC, TC I, *The Prosecutor v. Gbagbo and Blé Goudé, Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Cour*, 19 Aug. 2015, ICC-02/11-01/15-185, para. 12.

[589] *Ibid*., paras 13-14.

[590] ICC, AC, *The Prosecutor v. Gbagbo and Blé Goudé, Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I entitled "Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court"*, 18 Dec. 2015, ICC-02/11-01/15-369 OA7, paras. 63 ff.

[591] ICC, TC VII, *The Prosecutor v. Bemba, Kilolo, Mangenda, Babala, Arido, Decision on Prosecution Application to Provide Notice pursuant to Regulation 55*, 15 Sep. 2015, ICC-01/05-01/13-1250, para. 10.

[592] *Ibid*., para. 11.

The TC confirmed its position when the Prosecutor readdressed the Court with the same request, noting that 'unspecific assertions that evidence has now been received' cannot alter the previously hold determination.[593] Moreover it concluded by emphasising that 'it is ultimately [the Chamber's] prerogative to decide if and when to give Reg. 55 notice', basically inviting the Prosecutor to refrain from abusing in submitting requests for reconsideration.[594]

At the time of writing, immediately after the confirmation of charges, and after the failed attempt to obtain a leave to appeal the confirmation decision or, in alternative, the reconsideration of the decision, and an amendment of the charges under Art. 61(9), the Prosecutor has submitted to the TC V an application for notice under Reg. 55 concerning the modes of liability in the *Yekatom and Ngaïssona case*.[595]

6. Concluding remarks

The confirmation of the charges represents a crucial step in the architecture of the trial. The relatively high standard of proof required by the Statute demands the Prosecutor to structure her case in a solid way. Her discretion as to the evidence supporting her allegations is significantly limited by the possibility for the PTC to reject the request or adjourn the hearing. The acquittal of Mr Bemba, Mr Gbagbo and Mr Blé Goudé, cases where the PTCs had detected deficiencies in the evidence, should recall not only to the Prosecutor, but also to the PTCs, to be careful in confirming the charges if not completely satisfied of the substantial ground to believe standard. Further, the Prosecutor should be confident in the possibility to prove the guilt of the suspect beyond reasonable doubt *before* submitting a request to confirm the charges.

Moreover, it seems that the Prosecutor has sometimes tried to compensate the deficiency of the evidence by leaving open all the possibilities as to the modes of liability, considering it a prerogative falling within prosecutorial discretion. But as highlighted by the PTC III in the *Gbagbo case*, the Prosecutor should shape the cases in a coherent way. Presenting a 'case theory' (an expression that may rise doubts about the conformity to the duty of finding the truth) and then requiring a Chamber to confirm modes of liability inconsistent

[593] ICC, TC VII, *The Prosecutor v. Bemba, Kilolo, Mangenda, Babala, Arido*, *Decision on Prosecution's Re-application for Regulation 55(2) Notice*, 15 Jan. 2016, ICC-01/05-01/13-1553, para. 5.

[594] *Ibid*., para. 8.

[595] ICC, OTP, *The Prosecutor v. Yekatom and Ngaïssona*, *Public Redacted Version of "Prosecution's Application for Notice to be given pursuant to Regulation 55(2) on Accused Yekatom's Individual Criminal Responsibility" 01 May 2020, (ICC-01/14-01/18-503-Conf)*, 01 May 2020, ICC-01/14-01/18-503-Red.

with this theory is reason for concern.[596] It is instead advisable to structure the cases in a clear and focused way, possibly limiting the number of charges and proceeding only for those charges and modes of liability which are sufficiently supported by strong evidence.

This approach would limit the use of Reg. 55, whose applicability should be exceptional. Moreover, it is worth recalling that the Reg. provides a power *for the Chamber* to modify the legal characterisation of the facts. The practice of the Prosecutor to stimulate the Chamber's intervention, usually immediately after the confirmation of the charges, is regrettable and testifies the difficulty of focusing on framed cases. It also testifies a certain disregard for the charges as depicted by the PTC, partially deleting the importance of its filtering and supervisory role. The decision of the TC VII in the *Article 70 case* seems instead going in the right direction.

Even assuming that in a specific case the TC would find Reg. 55 applicable at the initiation of the trial, a possible solution for granting the respect of the prerogatives of the PTC with regards to the confirmation of the charges, is referring the matter to the PTC on the basis of Art. 64(4) of the Statute.[597]

[596] *See* BAIS D., *Prioritisation of Suspected Conduct and Cases: From Idea to Practice*, in AGIRRE X., BERGSMO M., DE SMET S., STAHN C., (ed.), *Quality Control in Criminal Investigation*, Torkel Opsahl Academic EPublisher, 2020, p. 37 at 563 at 641 ff.

[597] In this regard, *see* ICC, TC V, *The Prosecutor v. Kenyatta*, *Decision on defence application pursuant to Article 64(4) and related requests*, 26 Apr. 2013, ICC-01/09-02/11-728, para. 84.

SECTION V

THE CONTROL OF THE JUDICIARY THROUGHOUT THE TRIAL: THE NO CASE TO ANSWER

This last section is devoted to a procedure recently used by the Court in its case-law, aimed at stopping trials which, in the opinion of the TCs, are too weak to continue. The legal concept evoked by the Chamber and the Parties is often that of the 'no case to answer'.

The 'no case to answer' is a procedure known to common law systems which allows the defendant to seek acquittal without having presented her case. The motion is submitted to the judge after the prosecution has presented its case when the defence deems that there is not even a prosecution case to be answered to. In this case, the judge has to determine whether a properly instructed jury could reasonably convict upon the evidence provided for by the prosecutor. The judge has therefore to determine whether the evidence produced is legally sufficient for a jury to support a verdict of guilt beyond reasonable doubt. The assessment of the sufficiency of evidence does not require the complete absence of evidence in order to stop the case and admits the existence of evidence insufficient to sustain a conviction.

Even if the introduction of the no case to answer procedure in the Court's system is debatable and is not a proper limitation to the Prosecutor's discretion, it results in a judicial review of the Prosecutor's activity before the ritual final judgment. Therefore it deserve attention. After an analysis of this procedure in some national common law (1) and civil law systems (2) it will be analysed the practice of other international tribunals, especially the ICTY (3). The last paragraph (4) is rather devoted to the ICC and will focus on the practice of the Court and on the main issues raised by this procedure.

1. The ruling of the 'no case to answer' in common law systems

The leading case in this procedure in Britain and Wales is the famous *R v Galbraith*, where Lord Lane CJ explained that, if there is no evidence that the crime has been committed by the defendant, the judge shall directly acquit the accused.[598] It is instead more problematic to directly acquit when the evidence 'is of a tenuous character, for example, because of inherent weakness or vagueness or because it is inconsistent with other evidence'.[599] In this

[598] BLACKSTONE'S, *Criminal Practice*, Oxford University Press, 2014, p. 1759.

[599] *See* ARCHBOLD, *Criminal, Pleading, Evidence and Practice*, 2012, p. 480 explaining that if the evidence is self-contradictory and out of reason and all common sense then it means that the

case, the judge is requested to 'take the evidence at its highest'. If she nevertheless comes to the conclusion that a jury 'properly directed could not properly convict' upon this evidence, the judge must stop the case. Conversely, if the evidence is such that its strength or weakness 'depends on the view to be taken of witness' reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty', the judge should leave the jury to decide and therefore reject the motion.[600]

This principle was then adjusted in the case *R. v. Shippey*, where Turner J explained that the expression 'evidence taken at its highest' 'does not mean picking out the plums and leaving the duff behind'.[601] Therefore, the judge must only determine whether there is part of the evidence which supports the prosecutor's case but must assess the evidence as a whole.[602] That the no case to answer is not applicable only if there is no evidence at all but also in other circumstances has been affirmed also by the Court of Appeal of England and Wales in *R v. F.(S)*. The Court summarised the test as follows: 'where the state of the evidence called by the prosecution and taken as a whole, is so unsatisfactory, contradictory, or so transparently unreliable, that no jury, properly directed could convict [...] it is the judge's duty to direct the jury that there is no case to answer and to return a "not guilty verdict"'.[603]

An analogous procedure is included in the U.S. system. Rule 29 of the Federal Rules of Criminal Procedure rules the 'Motion for a Judgment of Acquittal'. The procedure is different depending on whether the request for acquittal is presented before or after the submission of the case to the jury. In the first case, after the closing of the presentation of the evidence by the prosecution or after the close of all evidence, the court enters a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The judge has the duty to decide on the matter if the request is presented by the defendant, but she may consider on her own motion whether the evidence is insufficient to sustain a conviction.

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evidence is tenuous and suffers from inherent weakness; and BLACKSTONE'S, *Criminal Practice*, Oxford University Press, 2014, p. 1759.

[600] *See Ibid*., p. 1759.

[601] *R. v. Shippey* [1988] Crim LR 767.

[602] *See* ARCHBOLD, *Criminal, Pleading, Evidence and Practice*, 2012, p. 480.

[603] Blackstone's identifies four propositions representing the position reached on determining submissions of no case to answer: (a) if there is no evidence to prove the essential element of the offence the motion must be granted; (b) if there is evidence which taken at face value establishes each essential element, the case should normally be left open to the jury; (c) if the evidence is so weak that no reasonable jury properly directed could convict on it, the motion should be upheld; (d) the questiono f whether a fitness is lying is 'nearly always one of the jury' but in some cases, as in Shippey, the inconsistencies are so great that any reasonable tribunal would reach the conclusion that it would not be proper for the case to proceed. BLACKSTONE'S, *Criminal Practice*, Oxford University Press, 2014, p. 1760.

Since, as explained above, the request aims at obtaining a direct acquittal without the presentation of the evidence, the provision further explains that if the court denies a motion for a judgment of acquittal at the close of the government's evidence, the defendant may still offer evidence without having reserved the right to do so.

Rule 29 also authorises the judge to reserve the decision on the motion. In this case she orders the proceeding of the trial if the motion is made before the close of all evidence and submits the case to the jury. The court shall decide on the motion either before the jury returns a verdict or after it returns a verdict of guilt or is discharged without having returned a verdict. Nevertheless, if the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.

But the defendant can submit or renew the motion within fourteen days after a guilty verdict or after the court discharges the jury, whichever is later. If the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal. If the jury has failed to return a verdict, the court may enter a judgment of acquittal. The rule further specifies that the defendant is not required to move for a judgment of acquittal before the court submits the case to the jury as a prerequisite for making such a motion after jury discharge. In light of the possible judgment of acquittal after a guilty verdict, the court must also conditionally determine whether any motion for a new trial should be granted if the judgment of acquittal is later vacated or reversed and the court must specify the reasons for that determination. The rule clarifies that the court's order conditionally granting a motion for a new trial does not affect the finality of the judgment of acquittal.

The possibility to submit the motion for directed acquittal serves the purpose of giving the defendant the chance to challenge the sufficiency of evidence against her. It is a direct consequence of the constitutional right not to be convicted except upon evidence that is sufficient fair to support the guilt of the accused beyond reasonable doubt.

The standard of review to be applied is the same irrespective of whether the motion for directed acquittal is submitted before or after the submission of the case to the jury. This standard has been clearly identified in case-law. In the case *Jackson v. Virginia*[604] it has been clarified that:

> 'a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to

[604] U.S. Supreme Court, *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560, 1979.

> determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond reasonable doubt, the motion must be granted. If he concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter.'

This standard has been defined by the Supreme Court as 'the prevailing criterion for judging motions for acquittal in federal criminal trials'.[605]

Also the Canadian system includes an analogous provision in its Criminal Code.[606] Art. 548(1) provides that when all evidence has been taken by the justice, she shall (i) if in her opinion there is sufficient evidence to put the accused on trial for the offence charged or any other indictable offence in respect of the same transaction, order the accused to stand trial; or (ii) discharge the accused, if in her opinion on the whole of the evidence no sufficient case is made out to put the accused on trial for the offence charged or any other indictable offence in respect of the same transaction. The functioning of this provision has been further clarified in case-law. The Supreme Court of Canada has repeatedly affirmed the test to be applied in the procedure[607] and has also partially amended the procedure of the directed judgment of acquittal, giving to the judge the power to directly acquit the defendant instead of directing the jury to acquit.[608]

From the abovementioned case-law it is apparent that the rationale of the no case to answer procedure is linked to the separation between the subject entitled to decide on the guiltiness or innocence of the accused, namely the jury which does not possess legal competence, and the subject in charge of ensuring the correct development of the trial, namely the judge. It is the judge who assesses whether, from a legal point of view, the Prosecutor has been able to bring a case in court, and if not, to avoid its continuation.

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[605] *See* LAFAVE W.R., ISRAEL J.H., KING N.J., KERR O.S., *Criminal Procedure*, West, 2009, pp. 1167 ff.

[606] *Canadian Criminal Code*, R.S.C., 1985, c. D-46.

[607] Supreme Court of Canada, *United States of America v. Shephard*, 1976, CanLII 8 (SCC), [1977] 2 S.C.R. 1067, where it refers to the *prima facie* case. The test is therefore whether there is any admissible evidence upon which a reasonable jury properly instructed could convict. If there is no evidence the accused is acquitted without any problem. *See* also Supreme Court of Canada, *Mezzo v. The Queen*, 1986 CanLII 16 (SCC), [1986] 1 S.C.R. 802; Supreme Court of Canada, *R. v. Monteleone*, 1987 CanLII 16 (SCC), [1987] 2 S.C.R. 154.

[608] Supreme Court of Canada, *R. v. Rowbotham*; *R. v. Roblin*, [1994] 2 S.C.R. 463. 'I conclude that the common law procedure with respect to directed verdicts should be modified -- in instances where in the past the trial judge would have directed the jury to return a particular verdict, the trial judge should now say "as a matter of law, I am withdrawing the case from you and I am entering the verdict I would otherwise direct you to give as a matter of law"'.

Despite its origin, the same procedure is in theory applicable in those cases where the magistrate is both trier of law and trier of facts. In this case, the Archbold states that

> 'even where at the close of the prosecution case, or later, there is some evidence which, if accepted, would entitle a reasonable tribunal to convict, they nevertheless have the same right as a jury to acquit if they do not accept the evidence, whether because it is conflicting, or has been contradicted or for any other reason'.[609]

2. The ruling of analogous situations in civil law systems

Civil law systems do not foresee the no case to answer procedure as such but, despite some different opinions,[610] they always include some mechanisms allowing the judge to stop the procedure.

It has already been seen that in the Italian system, Art. 129 of the Italian Code of Criminal Procedure states that at any moment and at any stage of the proceedings the judge shall close it *ex officio* when she detects that the offence has not been committed or that the accused did not commit the offence; when she detects that the fact is not provided for by the law as an offence' or that 'the fact is not an offence'; when she detects a 'ground extinguishing the offence' or when a procedural condition is missing.

With regards to the German system, if the charges have already been profferred by the prosecutor in those cases where she is allowed to deviate from the principle of mandatory prosecution, (§§153; 153a) the court, with the consent of the public prosecution office and the indicted accused, may terminate the proceedings. Under §153 StPO the court may terminate the proceedings at any stage thereof under the conditions which allow the prosecutor to decide not to proceed; under §153a StPO the court may provisionally terminate the proceedings up until the end of the main hearing in which the findings of fact can last be examined, and concurrently impose the conditions and instructions referred to in the section; under §153b StPO the court may terminate the proceedings at any time prior to commencement of the main hearing; under §153e StPO the Higher Regional Court competent pursuant to §120 of the Courts Constitution Act may, with the approval of the Federal Public Prosecutor General, (and without the consent of the accused) terminate the proceedings if the conditions designated

[609] *See* ARCHBOLD, *Criminal, Pleading, Evidence and Practice*, Sweet & Maxwell, 2019, p. 481; ARCHBOLD, *Magistrates' Courts Criminal Practice*, Sweet & Maxwell, 2017, pp. 519-522.

