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The International Criminal Court's prosecutorial review mechanism: In rude health or crippled?

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1 Introduction

> *"The Prosecutor is not required to provide her reasoning (if any) or justify her conclusion regarding the interests of justice under article 53(1)(c) of the Statute."*[1]

On 5th March 2020 the Appeals Chamber of the International Criminal Court delivered arguably one of the most controversial decisions in the Court's nearly two decades of history.[2] Much of the focus in the press and blogosphere lies on the political implications of this decision; the fact that the Court has authorized an investigation, not only into the involvement of Afghan nationals and members of armed groups in the area in grave crimes, but also the involvement of American soldiers.[3] There is, however, another crucial change that this decision has made; one that has also been criticized the last three months by many in the academic sphere of international criminal law- the ruling that the Pre-Trial Chamber does not have the authority to review the 'interests of justice' criterion.[4] By giving this decision, the Appeals Chamber has effectively nullified a significant part of the judicial mechanism reviewing prosecutorial discretion at the ICC. Now, the Pre-Trial Chamber only has the authority to review matters of jurisdiction and evidence, which excludes elements of vital importance, such as the allocation of resources, public trust and other considerations that fall outside of strictly legal matters.[5] This thesis will argue that this decision will leave the ICC – a Court that has significant power through its wide temporal and geographical jurisdiction to

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[1] *Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan*, International Criminal Court: Appeals Chamber [2020] ICC-02/17 OA4, para. 39.

[2] Evenson, Elizabeth. "US Again Threatens International Criminal Court", Human Rights Watch, 19 March 2020, available at: https://www.hrw.org/news/2020/03/19/us-again-threatens-international-criminal-court; Amnesty International. "Afghanistan: ICC authorizes historic investigation", 5 March 2020, available at: https://www.amnesty.org/en/latest/news/2020/03/afghanistan-icc-authorizes-historic-investigation/.

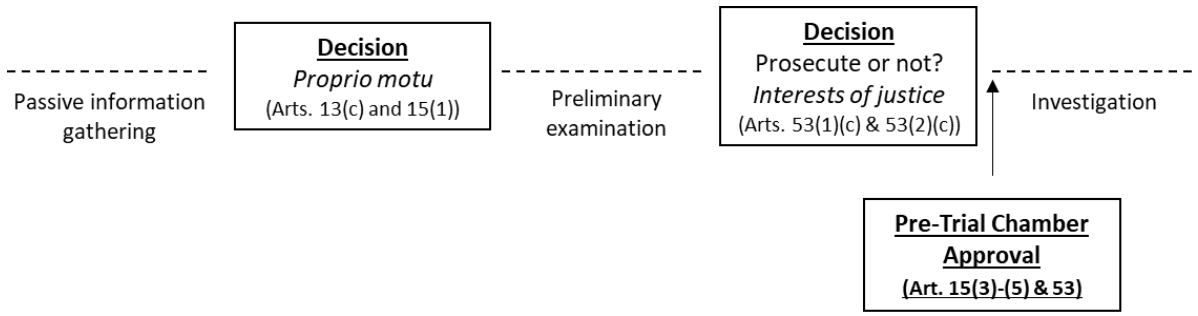
Peltier, Elian; Faizi, Fatima. "I.C.C. Allows Afghanistan War Crimes Inquiry to Proceed, Angering U.S.", The New York Times, 5 March 2020, available at: https://www.nytimes.com/2020/03/05/world/europe/afghanistan-war-crimes-icc.html; Post-Gazette. "Concerning threats: Mike Pompeo wrong to accost ICC personnel", 4 April 2020, available at: https://www.post-gazette.com/opinion/editorials/2020/04/04/Mike-Pompeo-threats-International-Criminal-Court-ICC/stories/202003280008.

[4] *Afghanistan case: Article 15 Appeals Judgment,* 2020, paras. 34 & 39; Heller, Jon Kevin. "The Appeals Chamber Got One Aspect of the Afghanistan Decision Very Wrong", OpinioJuris, 9 March 2020, available at: http://opiniojuris.org/2020/03/09/the-appeals-chamber-got-one-aspect-of-the-afghanistan-decision-very-wrong/; Luban, David. "The 'Interests of Justice' at the ICC: A Continuing Mystery", Just Security, 17 March 2020, available at: https://www.justsecurity.org/69188/the-interests-of-justice-at-the-icc-a-continuing-mystery/.

[5] See Chapter 2.

initiate investigations and prosecutions into situations of conflict all around the world[6] – without a proper mechanism that reviews and balances the choices of the Prosecutor with that of the Court's mandate.

Prosecutorial discretion as reflected in the Rome Statute can be found within two phases: when the Prosecutor decides to initiate a preliminary examination (the *proprio motu* investigation)[7] and when deciding to open a case to prosecute ('interest of justice')[8]. Both elements of prosecutorial discretion have been drafted to suit the wishes of the State Parties and the international community during the drafting of the ICC Statute.[9] This has resulted, by way of political compromise, in a reviewing mechanism that should serve as an effective counterweight to the Prosecutor's power. The checking mechanisms in both stages involve a review by the Pre-Trial Chamber prior to initiating an investigation (see figure below).



As this thesis shows, this balance has, however, been disrupted. In practice, there is no judicial review on a *proprio motu* preliminary examination. Additionally, the Appeals Chamber decision has crippled the second judicial review mechanism, stating that an important part of the prosecutorial discretion, namely the 'interests of justice' criterion, should not be reviewed by the Pre-Trial Chamber. Hence, this thesis will answer the question whether or not the Appeals Chamber has misinterpreted its role as a judicial checking mechanism of prosecutorial discretion by dismissing the Pre-Trial Chamber's power to review the 'interests of justice' criterion. A Court without a proper judicial review mechanism, is like

[6] UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010) (1998) Arts. 4(2), 11.

[7] Ibid., Arts. 13(c), 15.

[8] ICC Statute, 1998, Art. 53(2)(c).

[9] See Chapters 2.2 and 3.1.

a chair that is missing one of its legs: imbalanced and unable to fulfil its purpose. The rest of this Chapter will discuss the methodology of this thesis and the layout.

1.1 Methodology

The goal of this research is to assess the efficiency of the judicial review mechanisms on prosecutorial discretion embedded into the ICC Statute. The work is conducted through a desktop study analysing both primary and secondary sources of international law, domestic jurisprudence, UN documents and general news reports to contribute to the proper context of the Court's practice.

As a basis for what sources are strong and reliable in the area of international law, article 38 of the ICJ Statute offers an authoritative vantage point.[10] Hence, international conventions, international customs, general legal principles, judicial decisions and academic sources will be the main sources that this thesis is relying on.[11] The weight accorded to these sources is in the order that they have been listed above, identical to the way they are listed in Article 38.

In order to properly the role and function of prosecutorial discretion at the ICC, primary sources such as the Court's Statute and its *traveux préparatoires* will be thoroughly analysed and used as a first reference.[12] The reasons for this is that the basis of this research lies in treaty interpretation, therefore the Vienna Convention on the Law of Treaties (henceforth 'VCLT') has been closely observed. Specifically article 31 outlining the various ways to interpret a treaty (its ordinary meaning, its context and the Statute's object and purpose) have been applied in this research.[13] Hence, extensive scrutiny of the provisions' text, the context in which they were created and their role will be examined.

International customary law and general legal principles will also form a strong core in the analysis of the ICC's review mechanism of prosecutorial discretion.[14] Domestic and international legal cases will be assessed to identify any customary law that might emerge from common practice and *opinio juris*.[15] International case-law, which reflects both general practice and principles, will be applied in this analysis.

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[10] United Nations, Statute of the International Court of Justice (1945) Art. 38(1); Evans (2018) p.90-91.
[11] Ibid., 1945; Ibid., 2018.
[12] ICJ Statute, 1945, Art. 38(1)(a).
[13] United Nations, Vienna Convention on the Law of Treaties, Treaty Series Vol. 1155 (1969) Art. 31.
[14] ICJ Statute, 1945, Art. 38(1)(b)&(c).
[15] Ibid., Art. 38(1)(b).

Judicial decisions, specifically ICC cases, will be analysed and compared to create an overview that accurately reflects the practical application of international prosecutorial discretion.[16] In some cases domestic jurisprudence will also be used as a source to give background to prosecutorial discretion, which finds its roots in domestic practices. A comparative analysis between jurisprudence in other international criminal tribunals will be made to accurately assess the effectiveness of the checking mechanisms at the ICC.
In order to get a proper overview of the varying perspectives within the legal discussion of this topic, books and academic articles by the highest degree of scholars will be used and analysed.[17]

It is of vital importance to juxtapose the actions of the Court with the wider context in which it operates; otherwise this research will remain blind to various factors that prove to be a significant part of the Court's practice. Hence, this research would neither be complete, nor accurate, without including the political alongside the legal dimensions within the subject matter of the research question. Therefore, this thesis will also employ newspaper articles, U.N. documents such as resolutions and reports and ICC documents and reports. Naturally, however, these sources will not be given the same weight as those listen in Article 38 of the ICJ Statute, but will serve merely as an indication of the context in which the Court operates.

1.2 Layout

To answer the question whether or not the Appeals Court has crippled the judicial review mechanism of the ICC' prosecutorial discretion, it is important to perform a proper analysis on both key elements of this discretion that have been identified.