[610] TOCHILOVSKY V., *The Law and Jurisprudence of the International Criminal Tribunals and Court*, Interstitia, 2014, p. 1069.

under the subsection are met; under §154 StPO the court may, upon the application of the public prosecution office, provisionally terminate the proceedings at any stage.[611]

In France, the presence of the *juge d'instruction* determines a different approach. According to Art. 175, when the *juge d'instruction* deems that the instruction is completed, she informs the parties and after twenty days she sends the file to the prosecutor, in order to allow her to make observations and issue an order to proceed or not. In the latter case, Art. 177 of the French Code of Criminal Procedure gives to the *juge d'instruction* the power to declare the '*non lieu à suivre*' if she considers that the facts do not constitute a felony, a misdemeanour, or a petty offence, or if the perpetrator has remained unidentified, or if there are no sufficient charges against the person under judicial examination. The same applies under Art. 212 to the *chambre de l'instruction*.

3. The ruling of the 'no case to answer' in international tribunals

The no case to answer is used in some international criminal tribunals as well.[612]

The first version of the Statutes and the RPE of the ICTY and ICTR did not include any reference to the no case to answer procedure and the first motions were treated under Rule 54 RPE.[613] Nevertheless, on 10 July 1998 Rule 98*bis* RPE of both the Tribunals, headed 'Judgement of Acquittal', was adopted. This provision was further amended on 17 November 1999 and later on 8 December 2004.

The original version of both Rules 98*bis* stated as follows:

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[611] Differently, under §153c StPO it is the public prosecution office which may, in the cases referred to in the subsections, withdraw the charges at any stage of the proceedings and terminate the proceedings if the conduct of proceedings poses the risk of serious detriment to the Federal Republic of Germany, or if other public interests of overriding importance present an obstacle to prosecution. Similarly, under §153d the Federal Public Prosecutor General may withdraw the charges under the conditions listed in the subsection at any stage of the proceedings and terminate the proceedings; and under section 153f StPO the public prosecution office may, at any stage of the proceedings, withdraw the charges and terminate the proceedings; in these cases the consent of the accused is obviously not required. The exceptional nature of the situations foreseen by these provisions justify the departure from the general rule of civil law systems which prevent the prosecutor to withdraw the charges as corollary of the principle of mandatory prosecution.

[612] In this regard, *see* KHAN K., DIXON R., FULFORD A., *Archbold, International Criminal Courts. Practice, Procedure, Evidence*, Sweet & Maxwell, 2005, pp. 600 ff.; TOCHILOVSKY V., *The Law and Jurisprudence of the International Criminal Tribunals and Court*, Interstitia, 2014, pp. 1067 ff.; *JONES J.R.W.D., POWLES S., International Criminal Practice*, Oxford University Press, 2004, p. 719 ff.

[613] Rule 54 ICTY RPE states as follows 'At the request of either party or *proprio motu*, a Judge or a TC may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.' *See*, for example. ICTY, TC, *The Prosecutor v. Tadić*, *Decision on Defence motion to dismiss charges*, 13 Sep. 1996, IT-94-1-T; ICTY, TC, *The Prosecutor v. Blaškić*, *Decision of Trial Chamber I in the Defence motion to dismiss*, 3 Sep. 1998, IT-95-14.

> 'If, after the close of the case for the prosecution, the Trial Chamber finds that the evidence is insufficient to sustain a conviction on one or more offences charged in the indictment, the Trial Chamber, on motion of an accused or *proprio motu*, shall order the entry of judgement of acquittal on that or those charges.'

The further amendments made the procedure entirely oral, no longer party driven, transforming it as follows:

> 'If after the close of the case for the prosecution, the Trial Chamber finds that the evidence is insufficient to sustain a conviction on one or more counts charged in the indictment, the Trial Chamber, on motion of an accused filed within seven days after the close of the Prosecutor's case-in-chief, unless the Chamber orders otherwise, or *proprio motu*, shall order the entry of judgement of acquittal in respect of those counts.'[614]

An analogous procedure was also included at Rule 98 SCSL RPE.[615] Contrary to the rule of ICTY and ICTR, the provision originally foresaw an oral procedure and the sentence referring to the oral procedure was later deleted. Similarly, Rule 167 of the Rules of Procedure of the Special Tribunal for Lebanon provided that at the close of the Prosecutor's case, the TC might, by oral decision and after hearing submissions of the Parties, enter a judgment of acquittal on any count if there is no evidence capable of supporting a conviction on that count.

No similar proceedings seems to be available in the Reg. of the United Nations Transitional Administration in East Timor or in the ECCC system, characterised by its inquisitorial structure. Nevertheless, with regards to the former, authoritative doctrine[616] deems that the general provision at section 30[617] of the Reg. 2000/30 may include the possibility to argue that there is no case to answer.

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[614] The Orić case was the first application of the amended rule, where the TC ordered the continuation of the case against Mr Orić in relation only to some counts. *See* Oral Decision Rendered Pursuant to Rule 98*bis*, in ICTY, *The Prosecutor v. Orić*, *Transcript of the hearing*, 8 Jun. 2005, IT-03-68.

[615] Rule 98 SCSL RPE states: 'If, after the close of the case for the prosecution, there is no evidence capable of supporting a conviction on one or more counts of the indictment, the TC shall, by oral decision and after hearing the oral submissions of the parties, enter a judgment of acquittal on those counts'. For an overview, *see* TOCHILOVSKY V., *The Law and Jurisprudence of the International Criminal Tribunals and Court*, Interstitia, 2014, p. 1077.

[616] KHAN K., DIXON R., FULFORD A., *Archbold, International Criminal Courts. Practice, Procedure, Evidence*, Sweet & Maxwell, 2005, p. 379.

[617] Section 30 of Regulation 2000/30 on Transitional Rules of Criminal Procedure (UNTAET/REG/2000/30) states as follows: '30.1 All judges who are required to participate in the final decision of the case must be present at all sessions of the trial. 30.2 On the date and time determined in accordance with Section 29.3 of the present regulation, the competent judge shall call upon the parties, shall verify their identities; shall enter such information into the record and shall declare the trial open. 30.3 Where the hearing is before a panel of judges, in accordance with Section 18.2 of UNTAET Regulation No. 2000/11, the Presiding judge shall identify one judge of the panel as the judge rapporteur. The judge rapporteur shall have primary responsibility for preparation of the final written decision in the case. 30.4 The Court shall confirm that the accused has read or has had the indictment

The most relevant jurisprudence developed during the activity of the ICTY and was followed by the ICTR as well. Therefore, it will be analysed in detail. Where appropriate, reference to the SCSL or STL will be made.

3.1. The first practice of the Trial Chambers of ICTY

Only two months after the entry into force of Rule 98*bis*, the TC had the chance to give some guidance on the applicable standard in order to enter a judgment of acquittal. In the *Blaskic case*, the Chamber states that:

> 'at this stage of the proceedings, when the Prosecution has completed its case, the standard used to determine the relevance of the Defence Motion must satisfy the level required either by the only text covering the Motion presented to it, that is, Rule 98*bis*, or by the decisions rendered specifically to respond to this type of motion; that it follows therefrom that the required standard is that the evidence presented by the Prosecution be insufficient to justify from this time forth a conviction for all or part of the counts concerned'.[618]

But an in-depth analysis of the applicability of this provision was made in the *Jelisić case*, after the TC had interpreted Rule 98*bis* in light of the beyond reasonable doubt standard. The reasons for this departure may be better understood in the light of the development of the case. Mr Jelisić had pleaded guilty for crimes against humanity and war crimes he was accused of but had pleaded not guilty with regards to the crime of genocide. In order to avoid undue delays, the Chamber proposed to pronounce on the crimes the accused had pleaded guilty and to postpone the trial for genocide, but the Defence opposed to this solution. Therefore, the Chamber, which was responsible for some of the delays of the proceedings, decided to initiate the trial. After the Prosecutor had finished to present her case, the Judges reviewed the evidence and concluded that, without even needing to hear the case of the defence, the accused could not be found guilty on the crime of genocide. The Chamber pronounced its judgment orally while full reasoning followed. More specifically, the Chamber found that the Prosecutor had not established 'beyond all

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read to him or her and understands the nature of the charges, that the right of the accused to counsel has been respected, shall remind the accused of his or her right to remain silent, and shall determine what statements or admissions, if any, the accused will make regarding the crimes alleged. If the accused makes an admission of guilt, the Court shall proceed as provided in Section 29A of the present regulation. 30.5 Where the accused decides to make a statement, the Court may question him or her about the statement. The Court may then invite the public prosecutor and legal representative of the accused for additional questions. 30.6 The public prosecutor and the legal representative of the accused may object to any question posed by each other on grounds of relevancy or if the question is designed to embarrass or harass the witness. The Court shall decide on such objections as they are raised. 30.7 The accused shall be given the opportunity to address the Court regarding any issue raised during the hearing, provided that such issue is relevant to the proceedings. 30.8 The accused shall sit beside his or her legal representative and may consult with him or her throughout the hearing without any restriction.'

[618] ICTY, TC, *The Prosecutor v. Blaskić, Decision of Trial Chamber I on the defence motion to dismiss*, 3 Sep. 1998, IT-95-14.

reasonable doubt that genocide was committed in Brcko during the period covered by the indictment' and therefore concluded that she had not proven 'beyond all reasonable doubt that the accused was motivated by the *dolus specialis* on the crime of genocide'.[619] The Chamber further gave to the accused the benefit of the doubt and therefore acquitted the accused from the count of genocide.

It is possible to infer that the departure from the previous standard sketched in the *Blaskić case* was probably determined by the fact that the decision under Rule 98*bis* was adopted in the same decision on the conviction for the facts the accused had pleaded guilty. Therefore, since the decision of the Chamber was not any decision, but the final judgment, the Chamber felt compelled to apply the beyond reasonable doubt standard.

The application of this standard constituted a ground of appeal, since, according to the Prosecutor, the TC erred in law by adopting the standard of guilt beyond a reasonable doubt for the purposes of Rule 98*bis* determination of the sufficiency of evidence to sustain a conviction. The AC intervened on the matter only in 2001, after other TCs had expressed their opinions on the applicable standard under Rule 98*bis* RPE. Therefore, before jumping to the AC's interpretation, it is worth recalling some other pronouncements of other TCs occurred in the meantime.

Expressly taking the distance from the conclusions reached by the TC in the *Jelisić case*, the TC in the *Kordic and Cerkez case* decided to provide its own interpretation on the applicable standard under Rule 98*bis*. It rejected the applicability of the test according to which there must be evidence which satisfies the TC beyond a reasonable doubt of guilt of the accused. It rather stated that the right test was 'whether there is evidence on which a reasonable TC could convict'.[620] It further argued that applying the standard of proof beyond reasonable doubt at this stage of the case would, among others, 'render it more difficult to acquit the accused at the end of the case' and 'would oblige the accused to call evidence [...] in a regime where he is under no obligation to do so'.[621]

In the *Kunarac et al. case*, the TC II had the opportunity to address the issue.[622] In particular it focused on the way of conducting the assessment, emphasising that the Chamber is not requested to draw any conclusion in respect to the credibility of the witnesses called by the Prosecutor. In its assessment the Chamber must keep in mind the necessity to conduct an

[619] ICTY, TC, *The Prosecutor v. Jelisić, Judgement*, 14 Dec. 1999, IT-95-10-T, para. 108.

[620] ICTY, TC, *The Prosecutor v. Kordić and Čerkez, Decision on defence motion for judgement of acquittal*, 6 Apr. 2000, para. 26.

[621] *Ibid*., para. 27.

[622] ICTY, TC II, *The Prosecutor v. Kunarać, Kovač and Vukocić, Decision on motion for acquittal*, 3 Jul. 2000, paras 4 ff.

overall assessment, and not to 'look at the evidence of each witness separately, as if it existed in an hermetically sealed compartment'. It highlighted how the evidence of one witness may appear weak if taken in isolation but have a significant weight if taken with the others and *vice-versa*. The reason for this approach is that

> 'If the Trial Chamber *were* entitled to weigh questions of credit generally when determining whether a judgment of acquittal should be entered, and if it found that such a judgment was not warranted, the perception would necessarily be created (whether or not it is accurate) that the Trial Chamber had accepted the evidence of the prosecution's witnesses as credible. Such a consequence would then lead to two further perceptions: (1) that the accused will bear at least an evidentiary onus to persuade the Trial Chamber to alter its acceptance of the credibility of the prosecution's witnesses, and (2) that the accused will be convicted if he does not give evidence himself. He would virtually be required to waive the right given to him by the Tribunal's Statute to remain silent.' [623]

According to the TC II only 'in limited circumstances' the Chamber may draw a distinction between the credibility of a witness and the reliability of that witness's evidence. If credibility 'depends upon whether the witness should be believed', reliability 'assumes that the witness is speaking the truth, but depends upon whether the evidence, if accepted, proves the fact to which it is directed'.[624] Therefore, it concluded that:

> 'where the particular fact to which the evidence is directed is an element of the offence charged (which has to be established beyond reasonable doubt), and where evidence of that witness is the only evidence given in relation to that fact, the Trial Chamber at this stage must be satisfied that a reasonable tribunal of fact could find beyond reasonable doubt that the particular fact has been established by the evidence of that witness.' [625]

The TC II further specified the decision adopted by the TC in the *Kordić case*, deeming that the Prosecutor had misunderstood the TC's decision submitting that under Rule 98*bis* the TC is required to interpret the standard of review 'to be lower than proof beyond a reasonable doubt'. It specifies that the TC had instead hold that the required test to be applied is not whether there is evidence which satisfies *the TC* beyond reasonable doubt of the guilt of the accused but rather whether there is evidence on which *a reasonable TC* could convict:

> 'The different standard of review is obvious. The prosecution needs only to show that there is evidence upon which a reasonable tribunal of fact could convict, not that the Trial Chamber itself should convict. The former would usually require less persuasion by the prosecution than would the latter, when questions of credit inevitably become important. But it is misleading to say, without reference to that context, that the standard is a lower one. The evidence to which the prosecution needs

[623] *Ibid*., para. 5.
[624] *Ibid*., para. 7.
[625] *Ibid*.

> to point must still be sufficient (if accepted) to establish the guilt of the accused beyond reasonable doubt for, without such evidence, it would not be open to the reasonable tribunal of fact to convict. [626]

3.2. The jurisprudence of the Appeals Chamber of ICTY

The AC of the ICTY settled the test to be applied under Rule 98*bis* RPE in the *Čelebici case* when Mr Delić appealed the TC's judgment challenging the legal and factual sufficiency of the evidence to sustain a conviction. The appellant had already submitted to the TC a motion to dismiss the charges, which had been rejected because the Chamber had concluded that there was evidence before it for each of the offences, which, if accepted, was such that a reasonable tribunal might convict.[627] In the Appeal against the TC's judgment, the AC dismissed the Defence ground of appeal noting that the test of the legal basis had already been done by the TC after the closing of the case of the Prosecutor and the defence had not appealed the decision. On this occasion, the AC also clarified that the test to be applied at that stage is 'whether there is evidence (if accepted) upon which a reasonable tribunal of fact *could* be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question'.[628]

It is now possible to turn towards the pronouncement of the AC in the *Jelisić case*, that followed of few months the *Čelebici* judgement.[629] The AC opens the decision explaining the meaning of the applicable test, namely that the evidence must be insufficient to sustain a conviction. Applying the traditional criteria of the Vienna Convention on the Law of Treaties, the Chamber concludes that these words necessarily 'import the concept of guilt beyond reasonable doubt', because 'it is only if the evidence is not capable of satisfying the reasonable doubt test that it can be described as "insufficient to sustain a conviction"'.[630]

The AC therefore approves the reference to the 'beyond reasonable doubt' and the test applied by the PTC II in the *Kunarać case*. It also refers to the standard applied in the *Kvocka case*, where the TC adopts the standard that 'no reasonable chamber could find guilt beyond a reasonable doubt on the basis of the Prosecution's case-in-chief'. The AC evokes therefore the classical test of the no case to answer procedure, namely that the evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, and recognises its

[626] *Ibid*., para. 10.
[627] ICTY, TC, *The Prosecutor v. Delalić, Mucić, Delić, Landzo, Order on the Motions to Dismiss the Indictment at the Close of the Prosecutor's Case*, 18 Mar. 1998.
[628] ICTY, AC, *The Prosecutor v. Delalić, Mucić, Delić, Landzo*, Judgment, 20 Feb. 2001, IT-96-21-A, paras 433- 434.
[629] ICTY, AC, *The Prosecutor v. Jalisić, Judgment,* 5 Jul. 2001, IT-95-10-A.
[630] *Ibid*., para. 35.

applicability in the ICTY procedure through Rule 98*bis*.[631] The Chamber's analysis continues with the applicability of the test of guilt beyond reasonable doubt, according to which the TC must stop the case when it believes that the prosecution evidence, if believed, is insufficient for any reasonable trier of fact to find that guilt has been proved beyond reasonable doubt. In this regard it refers to its previous jurisprudence in the *Čelebici* appeal judgement. In its words:

> 'The capacity of the prosecution evidence (if accepted) to sustain a conviction beyond reasonable doubt by a reasonable trier of fact is the key concept; thus the test is not whether the trier would in fact arrive at a conviction beyond reasonable doubt on the prosecution evidence (if accepted) but whether it could. At the close of the case for the prosecution, the Chamber may find that the prosecution evidence is sufficient to sustain a conviction beyond reasonable doubt and yet, even if no defence evidence is subsequently adduced, proceed to acquit at the end of the trial, if in its own view of the evidence, the prosecution has not in fact proved guilt beyond reasonable doubt.'[632]

Judge Nieto-Naiva, in his separate opinion offers a more compelling reading of Rule 98*bis* RPE, suggesting that it not only gives the TC the power to enter a judgment of acquittal after the presentation of the case of the Prosecutor, but that the Chamber is obliged to do so, rejecting that the Prosecutor has the right to be heard before the issuing of the judgment.[633]

Judge Shahabuddeen, in his partially dissenting opinion stresses that the TC at the ICTY is both the triers of the fact and the law. He refers to the literature on this subject and notes that in this case, a no case to answer motion may be submitted when there is no evidence at all to prove an essential element of the alleged offence; or when the evidence has been so discredited in cross-examination or is so unreliable that no reasonable tribunal could safely convict upon it. Apart from these exceptional situations the judge should not be required to render a judgment of acquittal before having heard the case of the defence. He nevertheless recognises the merit of the statement that 'in borderline cases, it may be thought pedantic to require [the judges] to go through the motions of hearing defence evidence if they have found the prosecution evidence so unconvincing that they will not convict on it in any event'.