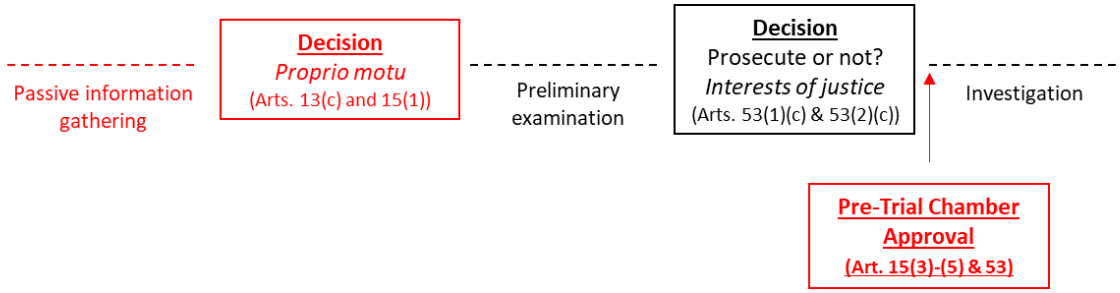
In the next two Chapters, these two elements, the *proprio motu* provision and the 'interests of justice' criterion, will be analysed respectively. Firstly, their object and purpose have been identified through interpreting the provisions' *travaux préparatoires.* Not only is an analysis of the drafting procedures of the Statute aid with illustrating the judicial reviewing mechanism, but it also the same method used by the Appeals Chamber in it decision.[18] Hence it will be a useful tool to assess the accuracy of the Appeals Chamber's assessment. The Chapters will then continue the overall analysis of the object and purpose of these elements of

[16] ICJ Statute, 1945, Art. 38(1)(d).
[17] Ibid., Art. 38(1)(d).
[18] *Afghanistan case: Article 15 Appeals Judgment,* 2020, para. 34.

prosecutorial discretion by comparing the said provisions to those in Statutes of other international criminal tribunals and through similar domestic practices.

After having established the role of these provisions in the Statute, Chapter Four will focus on a case study of the recent ICC Appeals Chamber's Decision in the *Afghanistan case.* This Decision takes the judicial review of prosecutorial discretion under the loop and marks a very unconventional development within the Court's practice.

After the completion of the analysis, the concluding question will be answered: whether or not the Appeals Chamber Decision has crippled the ICC by rendering its judicial review mechanism of the OTP's prosecutorial discretion useless. First, however, it is important to start with understanding the element of the prosecutor's discretion: deciding to initiate a preliminary examination on his/her own.



2 *Proprio motu*: To initiate a preliminary examination

> *"But perhaps the Prosecutor will also act based upon something that she has read in the morning newspaper, or heard on the radio, or that she has learned from Facebook."*[19]

The prosecutorial discretion to investigate globally solely on a Prosecutor's own initiative is an unique and singular power embedded in the ICC Statute and it is arguably one of the most controversial and significant developments in international criminal law.[20] As a result of the Court's wide jurisdiction based not only on territory but also on nationality,[21] as of 2016, the Prosecutor has been conducting preliminary examinations in more than twenty States, some of which are not directly a party to the ICC Statute.[22] Examples of this are the cases involving the United Kingdom in Iraq, the United States in Afghanistan and Russia in Georgia.[23] Because of this extraordinary scope, the Prosecutor's powers and discretion to initiate a preliminary examination must be balanced by judicial checks. In order to appropriately assess the effectiveness and significance of such judicial review of prosecutorial discretion, articles 13(c) and 15(1) of the ICC Statute will be analysed in order to explore the text's 'ordinary meaning'.[24] After this, an overview of the *travaux préparatoires* of the Preparatory Committee establishing this provision will be given to investigate the 'object and purpose' of the provision.[25] Following this, comparisons will be made between the ICC Prosecutor's *proprio motu* power and the initiation of a preliminary examination in other international tribunals. Lastly, this thesis will analyse the practical application of the *proprio motu* provision in the ICC cases of Kenya, Côte d'Ivoire, Georgia, Burundi and Bangladesh/Myanmar.

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[19] Schabas (2016) p.400.
[20] Ibid., p.398.
[21] ICC Statute, 1998, Art. 12(2).
[22] Schabas (2016) p.399.
[23] ICC OTP Report on Preliminary Examination Activities, 2015; Schabas (2016) p.399.
[24] VCLT, 1969, Art. 31.
[25] Ibid.

2.1 Articles 13(c) and 15(1)

Article 13(c) and 15(1) give the Prosecutor the power to initiate a preliminary examination.[26] Article 13(c) refers to Article 15, which states that "the Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court".[27] This embodies the principle of prosecutorial independence, elevated into the international criminal sphere.[28] A preliminary examination is the starting point of all prosecutorial activity, no matter if it is initiated *proprio motu* or by referral.[29] The jurisdiction of the Prosecutor is subject to temporal and geographical limitations; he or she can only initiate an investigation of the specified crimes occurring after the Statute went into force in 2002 and only if they occurred on the territory of a State party to the ICC.[30] These restrictions are, essentially, the only limitations placed on the Prosecutor's *proprio motu* power that can explicitly be found in the ICC Statute. Therefore, when looking at the ordinary meaning of Articles 13(c) and 15(1) the object and purpose of the provisions is to provide for an independent Prosecutor who has the discretion and freedom to initiate a preliminary examination and whose office is encouraged to actively search for information on situations, even without a referral from a State party or the Security Council.

Judicial review occurs after the preliminary examination has already been conducted; prior to that, the Pre-Trial Chamber cannot place any limitation on the preliminary phase of the Prosecutor's conduct.[31] After the preliminary examination has been conducted however, the Pre-Trial Chamber may assess the findings and the evidence retrospectively.[32] Apart from the jurisdictional boundaries, the ICC Statute does not clarify what elements should be taken into account in the Prosecutor's decision to initiate a preliminary examination. This gives a considerable amount of freedom to the Prosecutor to fill in the gaps, hence, the question arises what appropriate elements should be considered by the OTP prior to exercising its *proprio motu* right.

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[26] ICC Statute, 1998, Art. 13.

[27] Ibid., Art. 15(1).

[28] Cf. Triffter, Otto. "Commentary on the Rome Statute of the International Criminal Court", Article 15, 'Prosecutor' Bergsmo, Morten; Pejić, Jelena. . C.H.Beck, 2nd edn (2008) p.586.

[29] International Criminal Court, Regulations of the Office of the Prosecutor, 23 April 2009, ICC-BD/05 01-09, Reg. 25; Schabas (2016) p.399.

[30] ICC Statute, 1998, Arts. 4(2), 11.

[31] Ibid., Art. 15(3).

[32] Ibid.

One could argue that additional to the jurisdictional limitation placed on the Prosecution, when deciding whether to exercise prosecutorial discretion, the OTP should also keep in mind questions of resources, the severity of the alleged crimes and societal interests. These additional subtle considerations could be made depending on what the Prosecutor considers to be important for reaching the object and purpose of the ICC Statute. For example, the Prosecutor has described the preliminary examination as "one of the most cost-effective ways for the Office to fulfil the Court's mission".[33] This is because whenever the OTP for the sake of transparency announces 'interest' in a specific situation, this could encourage national proceedings.[34] Therefore, budgetary concerns and local involvement are definitely a priority to the OTP when considering a situation. Given that there is clearly a grey area concerning the decision-making process of the Prosecutor when enacting Article 15, it is important to identify the elements that contribute *de facto* to that process. The importance in identifying such factors lies in the fact that in later phases the Pre-Trial Chamber has to assess these factors, which would be difficult to do if it turned out that the OTP and the Chamber have different standards as to what they consider to be a variable case for prosecution.[35]

2.2 The *traveux préparatoires*

To assess what the object and purpose of the *proprio motu* provision are, the *traveux préparatoires* (preparatory works) of the Statute should be analysed.[36] These preparatory works are key when analysing the role and scope that the drafters intended for the prosecutorial discretion of the ICC as a whole, and it is something that the Appeals Chamber relied on as well in its decision in the *Afghanistan* case.[37] The object and purpose of the Statute itself is "the prevention of serious crimes of concern to the international community

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[33] ICC OTP Report on Preliminary Examination Activities, 2015, para. 16.

[34] Schabas (2016) p.399.

[35] Cf. *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, International Criminal Court: Pre-Trial Chamber II [2010] ICC-01/09, para. 24.

[36] The meaning of object and purpose have been elaborated on in various ICJ cases, as well as scholarly literature: VCLT, 1969, Arts. 31 & 32; *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide; Advisory Opinion*, International Court of Justice, I.C.J. Reports 1951, p. 12-13; *Maritime Delamination and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgement*, I.C.J. Reports 1995, para. 41; *Gabčíkovo-Nagymaros case* (ICJ) 1997, para. 104 & 133; *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment*, I.C.J. Reports 2014, para. 56; Klabbers, Jan. "Treaties, Object and Purpose", Max Planck Encyclopedia of Public International Law, Oxford University Press (2006) para. 6-8; Evans, Malcolm D. "International Law", Oxoford University Press 5th edn (2018) p. 156-157.