Therefore, in Judge Shahabuddeen's view, the TC is allowed to render a definitive acquittal 'even accepting that a reasonable tribunal could convict on the evidence (if accepted)', while in non-border line cases she should let the trial to follow its course.[634] In his view:

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[631] *Ibid*., para. 36.

[632] *Ibid*., para. 37.

[633] ICTY, AC, *The Prosecutor v. Jalisić*, *Separate Opinion of Judge Nieto-Navia*, annexed to *Judgment*, 5 Jul. 2001, IT-95-10-A.

[634] ICTY, AC, *The Prosecutor v. Jalisić*, *Partial Dissenting Opinion of Judge Shahabuddeen*, annexed to *Judgment*, 5 Jul. 2001, IT-95-10-A, paras 11-12

> '(excepting clear cases of insufficiency of evidence, in which the decision goes in favour of the defence) the danger of deciding a no case issue by attempting to adjudicate on guilt at the mid-trial stage is that, if the no case decision went against the accused, he would understandably feel that the Trial Chamber had made a definitive finding of guilt, so that, in his mind, subsequent defence evidence and submissions would be addressed to a court which had already come to a conclusion as to the result of the case. It could not be correct to engender such lack of confidence in the judicial process'[635]

The second problem addressed by Judge Shahabuddeen is the correct test. He reproaches the TC for having referred only to part of the Prosecutor's evidence and in particular only to the material that it considered relevant to the test 'depriv[ing] itself of the benefit of being able to make recourse to a larger pool of material which the right test would have put at its disposal'.[636]

Judge Pocar appended a partial dissenting opinion as well. If, on one side, he agrees with the majority that the TC should dismiss the case if it believes that no reasonable tribunal could convict on the basis of the Prosecutor's evidence, he rejects the idea that the Chamber must continue the proceedings if a reasonable trier of fact could be satisfied beyond reasonable doubt of the guilt of the accused, 'even if it has concluded that, on the face of the evidence heard, that Chamber itself would not be satisfied beyond reasonable doubt of the guilt of the accused'.[637] He stresses the applicability of the no case to answer mechanism in a system distinguishing between triers of facts and triers of law, but points out that at the ICTY 'there is no jury; the judges are the final arbiters of the evidence.' Therefore, in his view, '[t]here is no point in leaving open the possibility that another trier of fact could come to a different conclusion if the TC itself is convinced of its own assessment of the case'.[638]

3.3. The following jurisprudence

The subsequent jurisprudence basically followed the approach of the AC[639] and on some occasion better specified the applicable standard or the way to apply it. For example, the

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[635] *Ibid*., para. 14.

[636] *Ibid*., para. 17.

[637] ICTY, AC, *The Prosecutor v. Jalisić*, *Partial Dissenting Opinion of Judge Pocar*, annexed to *Judgment*, 5 Jul. 2001, IT-95-10-A, para. 4.

[638] *Ibid*., para. 7.

[639] *See*, among others, ICTY, TC, *The Prosecutor v. Simić, Tadić, Zarić*, *Transcript of the hearing*, 9 Oct. 2002, IT-95-9-T, p. 12002; ICTY, TC, *The Prosecutor v. Brdjanin*, *Decision on Motion for Acquittal Pursuant to Rule 98bis*, 28 Nov. 2003, IT-99-36-T, paras 2-4; ICTY, TC II, *The Prosecutor v. Strugar*, *Decision on defence motion requesting judgment of acquittal pursuant to rule 98 bis*, 21 Jun. 2004, IT-01-42-T, para. 16; ICTY, TC, *The Prosecutor v. Radoslav Brdjanin concerning allegations against Milka Maglov*, *Decision on motion for acquittal pursuant to rule 98 bis*, 19 Mar. 2004, IT-99-36-R77, para. 9 even if some reference recalls the partially dissenting opinion of Judge Shahabuddeen; ICTY, TC I, *The Prosecutor v. Blagojević and Jokić*, *Judgment on motions for acquittal*

TC of the ICTR emphasised that the standard set forth by the AC of the ICTY requires the Prosecutor 'to establish a *prima facie* case'[640].

Moreover, the TC of the ICTY reaffirmed the prohibition of conducting any assessment of the credibility and reliability of the witnesses unless the Prosecution case can be said to have 'completely broken down', in that no trier of fact could accept the evidence relied upon by the Prosecution to maintain its case on a particular issue[641] and rejected that any determination as to the existence of a case to answer could be an indication of the view of the Chamber as to the guilt of the accused on that charge.[642]

More importantly, at a certain point one TC noted 'the extent and frequency to which Rule 98 *bis* has come to be relied on in proceedings' and 'the prevailing tendency for Rule 98 *bis* motions to involve much delay, lengthy submissions, and therefore an extensive analysis of evidentiary issues in decisions'. Therefore it pointed out the contrast of the procedure in front of the Tribunal with the rationale of the mechanism in the common law systems, whose 'essential function is to bring an end to only those proceedings in respect of a charge for which there is no evidence on which a Chamber could convict, rather than to terminate prematurely cases where the evidence is weak'.[643] It was this awareness which led to the amendment of the rule and to the introduction of a more rapid, oral and chamber-driven mechanism.

The AC further returned on the standard of review in the *Karadžić* judgment, where the Prosecutor appealed the decision of the TC to acquit under Rule 98*bis*. The Prosecutor argued that the AC could reverse the TC's acquittal if it determined that there was evidence which could have provided a basis for any reasonable TC to find the Accused guilty of the

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*pursuant to rule 98*bis, 5 Apr. 2004, IT-02-60-T; ICTY, TC I, *The Prosecutor v. Krajisnik*, *Oral decision on motion for acquittal*, 19 Aug. 2005, CT/MOW/997e; ICTY, TC, *The Prosecutor v. Delić*, *Transcript of the hearing*, 26 Feb. 2008, IT-04-83-T, p. 6891-6892; ICTY, TC, *The Prosecutor v. Prlić et al*., *Transcript of the hearing*, 20 Feb. 2008, IT-04-74-T, p. 27206-27207; ICTY, TC, *The Prosecutor v. Stanisić and Simatović*, *Transcript of the hearing*, 5 May 2011, IT-03-69-T, p. 11465-11466; ICTY, TC, *The Prosecutor v. Karadzić*, *Transcript of the hearing*, 28 Jun. 2012, IT-95-5/18-T, 28732-28733; ICTY, AC, *The Prosecutor v. Mladić*, *Rule 98bis Judgment*, 15 Apr. 2014, IT-09-92.

[640] ICTR, TC III, *The Prosecutor v. Semanza*, *Decision on the Defence motion for a judgment of acquittal in respect of Laurent Semanza after quashing the counts contained in the third amended indictment (Article 98bis of the Rules of Procedure and Evidence) and decision on the Prosecutor's urgent motion for suspension of time-limit for response to the Defence motion for a judgment of acquittal*, 27 Sep. 2001, ICTR-97-20-T, para.15.

[641] ICTY, TC, *The Prosecutor v. Galić*, *Decision on the motion for the entry of acquittal of the accused Stanislav Galić*, 3 Oct. 2002, IT-98-29-T, para. 11.

[642] ICTY, TC, *The Prosecutor v. Kordić and Čerkez*, *Decision on defence motion for judgement of acquittal*, 6 Apr. 2000, para. 17; ICTY, TC, *Prosecutor v. Hadzihazanovic and Kubura*, *Decision on motions for acquittal pursuant to rule 98 bis of the rules of procedure and evidence*, 27 Sep. 2004, IT-01-47-T, para.17.

[643] *Ibid*., para. 20.

charged offence. The AC, partially referring to the Jelisić jurisprudence, noted that '[p]ursuant to Rule 98*bis* of the Rules, a trial chamber is required to "assume that the prosecution's evidence [is] entitled to credence unless incapable of belief' and to "take the evidence at its highest"; it cannot "pick and choose among parts of that evidence" in reaching its conclusion.'

With regards to the SCSL, it generally followed the ICTY jurisprudence.[644] Nevertheless, it is only worth recalling that the TC I expressly rejected the reference to the beyond reasonable doubt made by the AC of the ICTY in the *Jelisić case*. It adopted instead the standard of the capability of the evidence to sustain a conviction.[645]

4. The no case to answer in the practice of the ICC

Neither the Statute nor the RPE include a procedure of no case to answer. Nevertheless, some TCs, including TC V(A) and TC VI respectively in the *Ruto and Sang case* and in the *Ntaganda case*, included in the directions on the conduct of the proceedings a reference to this procedure. Moreover, a reference to the no case to answer was also made by the parties in the procedure that led to the conclusion of the *Gbagbo and Blé Goudé case*.

Both the *Ruto and Sang case* and the *Gbagbo and Blé Goudé case*, which were stopped after the closing of the presentation of the evidence by the Prosecutor, were complicated by the fact that the Prosecutor largely used circumstantial evidence, asking the Judges to draw a certain number of inferences.[646]

4.1. The Ruto and Sang case

The first time that the no case to answer was evoked at the Court was in the *Ruto and Sang case*, which ended with a 'Decision on Defence Applications for Judgments of Acquittal' issued after the closing of the case of the Prosecutor. The decision was adopted by majority by

[644] *See* SCSL, TC I, *The Prosecutor v. Sesay, Kallon and Gbao ('RUF')*, *Rule 98 Decision*, 25 Oct. 2006, SCSL-04-15-T, 25 Oct. 2006; SCSL, TC II, *The Prosecutor v. Brima, Kamara and Kanu('AFRC')*, *Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98*, 31 Mar. 2006, SCSL-04-16-T; SCSL, TC II, *The Prosecutor v. Taylor*, *Decision*, *Transcript*, 4 May 2009, SCSL-2003-01-T. *See* KHAN K., DIXON R., FULFORD A., *Archbold, International Criminal Courts. Practice, Procedure, Evidence*, Sweet & Maxwell, 2005, p. 604.

[645] SCSL, TC I, *The Prosecutor v. Norman, Fofana, Kondewa*, *Decision on Motions for Judgment of Acquittal Pursuant to Rule 98*, 21 Oct. 2005, SCSL-04-14-T. In this regard *see* NIV A., *The Schizophrenia of the 'No Case To Answer' test in International Criminal Tribunals*, in *Journal of International Criminal Justice*, 14, 2016, p. 1121 at 1125.

[646] *See* ICC, TC V(A), *The Prosecutor v. Ruto and Sang*, *Decision on Defence Application for Judgments of Acquittal*, *Reasons of Judge Fremr*, 5 Apr. 2016, ICC-01/09-01/11-2027, para. 23. On the compatibility of the no case to answer procedure and circumstantial evidence *see* ARCHBOLD, *Criminal, Pleading, Evidence and Practice*, 2012, p.480, BLACKSTONE'S, *Criminal Practice*, Oxford University Press, 2014, p. 1762.

TC V(A) composed by Judge Eboe-Osuji, Judge Fremr and the dissenting Judge Herrera Carbuccia.

The possibility for the defence to file a motion for no case to answer was included in the directions on the conduct of the proceedings issued by the TC V(A) during the preparation of the trial. At that time the Chamber had not provided for a full procedure and had simply stated that it would have given 'both its reasons for permitting this manner of procedure and further guidance as to procedure and applicable legal test' in due course.[647]

The principles and procedure on the motion were issued later during the trial in the so called 'Decision no. 5'.[648] The decision expressly refers to the absence of statutory basis for the procedure, but deems it consistent with the Statute on the basis of Art. 64(3)(a) and inherent within the powers provided to the Chamber under Art. 64(2) and 64(6)(f). As far as the applicable standard is concerned, the Chamber draws a distinction between 'the determination made at the halfway stage of the trial, and the ultimate decision on the guilt of the accused'.[649] Therefore, the Chamber deems that the test applicable at the no case to answer stage is whether, on the basis of a *prima facie* assessment of the evidence, there is sufficient evidence on which, 'if accepted, a reasonable Trial Chamber could convict'.[650] It further excludes that the assessment includes any reference to the strength of the evidence, including reliability and credibility as the evidence must be taken at its highest. The Chamber than specifies that the test must be applied to each count and that in order to proceed it is enough to assess the existence of any criteria of individual criminal liability set forth in Art. 25 of the Statute. Moreover, in the light of the power of recharacterisation provided to the Chamber by Reg. 55, the Chamber must also take into account the possible use of the regulation before granting the Defence's request. Judge Eboe-Osuji appended a separate further opinion in order to better explain why, in his view, the *prima facie* assessment of the evidence is the appropriate test.[651]

It is now possible to turn to the decision closing the case. The decision of the majority is twofold: on one side there are the 'reasons of Judge Fremr', containing the procedural history, the reference to the standard of review and the review of the evidence. On the other

[647] ICC, TC V(A), *The Prosecutor v. Ruto and Sang*, *Decision on the Conduct of Trial Proceedings (General Directions)*, 9 Aug. 2013, ICC-01/09-01/11-847.

[648] ICC, TC V(A), *The Prosecutor v. Ruto and Sang*, *Decision No. 5 on the Conduct of Trial Proceedings (Principles and Procedure on 'No Case to Answer' Motions)*, 3 Jun. 2014, ICC-01/09-01/11-1334.

[649] *Ibid*., para. 23.

[650] *Ibid*.

[651] *See* below, 4.4.4. The standard of review.

side there are the reasons of Judge Eboe-Osuji, who completely adheres to the review of the evidence made by his colleague but adds his reflections on some aspects which he deems crucial, even if he admits some of them are a mere *obiter dictum.*

With regards to the reasons of Judge Fremr, under the section entitled 'standard of review' and subscribed also by Judge Eboe-Osuji, he recalls the test on the Decision no. 5 and provides a clarification. In his view, the reference to '*a reasonable* TC' clearly admits that different reasonable TCs may reach different conclusions. Nevertheless, he notes that, if *the* TC actually conducting the no case to answer procedure concludes that 'on the basis of the evidence before it, it would not be satisfied beyond reasonable doubt of the accused's guilt', there would be no reason for continuing with the proceedings.[652]

At the end of his Reasons, Judge Fremr adds some reflections on the standard of review, providing his personal view thereof. He points out that even if the review of the evidence was conducted following the abovementioned standard of review, he does not believe that the TC is prevented from conducting a credibility assessment but in those cases where it is obvious that the evidence (in particular the testimony) is unreliable. In his opinion it is not enough to look at the quantity of the evidence, but it is necessary to take into consideration its quality as well. He deems that it is the Chamber's duty to avoid an unwarranted continuation of the trial without any prospect of conviction. In the absence of any statutory discipline of the no case to answer and of a provision imposing the continuation of the trial irrespective of the strength of the Prosecutor's case, introducing this unnecessary limitation is inconsistent with the Chamber's duty to ensure a fair and expeditious trial as required by Art. 64(2) of the Statute, which is the only provision which may ground a decision to stop the trial before its 'natural' ending.[653]

Also Judge Eboe-Osuji points out the inconsistency of continuing criminal trials when the Prosecutor case turned out to be weak.[654] He returns on the standard provided for in the Decision no. 5 and enters into a detailed analysis of the concept of no case to answer, perhaps more suitable for a dissertation rather than for a judicial decision, in order to support his conclusions.[655] The fundamental aspects of his reasoning are four. First of all, he deems necessary to assess the evidence as a whole in order to assess its capability of securing a

[652] ICC, TC V(A), *The Prosecutor v. Ruto and Sang, Decision on Defence Application for Judgments of Acquittal, Reasons of Judge Fremr*, 5 Apr. 2016, ICC-01/09-01/11-2027, para. 18

[653] *Ibid*., paras 144-146.

[654] ICC, TC V(A), *The Prosecutor v. Ruto and Sang, Decision on Defence Application for Judgments of Acquittal, Reasons of Judge Eboe-Osuji*, 5 Apr. 2016, ICC-01/09-01/11-2027, para. 15

[655] *Ibid*., paras 46 ff.

conviction. The safeness of the conviction must, in his view, 'remain a matter of concern at the stage of the no case to answer submissions'.[656] In second place, he believes that when the triers of law is also the triers of facts, 'the reasonable doubt perceived in the case of the prosecution at its closing should then be a valid basis for the trial judge that an acquittal should be the proper verdict for a reasonable trier of fact to render at this stage. In fact, if the trial judge is not persuaded by the case of the Prosecutor, there is little chance that the case of the Defence will dispel this doubt, even more considering that the Defence is not requested to produce any evidence'.[657] Thirdly, in case of circumstantial evidence, which therefore requires the judge to draw inferences, the inference supporting the guilt must be compelling in order to support a conviction.[658] Ultimately, he overturns the '*prima facie*' test suggested in Decision no. 5 and explains that the Chamber's assessment includes the credibility or reliability of the evidence, in particular because, differently from the jury system the Chamber is also in charge of conducting this assessment.[659]

In conclusion he believes that 'the regime of no case to answer [is] applicable at the ICC' and 'it should enable the termination of a weak case after the case for the prosecution'.[660]

But Judge Eboe-Osuji also suggests adapting the no case to answer regime to the peculiar features of the Court. An assessment of the evidence beyond reasonable doubt in the middle of the proceedings may be reason for concern since it risks pre-adjudicating the case if the Chamber decides to continue. The same problem does not arise in case of dismissal, because it is immaterial whether the weakness of the Prosecutor's case depends on the credibility of the witness or on other factors. Therefore, for Judge Eboe-Osuji in the first case it would be enough for the Chamber to simply say that the case of the Prosecutor 'is not weak' without engaging in explaining why in order not to pre-adjudicate the case; in the second case the Chamber should be allowed to explain why, in its opinion, the case is weak.[661] The Judge further stresses the need to consider the case of the Prosecutor as a whole, conducting a provisional review with the purpose not to determine whether the Prosecutor has established guilt beyond reasonable doubt, but rather to determine whether the case is weak to the point

[656] *Ibid*., para. 60.
[657] *Ibid*., paras 71-72.
[658] *Ibid*., para. 74.
[659] *Ibid*., para. 93-95. *See* also paras 96 ff. where he concurs with the reasons of Judge Shahabuddeen and Judge Pocar in the *Jelisić case*.
[660] *Ibid*., para. 109
[661] *Ibid*., paras 110-114.

that the trial should be stopped. The focus is therefore the capability of the case to result in a conviction which does not need to address the question of proof beyond reasonable doubt.[662]

Judge-Eboe Osuji explains why, in his view, the TC would have the power to stop the case. The first reason emerges from Art. 64(2) of the Statute and the duty to ensure a fair and expeditious trial. The second reason is related to the powers of the PTC during the confirmation of the charges procedure. If at that stage the Chamber may assess the credibility and reliability of the evidence, it would be 'inconvenient' for the TC not to have the same power. In his view:

> '[a]t the close of the prosecution case at the level of the Trial Chamber (which entails an appreciably more robust process of inquiry) did the case for the prosecution remain as strong as the Pre-Trial Chamber had found it to be when the charges were confirmed? If so, there is a case for the accused to answer. If not, there is not'.[663]

Dissenting Judge Herrera Carbuccia conducts her own review of the evidence and reaches an opposite conclusion in respect of her colleagues'. She devotes some paragraphs to the standard of review. She recalls the standard unanimously adopted in Decision no. 5 and stresses that the reference to the 'reasonable Chamber' is to be interpreted as a Chamber capable of issuing a fair and not unfounded judgment.[664] The theoretical nature of the question excludes that conviction will be the only outcome of the trial at its end. She focuses in particular on the expression 'if accepted', which, in her view, entails the theoretical nature of a *prima facie* determination because at this stage the Chamber cannot establish whether it could convict. She interprets the concept of *prima facie* as 'superficial and "on the first appearance"' and excludes that the assessment of the evidence entails an evaluation of its strength. The standard is therefore 'one of "existence" rather than "weight"'.[665] She also notes that Decision no. 5 had, in line with the jurisprudence of the *ad-hoc* Tribunals, excluded an assessment of the reliability unless the case of the Prosecutor has 'completely broken down'. Eventually she finds that including an assessment of the credibility of the evidence at this stage and entering a beyond reasonable doubt standard is inconsistent with the expeditious conduct of the proceedings.[666] In Judge Herrera Carbuccia's view the evidence must be considered as a whole and 'must not be done in relation to every single individual piece of evidence'.[667] Even if some

[662] *Ibid*., para. 115.
[663] *Ibid*., para. 122.
[664] ICC, TC V(A), *The Prosecutor v. Ruto and Joshua Arap Sang, Dissenting Opinion of Judge Herrera Carbuccia*, annexed to *Decision on Defence Application for Judgments of Acquittal*, 5 Apr. 2016, ICC-01/09-01/11-2027-AnxI, paras 14 ff.
[665] *Ibid*., para. 17.
[666] *Ibid*., paras 16-20.
[667] *Ibid.*, para. 22.

items of evidence, in particular circumstantial evidence and hearsay, may be themselves insufficient to establish guilt, she deems necessary to assess them all together.[668] It is remarkable that Judge Herrera Carbuccia refers to the possible consequences that a no case to answer decision such as her colleagues' may have if it were appealed and the AC reversed it, referring it back to the TC.[669]

4.2. The Ntaganda case

In the conducts of proceedings of the *Ntaganda case*, TC VI declined to take any decision with regards to the possibility for the Defence to enter a motion for no case to answer. It only instructed the Defence to file a notice if it intended to file it towards the end of the presentation of the evidence by the Prosecution, in order to allow the Chamber to set out the procedure.[670] When the Defence filed the request, the TC VI decided to use 'its broad discretion as to whether or not to pronounce upon such matters' and deemed inappropriate to entertain the no case to answer motion. The Chamber recognised the possible advantages that a successful motion may bring, in particular a more focused and shorter trial, but also underlined the risk for a lengthy proceeding which may be counterproductive *vis-à-vis* the expeditiousness of the trial. Nevertheless, the Chamber did not exclude the possibility to engage in a *proprio motu* intervention, should it deem it appropriate.[671]

The Defence appealed the TC's decision, giving the AC the chance to rule, for the first time, on the no case to answer procedure. In particular, the AC decided on the compatibility of the no case to answer procedure with the Statute. In this regard the judgment is quite laconic, since it simply states that no provision rules this procedure, that the matter was not discussed in the preparatory works and that the possibility to introduce this procedure is left to the discretion of each TC which may decide to conduct or decline to conduct it in the exercise of its discretion.[672]

[668] *Ibid*., para. 22.
[669] *Ibid*., para. 21.
[670] ICC, TC VI, *The Prosecutor v. Ntaganda*, *Decision on the conduct of the proceedings*, 2 Jun. 2015, ICC-01/04-02/06-619, paras 17-18.
[671] ICC, TC VI, *The Prosecutor v. Ntaganda*, *Decision on Defence request for leave to file a 'no case to answer' motion*, 1 Jun. 2017, ICC-01/04-02/06-1931, paras 25-29.
[672] ICC, AC, *The Prosecutor v. Ntaganda*, *Judgment on the appeal of Bosco Ntaganda against the 'Decision on Defence request for leave to file a "no case to answer" motion*, 5 Sep. 2017, ICC-01/04-02/06-2026 OA6, paras 43-45.

4.3. The Gbagbo and Blé Goudé case

The second time that the Chamber decided to stop the case after the conclusion of the presentation of the evidence of the Prosecutor was in the case against Mr Gbagbo and Mr Blé Goudé. The procedure leading to the decision was quite long and deserves to be recalled.

First of all, differently from the *Ntaganda case*, the directions on the conduct of the proceedings[673] did not include a provision mentioning the no case to answer motions, even if some views in this regards had been presented by the Prosecutor[674] and the Defence before their drafting.[675] No reference appeared either in the amended conduct of the Proceedings.[676]

Nevertheless, when the Chamber heard the parties in order to decide on how to proceed after the conclusion of the presentation of the evidence by the Prosecutor, the Defence for Mr Blé Goudé flagged the possibility to file a motion of no case to answer.[677] After having heard the last witness called by the Prosecutor, the Chamber issued an order on the further conduct of the proceedings.[678] The TC I, sharing some views raised by the Defence, requested the Prosecutor to file a 'Trial Brief' in order to better appreciate the case of the Prosecutor in light of the many witnesses that the Office had withdrawn in respect to the list filed at the beginning of the trial. The Chamber further specified the features of this narrative document[679] in order to 'remedy some of the difficulties raised by the pre-trial brief [...] and, consequently, contribute to focus the debate on matters of substance'.[680] It also stated that after the filing of the Trial Brief, the Defence would have been given time for submitting written observations

[673] ICC, TC I, *The Prosecutor v. Gbagbo and Blé Goudé*, *Directions on the conduct of the proceedings*, 3 Sep. 2015, ICC-01/11-01/15-205.

[674] ICC, OTP, *The Prosecutor v. Gbagbo and Blé Goudé, Prosecutor's Observations on the Conduct of the Proceedings*, 21 May 2015, ICC-02/11-01/15-59, paras 2-6.

[675] ICC, Defence for Mr Gbagbo, *The Prosecutor v. Gbagbo and Blé Goudé*, *Soumissions de la Défance quant à la conduite de la procédure*, 21 May 2015, ICC-02/11-01/15-74, paras 44-51; ICC, Defence for Mr Blé Goudé, *The Prosecutor v. Gbagbo and Blé Goudé*, *Defence observations on the conduct of proceedings*, 21 May 2015, ICC-02/11-01/15-77, paras 3-5.

[676] *See* ICC, TC I, *The Prosecutor v. Gbagbo and Blé Goudé*, *Decision adopting amended and supplemented directions on the conduct of the proceedings*, 4 May 2016, ICC-02/11-01/15-498 and relative annex.

[677] ICC, Defence for Mr Blé Goudé, *The Prosecutor v. Gbagbo and Blé Goudé*, *Public Redacted Version of "Blé Goudé Defence submissions pursuant to the Chamber's order issued on 28 August 2017" (ICC-02/11-01/15-1040-Conf)*, 2 Oct. 2017, ICC-01/11-01/15-1040.

[678] ICC, TC I, *The Prosecutor v. Gbagbo and Blé Goudé*, *Order on the further conduct of the proceedings*, 9 Feb. 2018, ICC-02/11-01/15-1124.

[679] 'The Chamber notes that, for the trial brief to best serve its purpose as an auxiliary tool to the benefit of both the Chamber and the parties and participants, the Prosecutor shall (i) adopt a clear and simple structure, avoiding repetitions, cross-references and circularity; (ii) ensure that each footnote only includes references to the specific items of evidence supporting the specific statement the footnote is appended to; (iii) avoid making references to evidence in bulk.' *Ibid*., para. 11.

[680] *Ibid*., para. 11.

and 'indicate whether or not they wish to make submission of a no case to answer motion or, in any event, whether they intend to present any evidence'.[681]

After the filing of the Trial Brief, both the defence teams submitted their observations expressing the view that the Prosecutor had not presented enough evidence to warrant a conviction and indicated that they intended to bring motions challenging the adequacy of the Prosecutor's evidence asking for a full acquittal. Therefore, the TC I issued a second order on the further conduct of the proceedings. In the order, the Chamber recalled the decision of the AC in the *Ntaganda case* and referred to the objectives pursued in the *Ruto and Sang case* but also stressed the need for each Chamber to identify the appropriate measures in order to reach those objectives. Therefore, noting that the Prosecutor had not respected the Chamber's request for conciseness and precision, it authorised the Defence 'to make concise and focused submissions on the specific factual issues for which, in their view, the evidence presented [was] insufficient to sustain a conviction and in respect of which, accordingly, a full or partial judgment of acquittal would be warranted'.[682] The Chamber concluded by stating that the submissions would have assisted the Chamber 'in determining whether the evidence presented by the Prosecutor suffice[d] to warrant the continuation of the trial proceedings and hear evidence from the accused, or whether the Chamber should immediately make its final assessment in relation to all or parts of the charges'.[683]

The Prosecutor, noting the different views expressed by the parties with regards to the test to be applied and the absence of any determination of the TC in this regard in the conducts of the proceedings, filed a motion for clarification to the Chamber. In the motion, the Prosecutor, partially referring to the test used by the TC V(A), stressed the need to apply the test on whether 'a reasonable TC could convict'. Eventually she warned the Chamber against conducting any assessment of the reliability and credibility.[684]

The Presiding Judge, acting as Single Judge on behalf of the Chamber, dismissed the request, noting that it was premised on the wrong assumption that the Chamber had decided to follow the steps of the TC V(A) in the *Ruto and Sang case*. He further stressed that this assumption amounted 'to a mischaracterisation of the procedural steps devised by this

[681] *Ibid*., para. 14.

[682] ICC, TC I, *The Prosecutor v. Gbagbo and Blé Goudé, Second order on the further conduct of the proceedings*, 4 Jun. 2018, ICC-02/11-01/15-1174, para. 10.

[683] *Ibid*., para. 13.

[684] ICC, OTP, *The Prosecutor v. Gbagbo and Blé Goudé, Urgent Prosecution's motion seeking clarification on the standard of a "no case to answer" motion*, 8 Jun. 2018, ICC-02/11-01/15-1179.

Chamber' in the two orders, which instead constituted the procedural path to be followed.[685] While

> 'the First Order was meant to provide the Prosecutor with an opportunity to provide a comprehensive narrative of her case as she sees it in light of the evidence on the record, with ample margins of discretion and flexibility as to how to shape such narrative', the Second Oder was [...] aimed at providing the Defence with an equally flexible opportunity to illustrate in detail their contention that such evidence is not suitable to sustain a conviction.' [686]

The Single Judge further concluded that there was therefore no reason for adopting a position as to the standard used by TC V(A) or to the application of those principles in the final decision in that case. Moreover, he noted that the Prosecutor's statement to the effect that the standards enunciated in *Ruto and Sang case* are representative of the jurisprudence at the Court 'sound[ed] far-fetched', being it the only precedent in the jurisprudence of this Court. [687]

When the Defence filed the motions,[688] one referring to a *jugement d'acquittement* and the other to the 'no case to answer', the Prosecutor filed a very long response basically extending and detailing the content of the Trial Brief.[689]

On 15 January 2019, after having heard the parties and participants in courtroom, the TC finally issued, by Majority, Judge Herrera-Carbuccia dissenting, an oral decision[690] stating that 'The Chamber, having thoroughly analysed the evidence and taken into consideration all legal and factual arguments submitted orally and in writing by the parties and participants, finds [...] that there is no need for the defence to submit further evidence as the Prosecutor has not satisfied the burden of proof in relation to several core constitutive elements of the crimes as charged.' This conclusion was followed by a list of four elements which, in the view of the Majority, the Prosecutor had failed to demonstrate. Ultimately, it reserved for full reasoning in due course in order to avoid the maintenance of the accused in detention once that the Majority had 'already arrived at its decision upon the assessment of the evidence'. The Majority, not

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[685] ICC, TC I, *The Prosecutor v. Gbagbo and Blé Goudé*, *Decision on 'Urgent Prosecution's motion seeking clarification on the standard of a "no case to answer" motion'*, 13 Jun. 2018, ICC-02/11-01/15-1182, para. 11.