[37] *Afghanistan case: Article 15 Appeals Judgment,* 2020, para. 34.

through ending impunity".[38] During the ICC negotiations, one of the most controversial issues concerned the inclusion of a provision allowing the Prosecutor to initiate provisions by virtue of his or her office (*ex officio*).[39] Judge Kaul described this provision as allegedly being "one of the most fervently negotiated provisions at the Rome conference".[40] The initial vision of the purpose and function of the ICC was to be a permanent version of the *Ad Hoc* Tribunals; the International Criminal Tribunal for the former Yugoslavia (henceforth 'ICTY') and the International Criminal Tribunal for Rwanda (henceforth 'ICTR').[41] The ICC would have been "an empty shell" whose functions would only be activated at the whims of the Security Council.[42] Hence, the '*proprio motu'* provision was not included by the International Law Commission (henceforth 'ILC') in the first draft of the ICC Statute in 1993, where it only provided for State party referrals and Security Council referrals as a way to trigger an investigation.[43] The reason for this was that such prosecutorial liberties at the time were considered extremely controversial and not reflecting the present stage of development of the international legal system.[44] In fact, only one member of the ILC suggested that an investigation should be initiated by the Prosecutor, in the absence of a referral or complaint.[45] However, in 1995 the *Ad Hoc* Committee (established by the UN General Assembly) disproved of the stance that the ILC had previously taken; many States wanted the Prosecutor to work on behalf of the international community, and not just on behalf of the Security

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[38] ICC Office of the Prosecutor, Policy Paper on the Interests of Justice, September 2007, p. 1.

[39] UN General Assembly, Report of the International Law Commission on the work of its forty-sixth session, 2 May - 22 July 1994, 49th Session, U.N. Doc. A/49/10 (1994), Arts. 21, 23 and 25; Cassese, Antonio; Gaeta, Paola; Jones, John R. W. D. "The Rome Statute of the International Criminal Court: A Commentary, Volume I", Chapter 17.3, 'Initiation of Proceedings by the Prosecutor' Kirsch, Philippe; QC; Robinson, Darryl. Oxford University Press (2002), p. 657.

[40] *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya: Dissenting Opinion of Judge Hans-Peter Kaul,* International Criminal Court: Pre-Trial Chamber II [2010] ICC-01/09, para. 12.

[41] Schabas, William A. "The International Criminal Court: A Commentary on the Rome Statute", Oxford University Press 2nd edn (2016) p. 829-830.

[42] Ibid.

[43] UN General Assembly, Report of the International Law Commission on the work of its forty-fifth session, 48th Session, U.N. Doc. A/48/10 (1993), Arts. 26, 27; Crawford, James. "The ILC's Draft Statute for an International Criminal Tribunal" *The American Journal of International Law* 88(1) (1994) p.148; Schabas (2016) p.394.

[44] ILC Draft Statute, 1994, p.90; UN General Assembly, Report of the Preparatory Committee on the Establishment of an International Criminal Court, 51st Session, U.N. Doc. A/51/22 (1996) para. 150; Triffter: Pejić (2008) p.582.

[45] ILC Draft Statute, 1994; Triffter: Pejić (2008) p.582.

Council or a State party.[46] Delegations based their concerns on the ineffective state complaint system implemented at the time throughout human rights treaties.[47]

The decision to investigate would in most national jurisdictions fall squarely within prosecutorial jurisdiction or the equivalent.[48] Therefore, many States shared the view that in order for the Court to be effective in punishing and deterring serious crimes of concern to the international community as a whole, it should have an independent Prosecutor.[49] Without this element of Prosecutorial discretion, the Court would be prevented from delivering justice in situations where neither State Party nor the Security Council were able or willing to open a case, be it for political or other reasons.[50] Many had taken the view that for an international criminal tribunal to be independent and impartial, its agenda could not be solely governed by political bodies.[51] The International Committee of the Red Cross (henceforth 'ICRC') and the delegation of New Zealand argued that it would be counterintuitive to not give the Prosecutor the power to initiate a preliminary investigation, when, at the same time, universal jurisdiction allows any State to prosecute individuals allegedly having committed grave crimes such as genocide and crimes against humanity.[52]

On the other hand, the group of States that disagreed with such a *proprio motu* provision did so because they deemed the scope of the power too big, and argued that it would overwhelm the Prosecutor's office with petitions from victims.[53] They mostly shared concerns regarding politically motivated and/or unchecked preliminary proceedings.[54] According to their interpretation, judicial discretion meant that once a situation had been referred by the Security Council or a State Party to the Court, the Prosecutor would have the freedom to decide whom

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[46] UN General Assembly, Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, 50th Session, U.N. Doc. A/50/22 (1995) p.26; UN General Assembly, Proceedings of the Preparatory Committee during the Period 25 March- 12 April 1996, U.N. Doc. A/AC.249/CRP.5 (1996) p.8; Triffter: Pejić (2008) p.582.

[47] Ibid., 1995; Ibid., 1996; Ibid., 2008.

[48] Triffter: Pejić (2008) p.586.

[49] ICC Ad Hoc Com Report, 1995, paras. 113-114; Triffter: Pejić (2008) p.583; Schabas (2016) p.395.

[50] ICC PrepCom Report, 1996, para. 149; Cassese: Kirsch (2002), p. 657; Triffter: Pejić (2008) p.583.

[51] Schabas (2016) p. 830.

[52] UN General Assembly, Concerns on Jurisdiction of the International Criminal Court relating to the Bureau Proposal, U.N. Doc. A/CONF.183/INF/9 (1998).

[53] ICC PrepCom Report, 1996, p.35; Cassese: Kirsch (2002), p. 657.

[54] Ibid., 1996, para. 151; *Kenya case: Article 15 Decision*, 2010, para.18; Schabas (2016) p.370; Triffter: Pejić (2008) p.583.

to indict and prosecute.[55] The prosecutorial freedom to initiate an investigation *ex officio* was viewed in a bad light due to an analogy that was drawn between a 'free' ICC Prosecutor and the controversial domestic experience by the U.S. and its 'independent counsel'.[56]

The final version of Article 15 that was signed at the end of the negotiation process was reduced in scope and judicially curtailed in a way to satisfy those States who had reservations about giving the Prosecutor too much freedom.[57] Italy, Trinidad and Tobago's proposal of an '*ex officio'* Prosecutor came quite close to what would become the final Article 15 of the Statute.[58] Proposals for the judicial review of this new provision were first introduced in 1996 during the March-April session of the Preparatory Committee.[59] During this session it was proposed that a Chamber of the Court would assess a case initiated by the Prosecutor and decide whether the case should be continued or not.[60] It was argued that the Prosecutor should have the power and discretion to trigger the Court's jurisdiction and initiate a full investigation, therefore this judicial check should occur after that phase, during the confirmation of an indictment (or 'charges').[61] However, when looking at the draft proposals submitted by the Preparatory Committee at the end of the session, this proposal was not

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[55] NGO Coalition for an International Criminal Court. "CICC Report on the March-April 1998 session of the Preparatory Committee on the Establishment of an International Criminal Court" 3 April 1998, p. 23-24; Triffter: Pejić (2008) p.583.

[56] *Morrison v. Olson,* Supreme Court of the United States, 487 U.S. 654 [1988]; Cassese: Kirsch (2002), p. 658; Balz, Dan; Deane, Claudia. "Poll Finds Impatience with Starr", Washington Post, 5 April 1998, available at: https://www.washingtonpost.com/archive/politics/1998/04/05/poll-finds-impatience-with-starr/0e4e5a62-6d5b-486e-aae4-6d6e147e2a4e/; Schmidt, Susan; Woodward, Bob. "Starr Probes Clinton Personal Life", Washington Post, 25 June 1997, available at: https://www.washingtonpost.com/wp-srv/politics/special/whitewater/stories/wwtr970625.htm. In 1978 the 'Ethics in Government Act' was passed, establishing The U.S. Department of Justice Office of Special Counsel; an independent prosecutor who would have the power to investigate possible misconduct by (former) Presidents and individuals holding high positions in the government and provide reports to the U.S. State Congress. In 1998 the independent counsel's report led to the impeachment of President Bill Clinton by the U.S. House of Representatives. Some argued that the independent counsel's office serves as a 'fourth branch' which causes an erosion of presidential power. In the *Morrison v. Olson* case, however, the Supreme Court held that the Ethics Government Act was constitutional and does not destabilise the separation of powers.

[57] *Kenya case: Article 15 Decision*, 2010, para.18; Triffter: Pejić (2008) p.586.

[58] UN General Assembly, Proceedings of the Preparatory Committee during the Period 25 March- 12 April 1996, Draft Summary, U.N. Doc. A/AC.249/CRP.9/Add.2 (1996) p.4:

"The Prosecutor shall initiate investigations ex officio or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and non-governmental organizations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed."

[59] ICC PrepCom Proceedings,1996, p.8-9; Triffter: Pejić (2008) p.582.

[60] Ibid., 1996; Ibid., 2008.

[61] ICC Statute, 1998, Art. 61; Triffter: Pejić (2008) p.583.

included.[62] In hindsight, it could have been the case that States did not agree with judicial review at such a late stage (during the indictment). Instead, the adopted article was identical to the ones in the Statutes of the ICTY and ICTR.[63]

In order to reach a compromise between the two camps, it became clear that additional checks should be placed on prosecutorial discretion in order to satisfy their concerns.[64] The Preparatory Committee started experimenting with the inclusion of checks to the *proprio motu* triggering mechanism.[65] The so-called Singapore proposal, for example, was another attempt to establish checks by introducing a system where the Security Council could stagnate proceedings of the ICC if needed, albeit temporarily, in "sensitive situations deemed necessary under Chapter VII".[66] Despite this proposal not making the cut, the March-April session of the Preparatory Committee in 1998 was a turning point. Argentina and Germany submitted a joint proposal, which was a compromise between the two groups of States, which included the *proprio motu* discretion, but also added additional checks to that power.[67] These checks would be carried out by the Pre-Trial Chamber from whom the Prosecutor would have to seek authorisation in order to proceed with a case/ an investigation.[68] This joint proposal proved a good compromise and was included in the final ICC Draft Statute that was submitted to the diplomatic conference in Rome in 1998.[69]

During the Rome Conference, there was still heavy opposition towards including such a triggering mechanism; in addition to including the option of judicial review by the Pre-Trial Chamber, the first Bureau discussion paper also provided the option "No such article".[70] However, the latter option was not included in the second Bureau paper, suggesting that a

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[62] ICC PrepCom Proceedings, 1996; Triffter: Pejić (2008) p.582.