[686] *Ibid*., para. 12.

[687] *Ibid*., para. 13.

[688] ICC, Defence for Mr Gbagbo, *The Prosecutor v. Gbagbo and Blé Goudé*, *Requête de la Défense de Laurent Gbagbo afin qu'un jugement d'acquittement portant sur toutes les charges soit prononcé en faveur de Laurent Gbagbo et que sa mise en liberté immédiate soit ordonnée*, 23 Sep. 2018, ICC-02/11-01/15-1199; Defence for Mr Blé Goudé, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, *Blé Goudé Defence No Case to Answer Motion*, 23 Sep. 2018, ICC-02/11-01/15-1198.

[689] ICC, OTP, *The Prosecutor v. Gbagbo and Blé Goudé*, *Annex 1 – Prosecution's Consolidated Response to the Defence No Case to Answer*, 10 Sep. 2018, ICC- 02/11-01/15-1207-Anx1, annexed to *Prosecution's Response to Defence No Case to Answer Motions*.

[690] ICC, *Transcript of the hearing*, ICC-02/11-01/15-T-232-ENG.

referring neither to the no case to answer nor to an acquittal, simply 'decide[d] that the Prosecutor ha[d] failed to satisfy the burden of proof to the requisite standard as foreseen in Art. 66 of the Rome Statute', 'grant[ed] the defence motions for acquittal from all charge' and ordered the immediate release of the accused.

The oral decision was accompanied by a written dissenting opinion of Judge Herrera Carbuccia. Expressly departing from the decision of the Single Judge on the request for clarification, which had been adopted on behalf of the Chamber, Judge Herrera Carbuccia accuses the Majority of not having clarified the applicable standard and referred to the standard of 'whether there is evidence on which a reasonable TC could convict'.[691] In her view, an analysis at a 'halfway stage' does 'not conclude with a determination of the truth or a decision based on a 'beyond reasonable doubt" standard'. She refers again to an 'expeditious and superficial (*prima facie*)' assessment 'in order not to preclude the judges from continuing with the trial (or be disqualified) if the Chamber decides to dismiss the motions for acquittal and carry on with the trial'.[692] Judge Herrera Carbuccia refers to the possible consequences that a reversal of the decision in Appeal may have on the continuation of the trial. Moreover she accuses the Majority of having applied an unclear and slow procedure, defeating the purpose of the no case to answer.[693] Eventually, she wonders whether the Majority, which declared having reached a decision upon the assessment of the evidence, had considered the 'relevance, probative value and potential prejudice to the accused of each item of evidence'. In her view, this assessment is only required to reach a determination beyond reasonable doubt and, according to the system of evidence adopted by the Chamber, had to be deferred at the end of the trial.[694]

On 16 July 2019, both the Majority and the dissenting Judge filed their full reasoned opinions. Also in this case the Majority decision is twofold.

Judge Henderson opens his opinion explicitly referring to the applicable standard in the no case to answer procedure. He refers to the Decision no. 5 of TC V(A). As Judge Fremr and Judge Eboe-Osuji, he refers to the AC's decision in the *Mbarushimana case* and endorses the view that, differently from the traditional no case to answer procedure, the TC is allowed to

[691] ICC, TC I, *The Prosecutor v. Gbagbo and Blé Goudé*, *Dissenting Opinion to the Chamber's Oral Decision of 15 January 2019*, 15 Jan. 2019, ICC-02/11-01/15, para. 40.
[692] *Ibid*., para. 41.
[693] *Ibid*., para. 43.
[694] *Ibid*., paras 46-47.

assess the credibility and reliability of the evidence.[695] In second place he points the finger against the system of admission of evidence adopted by majority by the Majority, that, having admitted all the evidence without filtering it, prevents, in his view, to take the evidence at its highest. He deems that it would be 'highly artificial' to rely on unauthenticated documents and anonymous hearsay in order to determine whether there is a case for the Defence to be answered since this evidence would not be given any value at the end of the trial.[696] For this reason, the Chamber is obliged, in his view, to conduct a full review of the evidence submitted 'in order to determine whether such evidence is sufficient to support a conviction on the respective charge or charges'.[697]

Another important aspect of Judge Henderson's opinion is his statement to the effect that the acquittal following a no case to answer decision is not a judgment under Art. 74 of the Statute. Adopting a strict adversarial view, he believes that a judgment under Art. 74 of the Statute can be adopted only at the end of the case of the Defence and after the formalities provided for under rule 141 and 142 RPE. According to him, the correct legal basis for a decision of no case to answer is instead Art. 66(2) of the Statute, which states that 'The onus is on the Prosecutor to prove the guilt of the accused'. Therefore, the decision is not a formal judgment of acquittal on the basis of the beyond reasonable standard, but only has 'an equivalent legal effect'.[698]

The opinion of Judge Tarfusser starts with an express statement that he does not consider 'necessary, or wise' to engage here on a debate as to the nature of the decision'[699] making evident the existence of a disagreement on this matter. He simply takes note of Judge Henderson's position that Art. 74 is not the appropriate basis to render a decision on the no case to answer. On the other hand, he recalls the content of the oral decision and stresses that the effect of the decision is an acquittal from all charges since they are not sustained by the evidence. Ultimately, he recalls the content of the decision of the Single Judge with regards to

[695] ICC, TC I, *The Prosecutor v. Gbagbo and Blé Goudé*, *Reasons of Judge Geoffrey Henderson*, 16 Jul. 2019, ICC-02/11-01/15-1263-AnxB, annex to *Reasons for oral decision of 15 January 2019 on the Requête de la Défense de Laurent Gbagbo afin qu'un jugement d'acquittement portant sur toutes les charges soit prononcé en faveur de Laurent Gbagbo et que sa mise en liberté immédiate soit ordonnée, and on the Blé Goudé Defence no case to answer motion*, para.3.

[696] *Ibid*., paras 4-7.

[697] *Ibid*., para.8.

[698] *Ibid*., paras 10-17.

[699] ICC, TC I, *The Prosecutor v. Gbagbo and Blé Goudé*, *Opinion of Judge Cuno Tarfusser*, 16 Jul. 2019, ICC-02/11-01/15-1263-AnxA, annex to *Reasons for oral decision of 15 January 2019 on the Requête de la Défense de Laurent Gbagbo afin qu'un jugement d'acquittement portant sur toutes les charges soit prononcé en faveur de Laurent Gbagbo et que sa mise en liberté immédiate soit ordonnée, and on the Blé Goudé Defence no case to answer motion*, para. 2.

the no case to answer procedure testifying his intention not to follow the path of the *Ruto and Sang case*.[700]

Conversely, Judge Herrera Carbuccia recalls the content of her previous written dissenting opinion to the oral decision and adopts the same approach followed in the *Ruto and Sang case*. In addition, she explains, for each kind of piece of evidence, how she will address it. She concludes by saying that since in her opinion the trial should have continued, her assessment is only provisional and, should have the trial continued, she would have carried on the duty to analyse each piece of evidence at the end of the trial.[701]

4.4. Remaining issues

Nowhere in the Statute a provision introduces a mid-way procedure in order to stop the trial if the Chamber reaches a determination leading to the acquittal of the accused. While the Chamber cannot convict the accused until it has heard the Defence, which under the Statute is also given the right to speak last, there is no reason for preventing it to acquit the accused if, at a certain point in trial, it reaches a determination in this sense. If it does, it is reasonable that the TC must have the power to stop the case and enter a judgment of acquittal. This is not only appropriate in order to save time and resources, it is also required by those general principles enshrined in Art. 64 of the Statue and requiring the Chamber to grant a fair and expeditious trial.

That said, the question is whether the no case to answer procedure is the instrument offering a coherent solution with the statutory system. It is possible to identify at least five reasons militating against this procedure.

4.4.1. The adversarial nature of the procedure

The first reason is the strict link between the no case to answer procedure and the adversarial structure of the trial.[702] In the adversarial system the Prosecutor presents her case

[700] *Ibid*., para. 2.

[701] ICC, TC I, *The Prosecutor v. Gbagbo and Blé Goudé*, *Dissenting Opinion of Judge Herrera Carbuccia*, 16 Jul. 2019, ICC-02/11-01/15-1263-AnxC, annex to *Reasons for oral decision of 15 January 2019 on the Requête de la Défense de Laurent Gbagbo afin qu'un jugement d'acquittement portant sur toutes les charges soit prononcé en faveur de Laurent Gbagbo et que sa mise en liberté immédiate soit ordonnée, and on the Blé Goudé Defence no case to answer motion*, paras 26-51.

[702] Among scholars enhancing the adversarial nature of the trial and therefore supporting its consistency with the no case to answer procedure, *see* FRIMAN H., *Trial Procedures – With a Particular focus on the Relationship between the Proceedings of the Pre-Trial and Trial Chambers*, in STAHN C. (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015, p. 909 at 926. Nevertheless, Friman recognises the managerial role of many TCs, but does not take into account the possibility that this approach could reduce the adversarial structure of the trial. The same Author, in

and after the conclusion of the case of the Prosecutor the Defence may present its case. The no case to answer procedure finds its place in between. Nevertheless, irrespective of the tendency highlighted in the praxis of the international criminal tribunals and of the Court itself, nowhere in the Statute or in the RPE there is a reference to the adversarial structure of the proceedings.[703] On the contrary, the conduct of the proceedings is left to the discretionary power of each Chamber, which under Art. 64(3)(a) of the Statute, upon assignment of a case for trial, has the duty to confer with the parties and adopt such procedures that are necessary to facilitate the expeditious conduct of the proceedings. Moreover, Rule 134 RPE states that prior to the commencement of the trial, the TC may rule on any issue concerning the conduct of the proceedings. The same power is recognised during the course of the trial. Therefore, each TC may follow a different approach, and structuring the trial in a different way, for example by requesting the parties to address first specific decisive aspects, such as the contextual element of the crimes or the modes of liability. In these cases, the no case to answer procedure could not find a proper place. At the same time, it would be even more irrational to prevent the Chamber from issuing a judgment of acquittal if, for example, after having heard the parties on the contextual element of the crimes, the Chamber deems that the Prosecutor has not provided enough evidence to support her allegation.

4.4.2. The risk of pre-judging the case

The second reason for avoiding this mechanism is the high risk of pre-adjudicating the case in the light of the correspondence between the subject deciding on the law and on the merit of the case. Even if Judge Eboe-Osuji addressed this problem and seems having found a solution, the suggested solutions are possibly applicable only if the Chamber decides to continue with the case and however obliges the Defence to produce evidence. The solution is debatable. Although saying that the case of the Prosecutor 'is not weak' does not include a determination on the liability of the accused, the TC's decision demonstrates that the Chamber which will adopt the final decision believes that the case of the Prosecutor 'is not weak'. Even

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a collective work, notes the need for caution in applying the no case to answer procedure at the Court in the light of the non-pure adversarial nature of the proceedings. FRIMAN H., BRADY H., COSTI M., GUARIGLIA F., STUCKENBERG C.F., *Cherges*, in SLUITER G., FRIMAN H., LINTON S., VASILIEV S., ZAPPALÀ S. (eds), *International Criminal Procedure*, Oxford University Press, 2013, p. 381 at 487.

[703] TC V(A) seems instead to give for granted the adversarial structure of the proceedings in front of the Court and therefore the possibility to clearly mark the distinction between a case of the Prosecutor and a case of the Defence. ICC, TC V(A), *The Prosecutor v. Ruto and Sang*, *Decision No. 5 on the Conduct of Trial Proceedings (Principles and Procedure on 'No Case to Answer' Motions)*, 3 Jun. 2014, ICC-01/09-01/11-1334, paras 17-18. The AC seems instead more cautious in this regard and also notes that in any event the adversarial structure does not automatically imply the no-case-to-answer procedure. ICC, AC, *The Prosecutor v. Ntaganda*, *Judgment on the appeal of Bosco Ntaganda against the 'Decision on Defence request for leave to file a "no case to answer" motion*, 5 Sep. 2017, ICC-01/04-02/06-2026 OA6, paras 50-52.

if a non-weak case is not necessarily a strong case and does not necessarily mean that the responsibility of the accused has been proven beyond reasonable doubt, the Defence would *de facto* be forced to produce evidence in order to challenge the (existing) case of the Prosecutor.

But the risk of pre-judging is even more evident if the TC grants the motion of the Defence as mentioned by Judge Herrera Carbuccia in both her dissenting opinions. As testified by the *Ruto and Sang case*, and even more by the *Gbagbo and Blé Goudé case*, a Chamber stopping the case has the duty to explain why it stopped it. Temporarily leaving aside the effects (vacation of the charges rather than acquittal) and the nature of the decision granting the request (judgment under Art. 74 of the Statute or another kind of decision), it is clear that the Chamber must reason the decision and (irrespective of the standard applied) review the evidence explaining why it does not suffice to continue with the trial. If the Prosecutor appeals the decision and the AC grants the Prosecutor's appeal, the trial should continue. It is hardly imaginable that the Prosecutor would accept to continue the trial in front of a Chamber who (at least by majority) has already declared that it would not be necessary to hear the Defence in order to acquit (or at least vacating the charges). It is therefore highly probable that the Prosecutor would require the disqualification of those judges which have expressed themselves in favour of the conclusion of the trial (probably accompanied by a request for disqualification by the Defence of the minority which would have opted for the continuation of the trial). Such a request could hardly be rejected but to the detriment of the fairness towards the Prosecutor because a Chamber which has already stopped the case and possibly acquitted the accused could not change its mind after having heard the case of the Defence. A procedure which increases the risk of a re-trial or of a fake (continuation of the) trial is therefore counterproductive since it jeopardises both fairness and expeditiousness, i.e. those principles which would instead pursue.

4.4.3. The nature of the decision

A third problem is the nature of the decision of no case to answer. In particular the problem is determining whether it is a decision or a judgment. The national systems always refer to a judgment of acquittal as it is rendered by a jury which can only convict or acquit. Therefore, also in the rare cases of magistrates, it always maintains the nature of judgment. The same was expressly recognised by the AC of the ICTY.[704]

[704] ICTY, AC, *The Prosecutor v. Karadžić*, *Judgment*, 11 Jul. 2013, IT-95-5/18-AR98bis.1, para. 9: 'The Appeals Chamber recalls that an appeal against an acquittal entered at the Rule 98*bis* stage of a case is an appeal against a judgement. Thus, in an appeal of a Rule 98*bis* judgement of acquittal, the

The case-law of the ICC, on the contrary, does not seem to give it necessarily the status of judgment. The decision in the *Ruto and Sang case* calls it 'Decision on Defence Applications for Judgments of Acquittal', therefore, despite referring to the judgment of acquittal the TC V(A) names it as 'decision'. Further, the fact that the Majority decided to vacate the charges rather than acquitting, makes it difficult to consider it a judgment.

In the *Gbagbo and Blé Goudé case* the problem is directly addressed by Judge Henderson, which, despite agreeing on the need to fully acquit the accused, does not find it appropriate to enter a judgment under Art. 74 of the Statute. Judge Tarfusser simply takes note of the position of his colleague, and stresses that the outcome of a decision is an acquittal. More explicitly, Judge Herrera Carbuccia, in her dissenting opinion attached to the oral decision on acquittal criticises the Majority for not issuing a full reasoned opinion in one time as required by Art. 74 of the Statute. The Prosecutor, in its notice of appeal seems having interpreted the decision rendered by the Majority of TC I as a judgment under Art. 74 of the Statute, since her first ground of appeal is the violations of the requirements listed in Art. 74(5) of the Statute.[705]

4.4.4. The standard of review

A fourth aspect is the applicable standard of review. As mentioned above, the Decision no. 5 in the Ruto and Sang case refers to the *prima facie* case test and stresses the difference with the standard required for conviction at the final stage of a trial. Moreover, Judge Eboe-Osuji devotes his entire separate opinion to explaining why the *prima facie* test is the most appropriate in the no case to answer procedure. After an in depth analysis, Judge Eboe-Osuji reaches the conclusion that the test of the *prima facie* case is applicable both at the confirmation procedure and at the end of the case of the Prosecutor.[706] In the second case, the purpose is determining whether the Prosecutor 'has managed (or failed) to sustain a forensic reality, at the *prima facie* level, that the accused has a case to answer; in the sense that the evidence thus far presented by the Prosecution has been able (or unable) to support any hypothesis that is consistent with guilt on the part of the accused'.[707] Conversely, since the Chamber never convicts the accused at the end of the case of the Prosecutor, 'it is not really

proceedings are governed by Article 25 of the Statute and by the standards of appellate review for alleged errors of law and alleged errors of fact.'

[705] ICC, OTP, *The Prosecutor v. Gbagbo and Blé Goudé*, *Prosecution Notice of Appeal*, 16 Sep. 2019, ICC02/11-01/15-1270, para. 5.

[706] ICC, TC V(A), *The Prosecutor v. Ruto and Sang*, *Separate further opinion of Judge Eboe-Osuji*, annexed to *Decision No. 5 on the Conduct of Trial Proceedings (Principles and Procedure on 'No Case to Answer' Motions)*, 3 Jun. 2014, ICC-01/09-01/11-1334-Anx, para. 105.

[707] *Ibid*., para. 107.

necessary at this stage to trouble in any way the question whether or not the evidence establishes guilt beyond a reasonable doubt'.[708]

Notwithstanding this, even if repeating that it applied the standard of whether a reasonable TC could convict, the Majority[709] in the *Ruto and Sang case* admits that irrespective of whether a different TC could convict, the TC actually deciding must stop the case if it concludes that, on the basis of the evidence before it, it is not satisfied beyond reasonable doubt of the guilt of the accused.[710] Therefore, the Majority, despite the attempt to refer to a theoretical abstract test, basically uses as reference the beyond reasonable standard test.

But assuming to adopt the approach of the *prima facie* case the first question would be determining its meaning. Judge Herrera Carbuccia interprets this expression as 'superficial'. This interpretation seems hardly compatible with the importance of the values at stake. Leaving aside this unhappy translation, the reasoning of Judge Eboe-Osuji which draws a parallel between the concept of *prima facie* case in the Statute of the *ad hoc* Tribunals required for the indictment and the substantial reasons to believe standard requested by the Rome Statute for the confirmation of the charges seems convincing. Nevertheless, even if the same test is applied at two different stages and relies on different evidence, the subsequent question is whether it is really possible to apply this test once the Prosecutor has concluded the presentation of the evidence. This usually means having already attended dozens of hearings, heard all the witnesses and analysed at least the most relevant documentary evidence which is often used in courtroom. At the confirmation of charges the PTC has at its disposal what the Prosecutor considers the most relevant evidence. Life testimony is an exception and the procedure of the confirmation of the charges is much shorter than the trial. If the confirmation procedure is not a duplicate of the trial, also the trial is not a duplicate of the confirmation procedure and the knowledge of the case by the TC is deeper. At the end of the presentation of the evidence by the Prosecutor, the TC necessarily has a knowledge of the case and the

[708] *Ibid*.

[709] Even if this statement is contained in the reasons of Judge Fremr, it is the standard of review applied to the evidence and subscribed also by Judge Eboe-Osuji, even if, as seen above, he also reiterates in his reasons the risks of applying the beyond reasonable standard at the no-case-to-answer procedure.

[710] ICC, TC V(A), *The Prosecutor v. Ruto and Sang*, *Decision on Defence Application for Judgments of Acquittal, Reasons of Judge Fremr*, 5 Apr. 2016, ICC-01/09-01/11-2027, para. 19: 'Indeed, if the Chamber, after assessing the evidence in accordance with the above-stated standard, comes to the conclusion after the Prosecution has finished calling its evidence that it could not support a conviction beyond reasonable doubt, then it should enter an acquittal and therewith end the proceedings even if it were possible for a different trier of fact to be satisfied beyond reasonable doubt of the guilt of the accused on the basis of the same evidence. This is consistent with the rationale of 'no case to answer' litigation.'

evidence far beyond the *prima facie* standard. Moreover, as highlighted both by Judge Fremr and Judge Eboe-Osuji, a Judge which has heard a witness necessarily has an opinion on the reliability and credibility of that witness that cannot but affect the weight given to its testimony. Pretending to consider evidence which the actual Judge does not give importance to is not useful to the expeditiousness of the trial. Therefore, the expression *prima facie* may be reasonable at the investigation stage, or at the pre-trial stage. But not when all the evidence has been submitted. This is further confirmed by the fact that at this stage the trial could be at its end because the Defence might decide not to call any evidence.

One conclusive remark. Keeping in mind the abovementioned issues connected to the pre-judgment of the case, the 'whether a reasonable TC could convict' test is inconsistent with a decision adopted by majority. If one of the Judges of a Chamber deems that a reasonable Chamber could convict on the basis of the available evidence, it means that she could convict on the basis of the available evidence. Therefore, stating that no reasonable TC could convict, her colleagues on the bench are alternatively wrong - because at least a TC sharing the point of view of the minoritarian Judge could convict - or are accusing the minoritarian Judge of being unreasonable. The same applies in the reversed case.

4.4.5. The consistency of the no case to answer with the Statute

A fifth aspect is the consistency of the procedure in the overall system of the Statute and in particular with the confirmation of the charges procedure.[711] It must be recalled that the *ad-hoc* Tribunals, which included Rule 98*bis* among the RPE, did not include a procedure analogous to that provided for under Art. 61 of the Statute.

Notwithstanding this, neither the TC V(A) nor the AC, found that the inclusion in the Statute of the confirmation of the charges procedure could obviate a subsequent no case to answer procedure. The TC V(A) referred to the 'lower evidentiary standard, limited evidentiary scope and distinct evidentiary rules applicable' at that stage and highlighted the different nature and content of the evidence at the two stages.[712] As to the AC, it noted that the confirmation of the charges 'is not intended to replace a "no case to answer" procedure' or any other procedure for that matter', but is a 'distinctive component of the protection of the rights

[711] *See* also AMBOS, K., *Treatise on International Criminal Law, Vol. III: International Criminal Procedure*, Oxford University Press, 2016, p. 353 footnote 193.

[712] ICC, TC V(A), *The Prosecutor v. Ruto and Sang, Decision No. 5 on the Conduct of Trial Proceedings (Principles and Procedure on 'No Case to Answer' Motions)*, 3 Jun. 2014, ICC-01/09-01/11-1334, para. 14.

of the accused', admitting the compatibility between these two mechanisms when recognising the discretion to each TC to decide upon the no case to answer.[713]

4.5. Concluding remarks

In conclusion, it is self-evident that there is no agreement on the no case to answer procedure. Moreover, there are many aspects which complicate or make the no case to answer procedure superfluous, preventing it from being a useful tool in order to grant the fairness and expeditiousness of the proceedings.

The adversarial nature of the procedure and its link with the common law tradition is the first problem. The thorough study made by Judge Eboe-Osuji in his opinions demonstrates that the trial at the Court shall, in his view, be exclusively led by legal arrangements inspired only by one of the two main families of law. Despite the attempt of adapting the common law procedure to the Rome Statute, it is inevitable that the large amount of differences between these systems make it almost impossible to create a coherent mechanism. The use of the language itself must be adapted in such a way that it would be better to completely re-think a mechanism which would fit the characteristics of the Statute. The right solution would therefore be starting from the comparative analysis of legal systems belonging also to civil law countries. Since legal questions are the same in each system, if each Country has found its own solution in order to face them, it is not clear why the Court could not find its solutions as well.

A first reason for abandoning the practice of the no case to answer is the artificiality of the assessment which it requires to the Judges. As seen above, and as highlighted by Judge Pocar at the ICTY,[714] it obliges a Judge which is both triers of law and triers of facts to act as if

[713] ICC, AC, *The Prosecutor v. Ntaganda, Judgment on the appeal of Bosco Ntaganda against the 'Decision on Defence request for leave to file a "no case to answer" motion*, 5 Sep. 2017, ICC-01/04-02/06-2026 OA6, para. 53.

[714] Similar concerns were expressed also by other Judges at the ICTY, such as Judge Agius, also cited by NIV A., *The Schizophrenia of the 'No Case To Answer' test in International Criminal Tribunals*, in *Journal of International Criminal Justice*, 14, 2016, p. 1121 at 1129, (ICTY, TC II, *The Prosecutor v. Brđanin*, *Transcripts*, 2 Dec. 2003, line 23118 ff. saying: These are fundamental in any criminal law system, be it civil or be it common-law-based, and those matters transcend the usual or accepted practice in exercises like that contemplated in Rule 98 here, which I better not elaborate on, because it's a system which has been adopted from the common law tradition, where the judge or magistrate who decides that matter is usually not going to be the judge or magistrate who will decide the merits of the case later on, and most of the time the merits being left in the hands of lay jurors. But here we have got this hybrid animal of transporting the common law principle and putting us in the anomalous situation where we have to acknowledge that we -- the three of us suffer from schizophrenia. We have to convince ourselves that we are not going to be the Judges that will eventually try this case at the end and just put ourselves in -- anyway, it's an awkward -- believe me, it's the first time I'm doing this in my life, knowing that I'm going to be the judge who will decide the issue later on, together with

it were only triers of law, preventing a rapid development of the trial.[715] The theoretical discussion on the applicable standard of review is clearly another valid reason, but the relationship with the whole system of the Court is probably the most important one. Introducing an additional intermediate stage to the already articulated structure of the trial only risks delaying the trial since it usually requires time for the Defence to prepare the motions, time for the Prosecutor and the Legal Representatives to respond and time for the Chamber to decide.[716]

If, on one side, it is true that the confirmation of charges does not obviate the possible weakness of the case in trial, it is not possible to pretend that it does not exist. It functions as filter and intermediary procedure between the pre-trial and the trial stage. Therefore, it is first of all necessary that the confirmation of the charges allows the Prosecutor to focus the object of the trial. If, at a certain point during the trial, the TC deems nevertheless that the evidence is no longer capable of supporting the charges, it should be allowed to enter a judgment of acquittal for all or some of the counts. In this regard it seems that the approach of TC VI was the right one, namely, to allow the Court to engage in a *proprio motu* review of the evidence. If, upon this review the Chamber finds that the evidence is not enough or is not of good quality to support an allegation, and the recharacterisation under Reg. 55 is useless, the Chamber should partially or fully acquit the accused.

One question may rise, i.e. whether the Chamber should flag the evidentiary weakness to the Prosecutor and possibly require additional or better evidence. Indeed, one may wonder whether the Chamber which does not acquit once that the Prosecutor has provided for additional evidence implicitly gives to the Defence the impression that the additional evidence convinced the Chamber of the goodness of the Prosecutor's allegation. This seems a false problem because the decision of the Chamber not to enter a direct judgement of acquittal (even after the submission of additional evidence) does say nothing on the possible responsibility of the accused. In the Italian system, the fact that the Judge does not enter a judgment of acquittal under Art. 129 of the Italian code of criminal procedure does not mean that she will convict the accused.

Judge Janu and Judge Taya, and trying to convince Judge Janu and Judge Taya and myself, forget about that, just imagine that's going to be someone else.').

[715] In the same vein *see* NIV A., *The Schizophrenia of the 'No Case To Answer' test in International Criminal Tribunals*, in *Journal of International Criminal Justice*, 14, 2016, p. 1121 at 1127 ff.

[716] Analogous problems were highlighted in the practice of the *Ad-Hoc* Tribunals. *See* In this regard, *see* KHAN K., DIXON R., FULFORD A., *Archbold, International Criminal Courts. Practice, Procedure, Evidence*, Sweet & Maxwell, 2005, p. 603; TOCHILOVSKY V., *The Law and Jurisprudence of the International Criminal Tribunals and Court*, Interstitia, 2014, p. 1071-1072.

The possible acquittal should moreover be given the same dignity of any acquittal. The mere fact the TC did not need to hear the possible evidence of the defence does not alter the nature of the acquittal. The idea of 'mid-way acquittal' itself should probably be abandoned. Despite the tendency of following a structure analogous to the one used in adversarial systems, the duty of objectivity and impartiality burdening on the Prosecutor of the ICC and her duty to investigate both incriminating and exculpatory circumstances, make it impossible to talk about a 'case of the Prosecutor'. The idea of a 'case of the Prosecutor' is by definition antithetical to the search for truth requested by Art. 54 of the Statute. Therefore, it is consequently inappropriate to refer to the 'case of the Defence'. Moreover, even if the Defence is expected to take position with regards to the responsibility of the accused, it is fictitious to consider that the 'end' of the trial coincides with the end of 'the case of the Defence'. A trial ends once the TC has enough elements to decide. What is important is that the Chamber does not convict before having heard the Defence, but if the evidence of the Prosecutor cannot sustain the conviction, nothing prevents it to acquit the accused. On the contrary, the need for granting expeditiousness and the rights of the Defence impose the Chamber to decide.

If the acquittal is full, a possible problem would be offered by Rule 141(2) RPE which requires the Presiding Judge to invite the Prosecutor and the Defence to make their closing statements. Nevertheless, the function of the closing statements is more ritual than of substance and as it clearly emerges from the express statement that the Defence shall be given the opportunity to speak last, it is aimed at safeguarding the rights of the Defence. Since a direct judgment of acquittal cannot be but in favour of the accused, it would be inappropriate to prevent the Chamber to issue a judgment of acquittal only because of a formality. Moreover, it must be recalled that a rule cannot be interpreted in a way which is inconsistent with the Statute. In this case, interpreting Rule 141(2) as preventing the Chamber to directly acquit the accused would be in contrast with Art. 64(2) of the Statute. A possible alternative would be for the TC to invite the parties to present their closing statements in order to respect the formality and then issue its judgment.

Ultimately, only the nature of judgment may adequately serve the purpose of the decision. A judgment under Art. 74 of the Statute is directly appealable under Art. 81. Conversely, other decisions are appealable under Art. 82 of the Statute. Since the decision would not be among those for which Art. 81(1)(a), (b) or (c) grants direct appeal, it could be appealed only under Art. 82(1)(d), therefore only with the leave of the TC issuing it. It would be unusual at best to allow the TC to block the appeal against a decision terminating the proceedings. It is significant that also the Prosecutor in the *Gbagbo and Blé Goudé case* did not request for leave to appeal, but directly referred to the AC.

CONCLUSIONS

The Prosecutor of the ICC faces significant challenges in performing her activities. Many of them are inherent in the functioning of the Court. For example, differently from other international experiences, the Court does not have the primacy over national jurisdictions, but its functioning is ruled by the principle of complementarity, granting the States the power to primarily exercise their penal power. Further, the Prosecutor of the ICC is not invested of the same powers as the prosecutors of other international tribunals and does not benefit of special powers granting her primacy even when her action is supported by a referral of the UNSC. The need for cooperation of the States is a safeguard for the States but risks jeopardising the effectiveness of the Prosecutor's activity. Since the duty to cooperate with the Court has limited applicability to the States Parties to the Rome Statute, the non-adherence of States such as the U.S., Russia, China and India (where the first three are also permanent members of the UNSC), further compromises the chances to obtain adequate support.

Besides, the Prosecutor may be required to investigate in hostile situations: unless her intervention is originated by a self-referral, in case of referral by other States or by the UNSC, and even more in case of investigations *proprio motu* under Art. 15 of the Statute, the States concerned may be reluctant in providing assistance to the Prosecutor, as her requests may be perceived as an improper intromission in national affairs.

The principle of complementarity, also requesting the Court to focus on a few relevant cases, in conjunction with the limited resources at the disposal of the Prosecutor, leads to tendentially investigating and prosecuting subjects occupying leading positions. Clearly, the more these subjects are affiliated to non-state actors, the more the chances of the Prosecutor to obtain cooperation increase. Nevertheless, international crimes may be (and often are) committed by State actors and the inability to investigate these crimes deprives the international criminal justice of part of its meaning.