[63] Ibid., 1996, Art.25 (2quat); UN Security Council, Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002), 3217th Meeting, U.N. Doc. S/RES/827 (1993) Art. 18(1); UN Security Council, Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006), U.N. Doc. S/RES/955 (1994) Art. 17(1).

[64] UN General Assembly, Bureau Proposal, U.N. Doc. A/CONF.183/C.1/L.59 (1998); Schabas (2016) p.370.

[65] UN General Assembly, Rolling Text for Articles 21, 21bis, 21ter, 22, 23, 24, 25 and 25bis, U.N. Doc. A/AC.249/1997/WG.3/CRP.l/Rev.l (1997) p.6-7; Schabas (2016) p.396.

[66] CICC Report, 1998, p. 24.

[67] UN General Assembly, Proposal Submitted by Argentina and Germany, U.N. Doc. A/AC.249/1998/WG.4/DP.35 (1998); CICC Report, 1998, p. 23-24; Triffter: Pejić (2008) p.583.

[68] Ibid. 1998; Ibid., 2008, p. 583-584.

[69] CICC Report, 1998, p. 24; Triffter: Pejić (2008) p.584.

[70] UN General Assembly, Bureau Discussion Paper, U.N. Doc. A/CONF.183/C.1/L.53 (1998) p.16-17; Schabas (2016) p.397.

shift had occurred. States indicated that they would support the provision on the proviso that additional safeguards were included at an early stage in the Prosecution phase.[71] In the end, this procedure, originally proposed by Argentina and Germany, ended up being the final version of Article 15.[72]

To summarise, based on the analysis of the preparatory proceedings for the ICC Statute, the object and purpose of the *proprio motu* provision is the existence of a triggering mechanism that would allow the Prosecutor to initiate preliminary examinations on his or her own initiative, which would be an element of prosecutorial discretion that serves the interests of the international community as a whole and not just the referring State party or the Security Council. All the while, judicial checks by the Pre-Trial Chamber will always occur following the preliminary examination to ensure that there has been no abuse of prosecutorial discretion. This compromise put to rest many State parties' concerns, such as that the OTP might be overwhelmed by complaints, or the OTP instigating politically motivated investigations. This is the balance and the scope that State parties wished to establish for the prosecutorial discretion at the ICC.

2.3 International comparisons

Even within the international sphere, a triggering mechanism that would allow the Prosecution of an international Court to investigate on his/her own initiative worldwide was unprecedented before the ICC was established.[73] Its 'predecessors', the ICTY and ICTR, were used as examples by advocates who supported such a *proprio motu* provision.[74] Both of these courts were used as an example of an already internationally established OTP that could investigate *ex officio.*[75] These courts are, however, inherently differed from the ICC. Despite the fact that the Prosecution for both the ICTY and ICTR have the freedom and discretion to initiate investigations of specific crimes and individuals, they are limited by the strict temporal and geographical scope of both their mandates (found in the founding Security Council resolutions of both Courts).[76] Such a limit does not exist for the ICC. Its jurisdiction

[71] ICC Bureau Proposal, 1998, p.14-15; Schabas (2016) p.397.

[72] ICC Statute, 1998, Art. 15.

[73] Schabas (2016) p.398.

[74] ICC Ad Hoc Com Report, 1995, p.26; ICC PrepCom Proceedings,1996, p.8; ICC PrepCom Report, 1996, p.35; Cassese: Kirsch (2002), p. 657; Triffter: Pejić (2008) p.582.

[75] Ibid, 2002.

[76] ICTY Statute, 1993; UN Security Council, Resolution 955, 3453rd Meeting, U.N. Doc. S/RES/955 (1994), Annex; Cassese: Kirsch (2002), p. 657-568; Schabas (2016) p.395.

is limited to any crime occurring only on the territory of a State party, any time after its Statute came into force in 2002,[77] Meaning that the extended power of the Court's Prosecutor should be appropriately balanced and checked.[78] The Pre-Trial Chamber has a "pivotal role" with its "filtering function" to prevent abuse of prosecutorial discretion,[79] which was not required in preceding tribunals. Therefore, when it comes to the *proprio motu* privileges of the ICC Prosecutor, it is difficult to draw a comparison with the ICTY and ICTR.

2.4 Practical application

The *proprio motu* power was expected to be the central point of operation for the Prosecution, however, in practise it took more than seven years after the ICC Statute came into force for a situation to be investigated pursuant to Article 15.[80] This was because the Prosecutor visibly favoured referrals by the Security Council and State parties.[81] In 2003, the first Prosecutor indicated in his report to the Assembly of State Parties, that the OTP had focussed on the situation in Ituri in the Democratic Republic of Congo (henceforth 'DRC') as a possible 'candidate' for a *proprio motu* preliminary investigation.[82] However, an Article 15 enactment proved to be unnecessary, given that shortly after the report, the President of the DRC referred the situation to the ICC himself.[83] This shows how the ICC can assert pressure on States simply by adding them as possible candidates for the exercise of the *proprio motu* triggering mechanism and thus for preliminary examination.[84] This pressure can come to a boiling point when the Prosecutor decides to open a *proprio motu* preliminary examination for one of the candidates, as seen in the case of Burundi. Shortly after the preliminary examination was started in Burundi, the State withdrew its membership from the ICC Statute.[85] This shows how powerful the *proprio motu* provision is as part of prosecutorial discretion within the ICC.

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[77] ICC Statute, 1998, Arts. 4(2), 11.

[78] Cassese: Kirsch (2002), p. 658.

[79] *Kenya case: Dissenting Opinion Judge Kaul*, 2010, para.12.

[80] *Kenya case: Article 15 Decision*, 2010; Schabas (2016) p.398.

[81] Ibid., 2016.

[82] ICC Office of the Prosecutor, Second Assembly of States Parties to the Rome Statute of the International Criminal Court, Report of the Prosecutor of the ICC, Mr Luis Moreno-Ocampo, 8 September 2003.

[83] ICC Office of the Prosecutor, "Prosecutor Receives Referral of the Situation in the Democratic Republic of Congo", Press Release, 19 April 2004; Schabas (2016) p.398.

[84] Schabas (2016) p.399.

[85] Coalition for the International Criminal Court. "Burundi and the ICC", 2017, available at: http://www.coalitionfortheicc.org/latest/resources/burundi-and-icc.

The Chamber has now authorised *proprio motu* proceedings in several situations, such as in Kenya in 2010,[86] Côte d'Ivoire in 2011,[87] Georgia in 2016,[88] Burundi in 2017[89] and Bangladesh/Myanmar in 2019.[90] In order to assess what criteria are being used in the assessment of an 'appropriate' application of Article 15, these cases will be examined. The focus herein will lie in the uniformity of standards between the OTP and the Pre-Trial Chamber.

The situation in Kenya was the first case initiated *proprio motu* by the Prosecutor.[91] At the outset of the Decision, the Court commences by immediately noting that Article 15 is "one of the most delicate provisions from the Statute".[92] It highlights that the provision is a product of extensive debates and a division of views.[93] This extensive focus in the first few paragraphs of the Decision on the difficulty of interpreting Article 15 shows how great the challenge was before the Pre-Trial Chamber, especially given that Article 15 contains a lot of grey areas that the Chamber would have to interpret in light of the contrasting views that many States have on this Article. The Chamber specifically refers to the Article's "sensitive nature and specific purpose".[94] This choice of diction ('nature and purpose') is a very specific reference to the treaty interpretation mechanisms embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, which the Chamber indicates to apply.[95] This indicates how great the absence is of a specifically defined standard within Article 15; the Chamber has to strongly rely on the most elementary instrument in international law for interpreting its own Statute. However, Through the use of the VCLT the Court does not clearly state what the object and purpose are of Article 15, but rather refers to the preparatory works and the struggle between

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[86] *Kenya case: Article 15 Decision*, 2010.

[87] *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire*, International Criminal Court: Pre-Trial Chamber III [2011] ICC-02/11.

[88] *Decision to the Prosecutor's Request for Authorization of an Investigation*, International Criminal Court: Pre-Trial Chamber I [2016] ICC-01/15.

[89] *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an investigation into the Situation in the Republic of Burundi*, International Criminal Court: Pre-Trial Chamber III [2017] ICC-01/17-X-9-US-Exp.

[90] *Bangladesh/Myanmar case: Article 15 Decision*, 2019.

[91] Totten, Christopher; Asghar, Hina; Ojutalayo, Ayomipo. "The ICC Kenya Case: Implications and Impact for *Proprio Motu* and Complementarity" *Washington University Global Studies Law Review* 13(4) (2014) p.716.

[92] *Kenya case: Article 15 Decision*, 2010, para. 17.

[93] Ibid.

[94] Ibid., para. 18.

[95] VCLT, 1969, Arts. 31 and 32; *Kenya case: Article 15 Decision*, 2010, para. 19.

the two sides to agree on an independent prosecutor;[96] similar to what already has been done above.

In the recent Bangladesh/Myanmar case the OTP requested an assessment of the Court regarding the possible jurisdiction over this case prior to initiating Article 15.[97] This is the first case where the Prosecutor has involved the Pre-Trial Chamber with proceedings prior to the initiation of Article 15. It shows that the biggest limitation to the *proprio motu* provision, as mentioned above, is the question of jurisdiction, as is states within the Article: "The Prosecutor may initiate investigations proprio motu on the basis of information on crimes within the *jurisdiction* of the Court".[98] Therefore, this limitation on the prosecutorial discretion has been included into the article and it does not constitute an unmentioned element prior to the *proprio motu* trigger within the Statute.

What is interesting is that none of the Article 15 Chamber decisions elaborate on the circumstances that the *proprio motu* power may be- and should be- used. They usually skip this part and go right into the findings of the preliminary examination. This is, however, a very crucial part for the Chamber to assess, because it is so important that it could cause member States to withdraw from the Statute, as shown in the case of Burundi.[99] The Chamber has ample opportunity and power to give its opinion regarding the whether the *proprio motu* provision has been properly used, but it refrains from doing so and focusses solely on the way the preliminary examination has been carried out. This indicates that the Chamber has little to no power over this triggering mechanism, other than assessing that the proper jurisdiction has been applied; once the Prosecution decides it wants to use Articles 13(c) and 15(1), there is nothing the Chamber can do to prevent this. This is not to say that the Prosecution should not assess certain factors (some of which have been mentioned above) at the 'pre'-preliminary stage before deciding to trigger its *proprio motu* power. However, the Chamber clearly does not go into whether it was appropriate for the OTP to initiate the *proprio motu* power in the first place, let alone outline the different factors that the OTP should consider prior to enacting that provision. The Chamber does not assess if Articles 13(c) and 15(1) have been

[96] *Kenya case: Article 15 Decision*, 2010, para. 17-19.

[97] *Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute" (Bangladesh/Myanmar)*, International Criminal Court: Pre-Trial Chamber I [2018] ICC-RoC46(3)-01/18.

[98] ICC Statute, 1998, Art. 15(1).

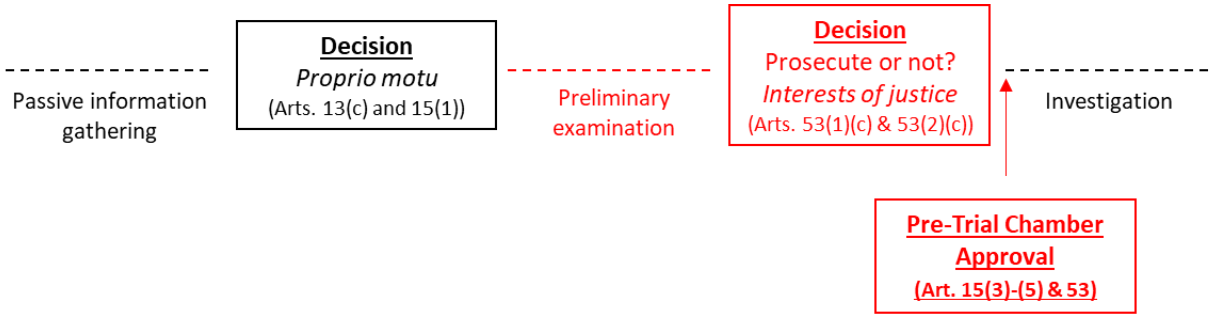
[99] Coalition for the International Criminal Court, 2017.

properly used. In practise, therefore, it does not check the use of the *proprio motu* provision; the Chamber does not directly counter-balance this prosecutorial power.

2.5 Conclusion

To conclude, aside from the condition of jurisdiction which has been outlined in Articles 4(2) and 11, prior to initiating a preliminary examination proprio motu, the Prosecutor has to take into account factors relating to cost efficiency and the interest of the international community as a whole. These factors stem from how the Prosecution and the Court interpret what the object and purpose are behind this provision and of prosecutorial discretion as a whole. As reflected in the Pre-Trial Chamber's decisions regarding Article 15 in various situations, the Chamber has little to no influence on when a proprio motu preliminary examination will be initiated, with jurisdictional issues being the exception. All the Chamber can do is assess the procedure and findings of these examinations, which is at a later stage within the proceedings. Therefore, Article 13(c) and 15(1) are the embodiment of prosecutorial discretion within the ICC Statute.

The analysis of the proprio motu provision's *travaux préparatoires* demonstrates the importance awarded to a well-balanced judicial review mechanism of the ICC's prosecutorial discretion. It took States years to agree to the right balance of the prosecutorial freedom needed for the ICC to fulfil its mandate on the on hand, and the proper way of reviewing the OTP's decisions. Within the *proprio motu* phase, however, no such review exists.



3 *The interests of justice:* To prosecute or not

After having discussed the *proprio motu* phase and the potential decision-making process that leads up to it, it is time to focus on the next phase of prosecutorial discretion: the decision (not) to initiate a prosecution through the interests of justice. The decision to prosecute or not is left mostly at the discretion of the Prosecutor. This is the embodiment of the statutory principle of functional prosecutorial independence which ensures the impartiality of the Court, and is ultimately what its legitimacy and trust is based on.[100] As part of his or her discretion, the Prosecutor may decide not to prosecute a case if it is not in the 'interests of justice'. The Pre-Trial Chamber has confirmed that real prosecutorial discretion lies in the 'interests of justice' provision, whereas the other elements in Article 53 constitute mere "extracting legal requirements".[101] Despite prosecutorial discretion playing such a vital role at the ICC, until recently, the 'interests of justice' criterion has never been used to discontinue a case. In the recent proceedings regarding the situation in Afghanistan, however, great focus has been placed on this provision. Given that the 'interests of justice' criterion marks another grey area on which the ICC Statute is silent, it is important to interpret what factors might constitute the 'interests of justice', in order to asses if the interpretation of the Appeals Chamber regarding this criterion in its recent decision in the *Afghanistan case*.

In this Chapter, the provisions providing for the interests of justice will be interpreted, after which the domestic and international decision-making processes used by prosecutors when deciding whether to prosecute a case or not will be examined. Lastly, the way in which the OTP uses the 'interests of justice' criterion in practise shall be analysed. The aim is to unravel what constitutes the 'interests of justice'.

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[100] ICC Statute, 1998, Art. 42; Triffter, Otto. "Commentary on the Rome Statute of the International Criminal Court", Part 5, 'Investigation and Prosecution' Bergsmo, Morten; Kruger Pieter. C.H.Beck, 2nd edn (2008) p.1066.

[101] *Decision on the Request of the Union of the Comoros to review the Prosecutor's Decision not to initiate an Investigation*, International Criminal Court: Pre-Trial Chamber I [2015] ICC-01/13, para. 14; Varaki, Maria. "Revisiting the 'Interests of Justice' Policy Paper" Journal of International Criminal Justice 14(3) (2017), p. 466.

3.1 Articles 15(2)-(5) and 53

Article 15(2)-(5) stipulates the procedural steps needed to be taken by the Prosecutor in order to initiate a prosecution after having carried out a preliminary examination on his or her own initiative (*proprio motu)*. These steps include the way that information is to be obtained during the examination,[102] the reasonable basis requirement of a crime having occurred,[103] the Pre-Trial request for authorization of an investigation,[104] and subsequent requests from the Prosecutor.[105] While Article 15 outlines the procedure to be followed when initiating a *proprio motu* prosecution, Article 53 outlines the substantive requirements for a case to be admissible and suitable for prosecution. It governs the OTP's decision making process when initiating an investigation and ultimately prosecuting a case.[106]

The first paragraph of Article 53(1) states that the Prosecutor has to establish whether or not there is a reasonable basis that a crime has occurred.[107] Unlike Article 47(1) of the Zutphen draft which read "a reasonable basis for a *prosecution*", the focus in Article 53(1) is upon whether a crime has occurred.[108] This is a significant difference, particularly when considered in the light of the variation in the standards of when to prosecute in many domestic jurisdictions. While in various domestic jurisdictions the prosecution has the burden of proof to deliver evidence that aims to satisfy the 'beyond a reasonable doubt-standard',[109] prosecutors in other countries might only choose to prosecute when they are 99% certain that

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[102] ICC Statute, 1998, Art. 15(2); International Criminal Court, Rules of Procedure and Evidence, 10 September 2002, Rules 46 & 47.

[103] Ibid., 1998, Art. 15(3); Ibid., 2002, Rule 48.

[104] ICC Statute, 1998, Arts. 15(3)-(4); ICC Rules of Procedure and Evidence, 2002, Rule 50.

[105] Ibid., 1998, Art. 15(5).

[106] Triffter: Bergsmo (2008) p.1066.

[107] ICC PrepCom Report, 1996, p.35.

[108] Triffter: Bergsmo (2008) p.1070. The Zutphen draft is the 1998 draft of the Preparatory Commission: see UN Press Release. "Preparatory Committee on Establishment of Criminal Court Concludes First Technical Reading of Zutphen Draft" 1998.

[109] Burden of proof in domestic systems: Grechenig, Kristoffel; Nicklisch, Andreas. "Punishment Despite Reasonable Doubt—A Public Goods Experiment with Sanctions Under Uncertainty" *Journal of Empirical Legal Studies* 7(4) (2010), 847-867.