Even though these difficulties cannot be easily circumvented by the Prosecutor alone, organisational and performing improvements are possible, in particular at the stage of the investigations. Many trials (for example in the cases against Mr Abu Garda, Mr Kosgey, Mr Ruto and Mr Sang, Mr Bemba, Mr Gbagbo and Mr Blé Goudé) demonstrated gaps, inadequacy of the evidence and sometimes even incapacity to recognise their insufficiency to proceed or to amend the narrative on the basis of the available material. The excessive ambition of the Prosecutor in structuring her cases mentioned by some Chambers mirrors these difficulties.

The Prosecutor is aware of the need of improvements in her action, as it emerges from the mandate given to External Independent Experts in order to produce a Report reviewing the OTP's conduct of the Kenya cases, including a root cause analysis of how the Office conducted its preliminary examination, investigations and prosecutions in the situation; and containing recommendations. Improvements in the activity of the Prosecutor may also come from an overall rethinking of the role of the Prosecutor in the statutory framework and particularly of her alleged discretion. Both the case-law and the doctrine have tendentially enhanced the importance of granting discretion to the Prosecutor, as only discretion could allow her to properly exercise her functions. The equivalence between discretion and independence has further increased this idea, as if limiting the Prosecutor's discretionary powers would be tantamount to make her act under the direction of other subjects.

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As briefly seen in Chapter I, the concept of discretion has been studied from a philosophical perspective by many authoritative scholars. This work did not engage in providing for an original definition of discretion, but only aimed at understanding a concept that is often associated with the action of the Prosecutor. The concept of discretion is essentially rooted in the power of a subject to decide among different alternatives. In the absence of alternative courses of action, discretion cannot emerge. Various authors identify in legality, legitimacy and reasonableness the limit of the admissible alternatives. Moreover, the decision ultimately adopted by the subject in charge must be driven by logic. The reasoning of one choice among the various alternatives allows to distinguish discretion from arbitrariness and ensures the transparency of the exercise of the discretionary power. The existence of limits to discretion and the possibility to verify its exercise are therefore its main features.

It has also been seen that, from a philosophical perspective, discretion is often placed at the same level as interpretation, and even in the opening of Chapter II it has been recalled that scholars refer to 'interpretative discretion' as opposed to 'procedural discretion'. Thus, the elastic nature of a concept is often considered a source of discretion. Other authors mark instead a line between interpretative activity and discretion. This second alternative seems preferable, especially in light of the application of the concept of discretion to the activity of the Prosecutor, where the exercise of discretion occurs in the decision on whether to investigate or not and in whether to prosecute or not. Since interpretation is an activity performed in order to give content and substance to a word, opting for an interpretation rather than for another does not confer discretion to the Prosecutor. The expression 'interpretative discretion' seems instead an unnecessary duplication of the concept 'margin of appreciation'

(*margine di apprezzamento*, *Beurteilungsspielraum*) that characterises each subject in charge of interpreting. For a clearer understanding it is possible to apply this reasoning to Art. 53 of the Rome Statute.

In Art. 53 of the Rome Statute two of the criteria driving the Prosecutor in the adoption of a decision on whether to investigate and prosecute are elastic concepts: 'gravity' and 'interests of justice'. These two terms are therefore usually linked to the Prosecutor's discretion. But an extensive or restrictive interpretation of two elastic concepts such as 'gravity' and 'interests of justice' does not *confer* or *deprive* the Prosecutor of the power to initiate an investigation or a prosecution. Leaving for one moment aside 'gravity', the interests of justice clause undoubtfully allows the Prosecutor to adopt a decision not to investigate or prosecute and creates therefore an alternative to the decision to investigate or prosecute. But the scintilla of the discretionary power is the clause itself, rather than the concept of interests of justice. The Prosecutor will always have the power to decide whether to investigate or prosecute and to defer the investigation and the prosecution if some circumstances occur, even if the interests of justice is given the more restrictive interpretation possible. The different interpretation of interests of justice does not affect the *existence* of the power to decide not to investigate or prosecute, but instead affects the *extent* of this power, or better may increase or reduce the number of situations where the Prosecutor can decide to defer an investigation or a prosecution. Even if this seems the understanding of those scholars suggesting to use the concept of 'interpretative discretion' as well, this expression is misleading, as it suggests that interpreting the concept of interests of justice falls within the competence of the Prosecutor, who can therefore autonomously decide the extent of her discretionary power. But interpreting the Rome Statute, including the parameters leading the action of the Prosecutor under Art. 53, is primarily responsibility of the Chambers. The only relevant 'interpretative discretion' does not belong to the subject in charge of adopting the decision on whether to prosecute or not. In other words, the discretion inherent in the interpretative activity of the concept of 'interests of justice' is not the discretion of the Prosecutor, but of the Chambers. The only relevant discretion of the Prosecutor remains the 'procedural discretion', i.e. the discretion to decide on whether to prosecute or not within the legal parameters set forth in Art. 53 as interpreted by the Chambers. For this reason, it has been necessary to analyse the concepts of gravity and interests of justice, even if only the latter turned out to be a discretionary factor.

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Before turning to the specific concepts of 'gravity' and of 'interests of justice', Chapter I further provided with a brief overview of the functioning of the prosecution in some

national systems. It has been seen that the distinction between systems adopting the model of mandatory prosecution and systems opting for the opportunity principle does not correspond to the traditional opposition between civil law and common law countries. But the comparison between the various systems demonstrates that on various aspects the opposition is more formal than substantive. The systems opting for the principle of mandatory prosecution always include some mechanisms aimed at avoiding an unnecessary overburdening of the judicial system. Vice-versa, all the systems opting for the opportunity principle include instruments for avoiding arbitrariness and granting a tendential equal application of the law: directives and superior control are the most common.

Despite the tendency of the supporters of the discretionary model to accuse the systems applying the principle of mandatory prosecution to hide a *de facto* discretion behind the screen of the legality principle, these systems tendentially include mechanisms of judicial control (which sometimes can be triggered even by the intervention of private subjects such as the victim) pursuing the same functions that the systems adopting the principle of opportunity expressly foresee in order to avoid abuses. Therefore, the idea that adjustments to the principle of mandatory prosecution may be the cause of uncontrolled abuses and that therefore it should be abolished in favour of an opened embracement of opportunity is unfounded.

The difference between the systems adopting the principle of mandatory prosecution and those adopting the opportunity principle is rather the approach towards investigation and prosecution. The basic idea of the former is that the existence of a *notitia criminis* requires the intervention of the Prosecutor, *unless* some circumstances prescribed by the law (and therefore foreseen by the legislator) occur. Conversely, under the discretionary model, the prosecutor is in charge of deciding whether the *notitia criminis* deserves her intervention, and in taking her decision she will be guided by legal directives, guidelines, principles and ethic.

The discussion on whether one system is better than the other is immaterial. The question is rather which of the two mentioned approaches the Prosecutor of the ICC should adopt according to Art. 53 of the Statute. It has been seen that most of the arguments supporting the idea of a Prosecutor possessing a (even significant) discretionary power are inherent in the necessary selectivity characterising ICL and in the interests of justice clause.

As to the selectivity, the main problem that other international prosecutors met in other international jurisdictions was that of selecting defendants and charges. Selectivity only rarely played a more relevant role, such as in the case of investigating alleged crimes committed by the NATO forces in Former Yugoslavia, or alleged crimes committed by Tutsi in Rwanda. But

even there, the prosecutors had quite a specific mandate, and their discretion may be equated to the discretion of the Prosecutor of the ICC investigating within the context of a specific situation.

The first problem posed by selectivity in the functioning of the Court is instead whether the Prosecutor has the power to select the situations to investigate, exercising her discretion in this activity. It is apparent that the structure of Art. 53 follows the approach described above typical of the systems adopting the mandatory prosecution (a duty to prosecute *unless* some circumstances occur). First, the provision states that the Prosecutor 'shall' open an investigation. Further, even if Art. 53 states that this duty is subject to the *Prosecutor's determination* of the existence of the reasonable basis, her determination does not follow an assessment of the 'opportunity' of the investigation, but rather of the existence of legal parameters, whose interpretation lies within the responsibility of the Chambers. Arguments such as the absence of a duty to commence an investigation in case of referral by a State or the UNSC do not automatically confer the Prosecutor any discretionary power. The possibility that the outcome of her assessment is a decision not to investigate is not tantamount to the existence of a power to decide in favour or against a prosecution. It only means that the Prosecutor has the duty to commence an investigation *if* the legal parameters are satisfied and, conversely that she has the duty to defer it, if they are not. Discretion plays therefore no role in the decision.

As far as the interests of justice clause is concerned, it would be improper to treat it differently from the other parameters, namely jurisdiction and admissibility. Its 'negative' structure does not empower the Prosecutor with more discretionary power than the 'positive' structure of the other two criteria. What the Prosecutor is required to do is assessing whether the interests of justice requires her not to investigate, therefore assessing a legal criterion which, if existent, may induce her to defer the investigation rather than to commence it. Discretion is not involved in the identification of the factors, but rather in the balancing procedure. As seen above, the elastic nature of this concept may extend the number of situations where the Prosecutor may adopt a decision not to investigate: the more the Court refrains from clarifying the content of interests of justice, the more the Prosecutor can fill it of significance, using this parameter for extending her room for manoeuvre in declining an investigation. But even the OTP adopted a restrictive interpretation of the concept of interests of justice, highlighting the exceptional applicability of the clause and automatically reducing the chances to benefit from it.

The limited purpose of ICL and the principle of complementarity militate in favour of a general duty for the Prosecutor to intervene. ICL only includes the most serious crimes, which *per se* deserve investigation and prosecution. This was the assumption founding the Rome Statute. Moreover, since the intervention of the Court (and of the Prosecutor) is limited to those situations that not only fall within ICL, not only reach a specific gravity threshold (that will be discussed in a while), but that also have not been (genuinely) investigated or prosecuted, the possibility of conferring one subject a discretionary power to decline investigation is, at best, unusual. Moreover, her legal functions do not make her the right subject for adopting decisions not driven by legal parameters, where politics inevitably takes over.

Arguments such as the limited budgetary resources at the disposal of the Prosecutor do not justify the existence of a discretionary power of selecting the situations where to investigate. First, economic restraints cannot undermine a legal framework so explicitly pointing towards the existence of a duty. Secondly, the risk of overburdening may be avoided through an appropriate interpretation of the legal standards required for distinguishing common crimes from international crimes and of the gravity threshold for admissibility. If, even adopting a rigid approach concerning the jurisdiction *ratione materiae* and possibly admissibility, the resources available to the Prosecutor were not sufficient for facing her challenges, it would not be her responsibility to decide which situations deserve the Court's attention and which do not. Ensuring that the Office has all the resources it requires to perform its activity is the responsibility of the States. If the Prosecutor does not have adequate resources, she may be compelled to develop adequate strategies, not for deciding on to whether to investigate or not, but rather on how to deal with the limited resources even possibly prioritising some situations, always making it clear that the impossibility to investigate all the situations that satisfy the legal requirements does not depend from her will.

Once the Prosecutor has conducted her investigations, the question turns to the prosecution. The Prosecutor is required to assess analogous legal parameters as when adopting a decision on whether to open an investigation. Nevertheless, the very function of the Court, before its capabilities, prevents her from prosecuting all the people responsible of international crimes within a given situation. At this stage, a selection is therefore warranted. The different wording of Art. 53(1) and (2) of the Statute, further suggests that applying the legality principle with regards to the investigation and introducing selective mechanisms at the prosecution stage is not inconsistent with the spirit of the Statute.

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CONCLUSIONS

In Chapter II the legal parameters to be considered by the Prosecutor in adopting a decision under Art. 53 have been analysed: jurisdiction, admissibility and interests of justice. Only if all these criteria are satisfied, the Prosecutor has the abovementioned duty to commence an investigation and may prosecute one or more individuals. If there is no doubt on the legal nature of the jurisdictional criteria and on the admissibility requirements under Art. 17(1)(a), (b) and (c), gravity as admissibility requirement under Art. 17(1)(d) of the Statute and interests of justice under Art. 53(1)(c) and (2)(c) have been often considered discretionary parameters. Even if their aptitude of conferring discretionary power to the Prosecutor has already been challenged, they require further analysis. Gravity has been analysed in order to demonstrate that it should not be considered a discretionary parameter. The Court (the Prosecutor at first and the Chambers as ultimate authoritative source) should rather build an objective concept of gravity, allowing to identify a threshold, beneath which the intervention of the Court is not warranted and above which it is. The concept of interests of justice instead has been analysed in order to understand its meaning and therefore determining whether this elastic concept is so broad that the Prosecutor may be *de facto* recognised a discretionary power to decide on the opportunity of an investigation or a prosecution.

As far as gravity is concerned, the Statute does not provide for a precise definition, but its inclusion among the admissibility requirements makes it clear that it is an additional feature to the gravity that characterises all international crimes. Therefore, although all international crimes are grave, not all of them necessarily deserve to be prosecuted at the international level. Nevertheless, this distinction seems to be relevant exclusively with regards to war crimes, while for the other crimes there is a sort of presumption of 'inherent additional' gravity. The consistent case-law of the Court requires gravity to be determined taking into account quantitative and qualitative factors, in order not to limit the assessment to a mere counting of the number of victims.

The need to conduct an admissibility assessment under Art. 53(1) at the situation stage, where it is not yet possible to talk about proper cases, the Court has consistently repeated that the admissibility is to be done with regards to 'potential cases'. Therefore, also the assessment of gravity at the situation stage is made with regards to potential cases. The Court focused its attention on both the gravity of the crimes and the concept of gravity *vis-à-vis* the alleged authors of the crimes, including scrutiny of the functional role of the alleged responsible and their actual role in the commission of the crime. Differently, in the assessment of gravity under Art. 53(2)(b), i.e. when switching from the situation to the case stage, the Court gives greater attention to the gravity of the crime, significantly reducing, although not excluding, the relevance of the relationship between gravity and alleged

perpetrators. Since the existence of mere potential cases makes an assessment of gravity superfluous as opposed to subjects that will not necessarily be the object of an actual case, excluding the assessment of gravity *vis-à-vis* the alleged perpetrators at the situation stage is advisable.

Irrespective of the factors included in the concept of gravity, many scholars recognise it a selective function, that requires a comparison among situations in order to determine the situations to be investigated. It is unnecessary to recall here the many problems raised by this interpretation that further exposes the Prosecutor to significant criticism and it is also apparent that this function of gravity is strictly connected to the challenged discretionary vision of the power of the Prosecutor. The absence of a duty to prosecute all the alleged responsible of international crimes allows instead a selective function of gravity in case selection and prioritisation. Constructing the concept of gravity objectively makes it possible to use it as a threshold distinguishing those situations requesting the Court's intervention from the others. The Statute itself refers to 'sufficient gravity', suggesting the need to identify an objective parameter and the drafting history of Art. 53 supports this conclusion. At the investigation stage a selective function may play a role only in the abovementioned exceptional situation where the Office does not have the capabilities of investigating all the situations that meet the objective requirements. The objective concept of gravity should be the primary criterion to exclude *de minimis* conducts also at the case stage, even if, as recalled above, at the case stage it may also be used with selective purposes.

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The interests of justice clause is the third and last fundamental criterion composing the assessment of the Prosecutor. As mentioned, it is negatively constructed as the Prosecutor has to assess whether factors deponing *against* the investigation or the prosecution exist. As in the case of gravity, the Statute does not provide for a definition of interests of justice, and this absence has inevitably fomented the debate. The historical background of the provision suggests that the concept of 'justice' is here to be interpreted in broad sense and not limited to the concept of 'criminal justice'. The possibility to include factors external to strict procedural law in its meaning is at the basis of the extensive references made between interests of justice and discretion.