'Reasonable doubt' standard in domestic systems: *Rex v. Davies,* Court of Criminal Appeal of the United Kingdom, 29 Times LR 350; 8 Cr App R 211 [1913]; *Woolmington v. DPP*, United Kingdom House of Lords Case, UKHL 1 [1935]; *R. v. Lifchus,* Supreme Court of Canada, 3 SCR 320 [1997]; *R. v. Wanhalla,* Court of Appeal of New Zealand, 2 NZLR 573 [2007]; *Miles v. United States,* Supreme Court of the United States, 103 U.S. 304 [1880].

a person is guilty, for example in Japan.[110] Similar to Japan, there are countries that have included the 'principle of opportunity' within their prosecution system, in which prosecutors may choose not to prosecute, even if it is clear that a crime has been committed.[111] It could be argued, however, that the whereas the choice of when to prosecute differs in varying domestic jurisdictions, the standard of psychical evidence required to establish that a crime has been committed might be more similar on a global scale. By choosing 'crime' instead of 'prosecution', the focus automatically shifts to the factual circumstances of the occurrence of a crime. If the focus had been on prosecution, one would have also had to look at the subjective consequences of potentially starting an investigation, which is more the of Article 53(1)(c).

Article 53(1)(c) states that a Prosecutor's decision as to whether or not to pursue a case is based on the interests of justice.[112] Other than mentioning the age and infirmity of the alleged perpetrator, the factors that constitute the 'interests of justice'-criterion are undefined in the ICC Statute.[113] The perpetrator might be too young or too old and/or ill that a prosecution might not serve the interests of justice, which of course is an assessment that should be made on a case-to-case basis.[114] Other than this, when it comes to the interests of justice the OTP confirms that "there is no clear guidance on what the content of the idea is",[115] therefore the OTP has clarified that it will have to assess the matter on a case-to-case basis.[116]

The reason for the lack of further definition of the term 'interests of justice' might stem from the basis that this is another part of prosecutorial discretion and an essential freedom that allows the OTP the freedom and flexibility to function properly. Another reason may be that the lack of definition allows for the prosecutor to make an assessment of the probable effects of the prosecution on the area where the crimes are alleged to have occurred and the actors that might be affected. Some might consider this the more political side of the ICC Statute.

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[110] Frielink (2010) p.167-169; Herber, Erik. "The 2011 Fukushima Nuclear Disaster - Japanese's Citzens' Role in the Persuit of Cirminal Personality" *Zeitschrift für Japanisches Recht* (21) (2016), 87-109.

[111] Criminal Code of the Netherlands, 1881, Arts. 1:12 & 2:167, 242; Frielink (2010) p.167-169; Herber (2010).

[112] ICC Statute, 1998, Arts. 53(1)(c) & 53(2)(c).

[113] Ibid., 1998, Art. 53(2)(c); ICC OTP Policy Paper on the Interests of Justice, 2007, p. 1; Triffter: Bergsmo (2008) p.1072.

[114] Triffter: Bergsmo (2008) p.1072.

[115] ICC OTP Policy Paper on the Interests of Justice, 2007, p. 2.

[116] Ibid., p. 1.

This aspect will be elaborated on in more detail in the Section 'International Comparisons where the differences between the ICTY/ICTR and the ICC during their preliminary examination phases are discussed.

Nonetheless, the 'interests of justice' requirement is not meant to be a doorway for the Prosecutor to escape investigation by invoking arbitrary grounds.[117] Paragraph 3 of Article 53 regulates the requirements for the Prosecutor to exercise his or her discretionary power not to proceed with a prosecution.[118] The Pre-Trial Chamber has certain powers in this regard, given that it functions as a safeguard and a checking mechanism after the preliminary examination phase.[119] The Prosecutor has to exercise his or her discretion in a reasonable manner and must be able to substantiate his or her assessment of a case's ability to meet the interests of justice requirement in front of the Pre-Trial Chamber,[120] therefore it is implied that there definitely are certain factors that constitute the 'interests of justice'.

Once the Prosecutor decides to discontinue a prosecution, the referring State party or the Security Council may request a review by the Pre-Trial Chamber, where the Chamber may only "request the Prosecutor to reconsider that decision".[121] If a review has been requested, the power of the Chamber is thus limited precisely because it may not force the Prosecutor's hand as to do so would reduce prosecutorial independence which might be viewed as problematic by some States.[122]

Such limitations are not imposed in the case where the Chamber reviews the decision on its own initiative. The Chamber may initiate a review if the Prosecutor's decision was based solely on the consideration of justice in Article 53(1)(c) or 53(2)(c).[123] In such a case, the Prosecutor's decision "shall be effective only if confirmed by the Pre-Trial Chamber".[124] This is an essential part of the checks on prosecutorial independence in the ICC Statute, which had

[117] Triffter: Bergsmo (2008) p.1072.
[118] Ibid., p.1066.
[119] ICTY Statute, 1998, Arts. 15(3) &53(2)-(3).
[120] ICC Statute, 1998, Arts. 15(3) & 53.
[121] Ibid., Arts. 15(3)(a); Triffter: Bergsmo (2008) p. 1075; Schabas (2016) p. 829.
[122] ILC Draft Statute, 1993, p. 113; Ibid.
[123] ICC Statute, 1998, Arts. 15(3)(b).
[124] Ibid., Arts. 15(3)(b).

an essential role in convincing many State parties to join the ICC.[125] The fact that the Pre-Trial Chamber might force the OTP to continue with an investigation that the Prosecutor initially did not want to initiate, could be seen as a strong discouragement for the OTP to place themselves in such a disempowering position in the first place.[126] Hence, it makes sense that the OTP has actually never refused the continuation of a case based on the 'interests of justice'. There have been situations in the past were arguably, looking from a transitional justice perspective, the preferred method of reconciliation would be a truth commission or amnesty for government officials who keep the current stability in a conflict-ridden region. That is why the OTP's choice not to rely on Article 53(2)(c) offers a more "solid safety net from judicial review".[127]

However, a situation might occur where the OTP does wish to discontinue a case because it is not in the 'interests of justice'. It is therefore important that the standard is defined. In order for the Pre-Trial Chamber to be an effective check on the assessment of the OTP, it is of paramount importance that the standard applied by both the Prosecutor and the Chamber when assessing Article 53(1)(c) is the same. Given that there is no definition of 'interests of justice' at present, this thesis will rely on a comparative analysis between domestic and international interpretations and assess the way in which Article 53 has been interpreted by the Court in its jurisprudence.

During the negotiations in the Preparatory Committee, there was much opposition towards including unchecked prosecutorial freedom at the *proprio motu* stage.[128] As mentioned before, during those proceedings, certain countries were against giving the Prosecutor too much freedom and discretion, and it was very difficult to find a compromise between the two camps. It is quite striking that there was such opposition towards including any unchecked prosecutorial freedom at the *proprio motu* stage, but when including an undefined provision such as the 'interests of justice' criterion, that might make the difference between a discontinuation of a case or prosecution, there has not been nearly as much opposition. There weren't necessarily two opposing camps on this issue and it did not take long for States to agree on the 'interests of justice' provision to be included into the Statue. Why the member

[125] Triffter: Bergsmo (2008) p. 1075.
[126] Varaki (2017) p. 466.
[127] Ibid.
[128] See previous Chapter, Section 2.2.

States would leave such an important factor in the grey, is the question to be asked here. This is not only a political issues, but a legal one as well. If we are to interpret the provision, we should take into account the intention of the drafters and the signatory States.[129]

3.2 Domestic comparisons

As has been shown, the precise interpretation of the 'interest of justice' criterion is uncertain, which gives flexibility and discretion to the OTP when deciding whether to prosecute a case. Such areas of prosecutorial discretion can be found in various guises in prosecutorial systems around the world. These examples are a relevant source of interpretation because they constitute general sources of international law.[130] Not only are judicial decisions of various nations considered key sources in the international legal field, but when enough countries have similar practises that form an *opinio juris,* certain elements when considering a prosecution might turn out to constitute customary international law.[131]

In common law countries, prosecutorial discretion on the domestic level focusses on many practical factors, such as, the allocation of resources. For example, if a small district attorney's office in the U.S. tries to prosecute a fast country-wide criminal network or a very wealthy individual or group, they might find themselves to have bitten of more than they can chew. The prosecution also does not have unlimited resources and therefore they strive to try and catch the key figures in a criminal organisation whose prosecution would serve most in crippling and dismantling this organisation.[132] This is similar to the ICC Prosecutor focussing on the highest member of the criminal hierarchy ('those most responsible') that committed a grave crime under the ICC's mandate.[133] This shows that the selection of who to prosecute on

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[129] VCLT, 1969, Arts. 31(2)& (3).

[130] ICJ Statute, 1945, Art. 38(1)(b)& (d).

[131] Ibid.; *Case Concerning Military and Paramilitary Activities In and Against Nicaragua; Merits*, International Court of Justice, I.C.J. Reports 1986, p.14; *Legality of the Threat or Use of Nuclear Weapons; Advisory Opinion,* International Court of Justice, I.C.J. Reports 1996, p.226; *Western Sahara; Advisory Opinion,* International Court of Justice, I.C.J. Reports 1975, p. 12; UN General Assembly, International Law Commission: Identification of Customary International Law, U.N. Doc. A/CN.4/710 (2018) p. 11-13; Evans (2018) p.128-130.

[132] Rhodes, William M. "Investment of Prosecution Resources in Career Criminal Cases" *Journal of Criminal Law and Criminology* 71(2) (1980) p.122-123.

[133] ICC Office of the Prosecutor, Policy Paper on Case Selection and Prioritization, 15 September 2016, p. 14; ICC Office of the Prosecutor, Strategic Plan 2016-2018, 6 July 2015, para. 34 (last bullet point); deGuzman, Margaret M. "Choosing to Prosecute: Expressive Selection at the International Criminal Court" *Michigan Journal of International Law* 33(2) (2012), 256-320.

a national level is reflected in the international practice, which demonstrates the importance of also including domestic practices into this analysis.

Other questions arise such as whether or not this office has dealt with similar cases and thus has experience in this field of law. Factors, such as the graveness of the offence and the importance of the alleged perpetrator in a bigger criminal organisation should also be taken into account.

The question of the reasonable probability of a conviction is a significant focus of the prosecution at the domestic level. Such considerations are made prior to initiating an investigation to ensure the efficiency of the office, both in time and resources. Despite such considerations not being included as a criterion for the initiation of a preliminary examination in the ICC Statute, they do remain an integral part of the ICC's OTP. As seen in the report of the Prosecutor to the State Parties, the Prosecutor does focus on the (cost-) efficiency of the OTP as a primary matter.[134] Realistically, the Prosecutor's discretion is not only limited by jurisdictional considerations, such as temporal and geographical conditions, but also by practical balances that must be struck at a domestic level as much as on an international scale. Even the ICC cannot avoid the crippling practical issues that affect its functionality, such as time management, budget allocation and the question of a realistic conviction.

In the common law system when considering matters of a less practical and factual nature to the domestic prosecutor's office, but rather of a subjective nature, those questions are often left to the jury. The jury takes the evidence and the factual circumstances into account, but their purpose is to reflect the societal interest and whether the alleged perpetrator deserves to be punished.[135] Not only is this body supposed to assure that the State does not convict with a bias against its people, but the jury determines if a conviction will benefit the community and, thus, acts as its voice.[136] Therefore, the responsibility of ensuring the community benefits from a prosecution is divided between the OTP and the jury. This is important, because this shows where the focus of the OTP lies when deciding to prosecute; more so on the procedural and evidential rather than on the subjective element of the case. The question would then be if

[134] ICC OTP Assembly of States Parties Report, 2003, p. 1.

[135] Lochhead, Robert. "Trial by Jury in the United States" *Revista Institutului Naţional de Justiţie* 9(3) (2015) p. 50.

[136] Ibid.

the ICC's Prosecutor shares this focus. If this were the case, the 'interests of justice' could be a complication of practical factors that should allow for a functional trial.

In some civil law countries, the 'principle of opportunity' can be seen as being quite similar to the interests of justice. The principle of opportunity gives the prosecutors the freedom to drop any case that they consider suitable to do so. Even if there is enough evidence to initiate a case against a suspect, there is no obligation to prosecute.[137] This principle is similar to the interests of justice, because they are both not completely defined and leave room and discretion to the prosecution to be flexible when deciding whether to prosecute or not. In Japan, for example, a good prosecutor is considered one who understands the attitudes and feelings of the general public and those of the victims of the alleged crime.[138] He or she is to act in a manner which should facilitate public trust into the prosecution system.[139] Prosecutors facilitating public trust is an important ideal in many European countries, as highlighted by the Council of Europe in their opinion on 'European norms and principles concerning prosecutors'.[140] Hence, public trust could also be an element to consider before initiating a prosecution; it could be part of the 'interests of justice' criterion.

The ICC has been accused of Western favouritism, especially by the African Union, which became especially evident after the arrest warrant of President al-Bashir was circulated.[141] It is evident that the ICC has tried to recover from this broken trust by being active in new regions such as in Afghanistan, Georgia and Iran.[142] This shows that the ICC OTP also focusses on public trust, in a similar way to domestic prosecutors when exercising their prosecutorial discretion in some civil law systems. The ICC is especially aware of the trust and approval that it receives from its member States, given that in recent years some members

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[137] Constitution of Japan, Code of Criminal Procedure, 1948, Art. 248; Criminal Code of the Netherlands, 1881, Art 1:12; Frielink, P.; Cleiren, C. "Het Oppostuniteitsbeginsel" (The Principle of Opportunity) *Strafblad: Criminal Law and Criminology* (2010), 167-169.

[138] The Justice System Reform Council. "Recommendations of the Justice System Reform Council - For a Justice System to Support Japan in the 21st Century" 2001, p. 62.

[139] Ibid.

[140] Consultative Council of European Prosecutors (CCPE) (Council of Europe). "European norms and principles concerning prosecutors ('Rome Charter'), Opinion No. 9, 2014, para. XIII.

[141] Prinsloo, Barend; Van Niekerk, Dewald. "UNAMID: an African solution to a complex case of geopolitical dynamics" *African Security Review* 24(3) (2015) p. 11; Talmon, S. "The Statements by the President of the Security Council" *Chinese Journal of International Law* 2(2) (2003) p. 419.

[142] ICC OTP Report on Preliminary Examination Activities, 2015; Schabas (2016) p.399.

have started withdrawing from the Statute like the Philippines and Burundi,[143] and others do not support the Court to the extent that they are required to under their international obligations, such as South Africa and many other African States harbouring al-Bashir.[144] The ICC relies greatly on State cooperation and support, precisely because it is formed by a multilateral legal instrument and depends on the goodwill of its creators.

Therefore, the interests of justice can both reflect practical implications such as cost-efficiency and reasonable probability of conviction, as well as more subjective factors. What such subjective factors might include could be similar to what has been used in domestic systems, such as societal interest and public trust. Societal interest, however, on the international stage translates inevitably to the interest not only of the people directly affected by a conflict, but also the interest of the international community as a whole. When a prosecutor needs to take into account the interest of States during every decision to prosecute, we do arrive in a territory that might have to do less with legal instruments and more with political bodies. Especially the importance of public trust, as has been shown, can play a significant role in selecting which situations are more suitable for prosecution and will therefore be most beneficial for the 'interests of justice'. This begs the question whether the 'interests of justice' reflects more practical concerns, or the subjective elements of the decision-making process, or a mix of both.

3.3 International comparisons

When comparing articles on preliminary examinations/investigations in the ICTY/ICTR Statutes and the ICC Statute, there is a significant difference between the word-use and the intent behind the provisions of the Tribunals and the Court.[145] When assessing the scope of prosecutorial discretion, it is most evident that the 'interests of justice'-criterion is singular to the ICC and is not included in the Statutes of the Tribunals.[146] When analysing the provisions

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[143] ICC Public Affairs Unit, "ICC Statement on The Philippines' notice of withdrawal: State participation in Rome Statute system essential to international rule of law", Press Release, 20 March 2018; Coalition for the| International Criminal Court, 2017.

[144] *Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir,* International Criminal Court: Pre-Trial Chamber II [2017] ICC-02/05-01/09.

[145] ICC Statute, 1998, Art. 53; ICTY Statute, 1993, Art. 18(1); ICTR Statute, 1994, Art. 17(1).

[146] ICTY Statute, 1993, Art. 18(1) & ICTR Statute, 1994, Art. 17(1):

"The Prosecutor shall initiate investigations ex-officio or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and

outlining prosecutorial discretion in the ICTY/ICTR Statutes, they provide that the Prosecutor has the discretion to assess the information obtained or received throughout the preliminary phase and decide whether there is "sufficient basis to proceed" with an investigation and indictment.[147] This is clearly an *evidentiary test*, which is based on factual observations and evidence to establish whether a crime has been committed. This *evidentiary* part has been included in the ICC Statute under Article 53(1)(a) under the 'reasonable basis that a crime has been committed'-part.[148] The unique part of Article 53 that contains the 'interests of justice'-variable is more of an *appropriateness test*.[149] In the case of the ICTY and the ICTR the consideration of the *appropriateness* of a exercising jurisdiction to pursue a prosecution or an indictment, which some would be inclined to describe as more political, was exercised by the UN Security Council when it decided that it would fight the impunity of the serious violations of international humanitarian law in the former Yugoslavia and Rwanda.[150] Seen as the Security Council is the executive organ of the UN, it is natural that such a politically loaded question (that of justifying international judicial intervention) would be within its sphere of power and duties. The ICC, however, is the product of multilateral negotiations and does not find its origins in a Security Council resolution. Therefore, the Court needs to perform both an *evidentiary* and an *appropriateness* test on its own when the Prosecutor has to decide whether or not to investigate and prosecute. Given that the ICC is dealing with multiple countries and situations, it is especially important to perform both tests due to the wide scope of the jurisdiction, rather than only looking at evidence. As mentioned above when analysing the domestic practise, there is standard of public trust and societal interest that prosecutors have to strive for. This is no less true for the ICC, whose legitimacy also depends on this public

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nongovernmental organisations. The Prosecutor shall assess the information received or obtained and decide **whether there is sufficient basis to proceed**."

ICC Statute, 1998, Art. 53(1):

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 interests of justice***.

[147] ICTY Statute, 1993, Art. 18(1); ICTR Statute, 1994, Art. 17(1).

[148] ICC Statute, 1998, Art. 53(1)(a)-(c); ICC Rules of Procedure and Evidence, 2002, Rule 48.

[149] Triffter: Bergsmo (2008) p.1067.

[150] Ibid.

trust. Therefore, there is an innate political element attributed to that part of Article 53 which addresses the question of *appropriateness* rather than *evidence*: the interests of justice.