The interests of justice clause legally introduces an alternative to the investigation or the prosecution, namely the non-investigation and the non-prosecution, in a way that partially differs from the other parameters of Art. 53. Jurisdiction and admissibility (including gravity if

objectively interpreted) fix exacting legal boundaries: a crime is or is not an international crime, a crime falls or does not fall within the temporal or territorial jurisdiction of the Court, a crime reaches or does not reach the required gravity threshold, an individual has been or has been not prosecuted by a national Court. Of course, in some circumstances this assessment may be difficult and may require judicial inquiry, but once the question has been determined, there is clearly no alternative between investigation and non-investigation and between prosecution or non-prosecution. The vague expression 'interests of justice' inspires instead the idea that the Prosecutor is free to consider all those factors which are not identifiable *ex ante* and balance them with those militating in favour of the investigation or the prosecution, making her free to adopt the most suitable decision to the concrete case. This freedom in interpreting the concept of interests of justice would turn into a freedom of discretionarily assessing the need for an investigation or a prosecution and is therefore often considered as expression of a discretionary power.

Nevertheless, by careful analysis it is possible to significantly reduce the extent of the expression 'interests of justice', identifying a limited number of factors possibly preventing the investigation or the prosecution. Giving substance to this concept reduces discretion because it is easily possible to assess whether the single relevant factor exists or does not exist, but it does not exclude discretion, because, differently from jurisdiction and admissibility, the existence of a factor composing the interests of justice militating against the investigation or the prosecution does not automatically prevent it. Discretion remains in the balancing procedure that may lead to a decision in one sense or in another.

Even if the role of the Prosecutor in interpreting the notion of interests of justice is relevant, because the Prosecutor is the first subject conducting the assessment, the development of its meaning lies within the power of the Chamber, since the interests of justice, as any other requirement under Art. 53 of the Statute, is a legal criterion included in the Statute and therefore subject to the Chamber's interpretation. It is worth recalling that, in the absence of case-law, the OTP published a Policy Paper providing its own understanding of the concept of interests of justice, interpreting it in a restrictive way. As anticipated, the judicial role of the Prosecutor significantly reduces the relevance of factors of political nature. The impossibility to completely exclude their relevance depends on the context in which the Court acts.

The correctness of the identification of the factors included in the concept of interests of justice and the correctness of their balancing with the factors militating in favour of an investigation or a prosecution (that further enjoy a rebuttable presumption) in conjunction with their exceptional prevalence are the parameters for verifying the correct exercise of the

Prosecutor's discretion under this provision both in the procedure under Art. 53(3) and (despite the recent judgment of the AC) in the release of the authorisation under Art. 15.

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Chapter III has analysed the control exercised over the activity of the Prosecutor. The control exercised by the Assembly of the States Parties and by the UNSC is not of judicial nature, but may affect the activity of the Prosecutor. For example, the approval of the budget by the Assembly is crucial for the Prosecutor's ability to investigate all the situations deserving the Court's attention. The control of the UNSC has different faces, and it generally affects the whole action of the Prosecutor: a referral may enable her to act also when the Court does not have jurisdiction; a selective referral may limit the scope of the Prosecutor's action; a deferral may prevent her action at all. Since the UNSC is responsible for granting peace and security, a factor that, in very limited and exceptional circumstances, may be included in the concept of interests of justice, a possible overlapping with the Prosecutor's determination may rise in this regard. For example, even if the Prosecutor may reject to open an investigation in a situation referred to her Office by the Council, it would be inappropriate for her to adopt a decision on the basis of the interests of justice clause since the investigation would compromise peace and security. Similarly, the UNSC could challenge the interests of justice assessment made by the Prosecutor when deferring an investigation under Art. 16 of the Statute.

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The most interesting control on the activity of the Prosecutor is the review exercised by the Chambers, and in particular by the PTC.

The first kind of review is the authorisation for commencing an investigation under Art. 15 of the Statute, i.e. when the Prosecutor acts *proprio motu* without a referral from a State or the UNSC. The recent judgment of the AC denying the reviewing power of the PTC on the request for authorisation has been challenged under various perspectives and does not justify the overruling of the previous consistent practice of many PTCs. Therefore, it would be advisable not only to maintain the judicial review of the Prosecutor's request, but to make it even more pervasive. The case-law of the PTCs shows two different approaches as to the function of the PTC in performing the review. The majoritarian approach limits it to a mere 'filtering' or 'strictly limited supervisory' function, that, with various degrees of intensity, aims at assessing the correctness of the determination of the Prosecutor and simply verifies whether the request is frivolous or moved by political reasons. Only in these cases the Chamber may reject the request for authorisation. On the other hand, the minoritarian approach

grants the PTC a more pervasive role, that may be defined as 'supervisory' or 'fundamental and decisive filtering'. According to this different perspective, the PTC is required to reach its own determination on the existence of the reasonable basis for commencing the investigation, grounding the determination in the information made available by the Prosecutor. The minoritarian approach is preferable for two reasons. First, the PTC shall reason the decision. Second, it can partially authorise the investigation. This testifies that the reason for the (partial) rejection cannot be rooted in the political nature of the request, but in the inability of the Prosecutor to substantiate part of the request. Moreover, the power of the Prosecutor to submit a new request in case of rejection militates against a limited function of the Chamber where it is only requested to assess the frivolousness of the investigation or the political reasons behind the request: the submission of new material is unsuitable to solve these problems.

The following issue is determining the value of the authorisation for the Prosecutor's investigation. Common features to all the decisions authorising the commencement of investigations are their blurred boundaries and the liberty given to the Prosecutor as to the object of the investigation. Many PTCs have even significantly extended the scope of the authorisations in respect to the Prosecutor's requests. This freedom does not seem having facilitated the performances of the Prosecutor. A more focused approach may instead be of assistance. In order to reach this result, the authorisation needs to be binding for the Prosecutor. Only those aspects of the request that the Prosecutor has substantiated with adequate information and that allowed the PTC to reach a positive determination as to the need for an investigation may delimit the scope of the authorised investigation. The binding nature of the authorisation emerges once again from the possibility of the PTC to partially authorise an investigation. Otherwise, assuming that the Prosecutor is not bound by the content of the Chamber's decision, she could also investigate those crimes included in the request and rejected by the Chamber, depriving the Chamber's authorisation of its meaning.

Strengthening the function of the PTC in the release of the authorisation and recognising its binding nature also means that the PTC has the power to provide for a different reading of the information *vis-à-vis* that made by the Prosecutor in the request. The re-reading is meaningless if the authorisation is not binding, as various PTCs seem instead to believe. But according to this interpretation, the re-reading would be no more than a suggestion to the Prosecutor, whose utility is dubious.

As to the extent of the reviewing power of the PTC (and once again ignoring the debatable recent judgment of the AC), it includes not only jurisdiction and admissibility, but also the interests of justice. Although the Prosecutor is not requested to prove that the

investigation is 'in the interests of justice', the information possibly brought to demonstrate that the investigation is consistent with the Statute and more generally the supporting material could be used by the Chamber in order to reach the opposite conclusion drawn by the Prosecutor. This power is the direct consequence of the power to offer a different reading of the information. The advantages of clarifying the content of interests of justice as far as possible and of limiting its applicability to exceptional circumstances avoid misuses of this concept also by the PTC, whose chances of rejecting a request on the basis of this parameter would be significantly reduced.

The binding nature of the authorisation does not prevent the Prosecutor to seek amendments on the basis of the information collected during the proper investigation. If the evidence suggests a legal recharacterisation it would be a non-sense preventing her to amend the scope of the investigation, in light of both the low standard required for opening an investigation and the possibility to legally recharacterise the charges in trial through Reg. 55. But as for the amendment of the charges after the confirmation decision, the Prosecutor should request the PTC for an authorisation. Similarly, if during the investigation the evidence points towards new crimes or new groups allegedly responsible for the crimes, the Prosecutor, once she is satisfied of the existence of reasonable basis in this regard, should submit a request for extension of the scope of the authorisation, allowing the PTC to analyse the supporting material and possibly authorise the extension of the scope of the investigation.

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The control of the PTC is not limited to the decision of the Prosecutor to initiate an investigation *propio motu* but is extended to the decision of the Prosecutor not to commence an investigation or a prosecution, as expressly recognised by Art. 53(3) of the Statute. If under Art. 53(3)(a) the judicial review may only be triggered by a request of the referring entity, according to Art. 53(3)(b) the PTC may review the Prosecutor's decision *ex officio*. The second difference is that the Prosecutor's decision under Art. 53(3)(a) (jurisdiction or admissibility) has immediate effect, while the Prosecutor's decision under Art. 53(3)(b) (interests of justice clause) is ineffective until confirmation of the PTC that may oblige the Prosecutor to initiate an investigation or a prosecution. Since the application of different procedures is rooted in the different nature of the criteria which lead to the Prosecutor's decision, Art. 53(3) further corroborates the idea expressed above that gravity, as all other parameters related to jurisdiction and admissibility, must be considered objectively, leaving the interests of justice as the sole criterion involving a discretionary component.

Even in this case the first problem is determining the nature of the reviewing power of the PTC over the Prosecutor's decision. In this case as well two approaches are possible: the *de novo* review of the information or the error-based approach. The Prosecutor herself admits that under Art. 53(3)(b) the PTC is allowed to conduct the former, i.e. the most intrusive kind of review. The question is therefore whether the review under Art. 53(3)(a) can be less intrusive or not.

As demonstrated by the dissenting opinion of Judge Kovács, when discussing technical aspects such as jurisdiction or admissibility under Art. 17(1)(a), (b) and (c) it is not really possible to avoid the so-called *de novo* review which on the other side cannot prescind from an assessment of the information that the Chamber must have the chance to analyse. The PTC considers the information and decides whether the alleged crimes fall within the Court's jurisdiction or not and whether the potential or actual cases would be or are admissible or not. Accepting the objective gravity notion, which justifies the application of the procedure under Art. 53(3)(a) to all grounds of admissibility, there is no reason for applying a different kind of review. Despite the lack of clarity, the recognition of the PTC's power to conduct a *de novo* review seems endorsed by the AC.

The problem of applying a *de novo* review under Art. 53(3)(a) is clearly that there would be little margin for the Prosecutor to depart from the PTC's determination. But this effect must be connected to the nature of the (legal) parameters rather than to the kind of review. Since the problem under Art. 53(3)(a) is determining the existence of the legal requirements for initiating an investigation or a prosecution, irrespective whether the PTC detects an error in the Prosecutor's assessment directly from its reasoning (error-based approach) or rather from the whole information put at its disposal (*de novo* review), the Prosecutor cannot challenge the determination of the Chamber, unless she appeals the decision. In this regard, it is regrettable that a narrow majority (three to two) of the members of the AC has denied appealability to the PTC's decision in the *Registered Vessels situation*.

Therefore, once the PTC deems that the Prosecutor made a mistake, it is undeniable that the request for review should induce the Prosecutor to follow the PTC's determination, as noted by Judge Eboe-Osuji and Judge Ibañez Carranza. This interpretation is consistent with the mandatory nature of the prosecution once the legal requirements of Art. 53(1)(a) and (b) and 53(2)(a) and (b) are fulfilled (unless the interests of justice clause is applicable).

This proposal does not equate the mechanism under Art. 53(3)(a) to the mechanism under Art. 53(3)(b) because only in the second case the investigation or the prosecution would

be 'compelled'. Only under Art. 53(3)(b) the Prosecutor might be forced to commence an investigation despite not agreeing with the interpretation of a discretionary factor. Following the PTC's determination as to legal factors such as jurisdiction and admissibility (including gravity) would be simply applying the legal statutory requirements as interpreted by the only subject allowed to authoritatively interpret them, i.e. the Chambers.

This solution excludes the possibility that the Prosecutor might hide, behind a gravity determination, non-legal considerations, jeopardising the transparency of the decision. In this way the Prosecutor is protected against any criticism of adopting politically motivated decisions. The correctness of the Prosecutor's determination in the assessment of the interests of justice, would instead be granted by the Chamber's confirmation.

As to the review of a decision adopted on the basis of the interests of justice clause, since the disagreement between PTC and the Prosecutor leads to the extreme solution of the compulsory investigation or prosecution, it is once again important to recall the need to clearly limit the extent of the concept of interests of justice. It must be further noted that in this case, despite the negative nature of the interests of justice requirement, it would be very difficult to challenge the Prosecutor's determination without enhancing the consistency of the investigation or the prosecution with the interests of justice.

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The last relevant control exercised by the PTC over the activity of the Prosecutor, takes place at the confirmation of the charges. This procedure represents a crucial step in the architecture of the trial. The relatively high standard of proof required by the Statute demands the Prosecutor to structure her case in a solid way. Her discretion as to the evidence supporting her allegations is significantly limited by the possibility for the PTC to reject the request or adjourn the hearing. The acquittal of Mr Bemba, Mr Gbagbo and Mr Blé Goudé, cases where the PTCs had detected deficiencies in the evidence, should recall not only to the Prosecutor, but also to the PTCs, to be careful in confirming the charges if not completely satisfied of the substantial grounds to believe standard. Further, the Prosecutor should be confident in the possibility to prove the guilt of the suspect beyond reasonable doubt *before* submitting a request to confirm the charges.

Moreover, it seems that the Prosecutor has sometimes tried to compensate the deficiency of the evidence by leaving all the possibilities as to the modes of liability open, considering it a prerogative falling within prosecutorial discretion. But as highlighted by the PTC III in the *Gbagbo case* (and more recently by the PTC II in the *Yekatom and Ngaïssona*

case), the Prosecutor should shape the cases in a coherent way. Presenting a 'case theory' (an expression used by the OTP strictly connected to the common law proceedings that may rise doubts about the conformity to the duty of finding the truth) and then requiring a Chamber to confirm modes of liability inconsistent with this 'theory' is reason for concern. It is instead advisable to structure the cases in a clear and focused way, possibly limiting the number of charges and proceeding only for those charges and modes of liability which are sufficiently supported by strong evidence.

This approach would limit the use of Reg. 55, whose applicability should be exceptional. Moreover, it is worth recalling that the Reg. provides a power *for the Chamber* to modify the legal characterisation of the facts. The practice of the Prosecutor to stimulate the Chamber's intervention, usually immediately after the confirmation of the charges, is regrettable and testifies the difficulty of focusing on framed cases. It also testifies a certain disregard for the charges as depicted by the PTC, partially undermining the importance of its filtering and supervisory role. The decision of the TC VII in the *Article 70 case* seems instead going in the right direction.

Even assuming that in a specific case the TC finds Reg. 55 applicable at the initiation of the trial, a possible solution for granting the respect of the prerogatives of the PTC with regards to the confirmation of the charges, is referring the matter to the PTC on the basis of Art. 64(4) of the Statute.

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Ultimately, it has been analysed the procedure applied by the Court in its case-law when it found it necessary to stop trials which, in the opinion of the TCs, were too weak to continue. The legal concept evoked by the Chambers and the Parties is often that of the 'no case to answer' and it results in a judicial control over the Prosecutor's activity before the ritual final judgment.

It has been seen that there is no agreement on the no case to answer procedure and those aspects complicating or making the no case to answer procedure superfluous, preventing it from being a useful tool in order to grant the fairness and expeditiousness of the proceedings have been analysed.

The artificiality of the assessment required to the Judges, the theoretical discussion on the applicable standard of review, and most of all the relationship with the whole system of the Court (including the confirmation of the charges procedure) are probably the most important

arguments militating against the 'no case to answer procedure' as developed in common-law systems (irrespective of possible adjustments). If during the trial the TC deems that the evidence is no longer capable of supporting the charges, it should be allowed to enter a judgment of acquittal for all or some of the counts. In this regard it seems that the approach of TC VI was the right one, namely, to allow the Court to engage in a *proprio motu* review of the evidence. If, upon this review the Chamber finds that the evidence is not enough or is not of good quality to support an allegation, and the recharacterisation under Reg. 55 is useless, the Chamber should partially or fully acquit the accused.

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In conclusion, it is apparent that the statutory framework does not really support the idea of a Prosecutor enjoying broad discretion. Moreover, it has also been seen that recognising her broad discretion may be counterproductive, as it may prevent her from correctly focusing the scope of the investigation and of the cases. The imposition of limitations by the Chambers should be seen as providing assistance to the Prosecutor rather than compromising her action. A step-by-step development of the situations and the cases, under a constant control of the PTC, may help the Prosecutor to reach positive results. Even if the success of a tribunal does not depend on the number of convictions, and the Prosecutor herself is required to find the truth and not to obtain a conviction at any cost, using time and resources for weak cases jeopardises the possibility to proceed with other stronger cases and does not adequately take into account the rights of the accused. It is in this perspective that this analysis has been conducted.

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