3.4 Practical application

Up to this point, several factors that might constitute the 'interests of justice' have been identified, such as practical considerations (cost-efficiency and gravity of importance), subjective consideration (public trust, societal interest and legitimacy) and political considerations (the appropriateness of a prosecution and the deliberate grey area that the drafters created). In 2007 the ICC OTP released a policy paper on its interpretation of Articles 53(1)(c) and 53(2)(c), confirming that the interpretation voiced in the paper is subjected to revision depending on legal determinations made by the Court.[151] The OTP views Article 53(2)(c) as an exception and states that there is a presumption in favour of the first two provisions of Article 53(1).[152] Therefore, at the time in 2007, there was no case in which the OTP had actually decided not to prosecute a case because of the interests of justice. The policy paper indicated also that the OTP will base its article 53(1)(c) decisions on the general object and purpose of the ICC Statute to fight the impunity of core international crimes.[153] The OTP is further of the opinion that other matters of peace, security and stability should be the responsibility of other institutions that might establish amnesties, truth finding commissions, domestic prosecutions, reparations programs, transitional justice mechanisms and other instruments.[154] Hence, the 'interests of justice' should not be confused with 'interests of peace'.[155] This is in stark contrast with the stance of the first ICC Prosecutor, Luis Moreno Ocampo, who stated that the 'interests of justice' entailed his consideration of "the various national and international efforts to achieve peace and security as well as the views of witnesses and victims of crimes".[156]

This goes back to the question of whether or not public trust and societal interest are factors that are part of Article 53, as they are part of the prosecutorial discretion of several domestic legal systems. It could be argued that in the preparatory works a general consensus cannot be

[151] ICC OTP Policy Paper on the Interests of Justice, 2007, p. 1.

[152] Ibid., p. 1.

[153] Ibid., p. 3-4.

[154] Ibid., p. 7-9.

[155] Ibid., p. 1.

[156] ICC Office of the Prosecutor, "Second Report of the Prosecutor of the International Criminal Court, Mr. Luis Moreno Ocampo, to the Security Council Pursuant to UNSC 1953 (2005), 13 December 2005, p. 6; Varaki (2017) p. 461.

found that would exclude issues of peace and security,[157] hence it is unclear what the Prosecution is basing their stance on in the 2007 policy paper. Rather than elaborating on what the 'interests of justice' provision entails, the policy paper focusses on what it is not and why it will seldomly be used. It is true that the Prosecutor might not have been in the position to give a more elaborate and limiting definition of the 'interests of justice', precisely because that could contradict the purpose of having an undefined embodiment of prosecutorial discretion in the Statute altogether.[158] However, it once again offers little insight on the substantive interpretation of Articles 51(1)(c) and 51(2)(c), which offers little transparency regarding the OTP's decision making process.

The hesitance of the OTP to resort to enacting Article 53(2)(c) has also resulted in the inability of the Pre-Trial Chamber to help further define the 'interests of justice'. If there are no decisions not to prosecute a case on the basis that it would not serve the 'interest of justice' by the Prosecutor, then the Pre-Trial Chamber is also unable to review it and voice its opinion regarding its content. The OTP has placed very low priority on Article 53(1)(c), as shown in its requests for an investigation in various situations.

In the most recent preliminary examinations report, on the situation on the territory of Palestine, the Prosecutor mentions the 'interests of justice' in this 112-page document twice, repeating the sentence: "no substantial reasons to believe that an investigation […] would not serve the interests of justice" without any elaboration on what factors have been taken into account.[159] However, there are many factors that it could have mentioned to show, indeed, that such a decision to prosecute serves the 'interests of justice'. The fact that it just briefly mentions the criterion to 'check the box' of Article 53(2)(c) shows either how little value the OTP places on this provision or how much it wants to avoid the topic. Precisely in such a sensitive situation as the one that has occurred between Israel and Palestine, the OTP could have mentioned public trust or societal interest to explain the need for an investigation. The 'interests of justice' were not created to limit the opportunity for the OTP to prosecute; the criterion has been created to add force and legitimacy to the prosecution.

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[157] Varaki (2017) p. 464; Schabas (2016) p. 663.

[158] Ibid., 2017.

[159] *Prosecution Request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine*, International Criminal Court: Pre-Trial Chamber I [2019] ICC-01/18, para. 2 & 97.

In the *Comoros case*, the Pre-Trial Chamber stated that the 'interests of justice' provision is the real embodiment of prosecutorial discretion.[160] It could be argued that the Chamber is trying to encourage the OTP to make use of the 'interests of justice' and assert their prosecutorial discretion, given that Article 53(2)(c) has been used by the Prosecution has not been used, despite the Court having functioned for more than a decade.[161] The difference is striking when comparing the diverging viewpoints regarding the importance of the provision: the OTP regards it as a mere tick-off box criterium for prosecution, whereas the Chamber sees it as the epitome of prosecutorial independence. However, it does make sense that the OTP will try to avoid a situation in which the Chamber's review might force their hand, which is only possible when the Chamber may review the OTP's use of Article 53(2)(c). That might mean that the ICC Statute, perhaps inexplicitly discourages the Prosecutor to resort to a non-prosecution because of the 'interests of justice', hence preventing the OTP from exercising one of its most fundamental elements of prosecutorial discretion.

The only instance in which the 'interests of justice' criterion has played a significant role is in *Afghanistan case,* which will be analysed in the next Chapter.

3.5 Conclusion

It is vital to consider what the use is of the 'interests of justice' criterion if it has never been used by the OTP to discontinue a case, until recently. It is difficult to imagine that such a unique and potentially powerful element of prosecutorial discretion was meant to serve as a mere tick-off box for the Prosecution to mention in their preliminary examination report. Especially when, as established above, there are so many vital functions that the 'interests of justice' provision could fulfil, such as practical considerations, subjective consideration and political considerations. Despite it having to go through the strictest judicial review mechanism in the ICC Statute, it could be well-worth it to still pursue course enacting Article 53(2)(c) in various cases. At the very least, it would be most useful for the Court, the OTP and the development of international criminal law to invest into a more solid definition of what constitutes the 'interests of justice'. So far in the past two decades the Prosecution has done little to further explore and elaborate on this part of Article 53 and that might create a situation in which the inclusion of the provision in the ICC Statute might prove redundant in

[160] *Comoros case: Request to Review Prosecutor's Decision not to Prosecute,* 2015, para. 14.

[161] Varaki (2017) p. 466; Heller, Jon Kevin. "The Pre-Trial Chamber's Dangerous Comoros Review Decision", OpinioJuris, 17 July 2015, available at: http://opiniojuris.org/2015/07/17/the-pre-trial-chambers-problematic-comoros-review-decision/.

practise. If the OTP were to actively start using the ‘interests of justice’ not only as a reason not to prosecute, but also as an active contribution to the argument to initiate an investigation/ a prosecution, it could improve the public trust and legitimacy of the Court, while empowering the prosecutorial discretion of the OTP.

The case study in the next Chapter will prove the benefit and the need for the ‘interests of justice’ criterion to be actively used in similar manner across the organs of the ICC, which will demonstrate an even greater need for a proper functioning judicial review mechanism.

4 Case study: The situation in Afghanistan

In November 2017, the ICC Prosecutor used her proprio motu discretion and requested authorisation from the Pre-Trial Chamber to initiate an investigation into alleged war crimes and crimes against humanity in Afghanistan. Afghanistan became a party to the Rome Statute on 10 February 2003, therefore the temporal scope of the investigation would be from May 2003 onwards. The geographical scope would include not only Afghanistan, but the territory of any State Party where such crimes might have been committed in relation to the Afghanistan situation. The requested jurisdiction included not only Afghan nationals, but also members of the Taliban (and associated non-governmental military groups) and foreign forces, particularly from the United States. The Prosecutor specifically alleged that U.S. troops and the Central Intelligence Agency (henceforth 'CIA') had committed acts of torture, cruel treatment, rape and sexual violence against conflict-related detainees on Afghan territory. This case is very controversial and was met with varying reactions.

This case is especially significant, because it combines the two discretionary elements of the proprio motu preliminary examination and the importance of the 'interests of justice' criterion. First, the judgment of the Pre-Trial Chamber will be analysed, and then the Appeals Chamber's decision will be examined. Finally, an assessment will be made regarding how well the prosecutorial discretion has been utilised and if these prosecutorial freedoms have been properly checked by the Chamber.

4.1 The Pre-Trial Chamber Judgment

The Pre-Trial Chamber delivered its decision regarding the Prosecutor's article 15 request in April 2019. Given that the situation had not been referred to the OTP by the UN Security Council or a State Party, but had been initiated *proprio motu* by the Prosecutor herself, the Chamber stated that it was "vested with a specific, fundamental and decisive filtering role".[162] The Chamber had to consider whether all the requirements set out in article 53(1)(a) to (c) were met.[163] It explains its rationale as follows:

> Article 53 of the Statute makes the investigation's consistency with the interests of justice a statutory legal parameter governing the exercise of the

[162] *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan,* International Criminal Court: Pre-Trial Chamber II [2019] ICC-02/17, para. 30.

[163] Ibid.; ICC Rules of Procedure and Evidence, 2002, Rule 48.

> prosecutorial discretion; as such, it follows that it also falls within the scope of the scrutiny mandated to the Chamber over that discretion for the purposes of the determinations under article 15.[164]

According to the Decision, the details as to the scope and object of the scrutiny performed by the Pre-Trial Chamber provided by Article 15(4) are *additional*.[165] The Chamber summarizes its obligations from Article 15(4) by referring to two elements. The first element is Article 53(1)(a), the 'reasonable belief that a crime has been committed'.[166] The second element is the Court's obligation to prevent "proceeding with unwarranted, frivolous, or politically motivated investigations that could have a negative effect on its credibility".[167] The latter entails considerations of public trust, the courts legitimacy and the political context of a situation, which are elements that are part of the 'interests of justice' criterion (see Chapter 3). Indeed, the Pre-Trial Chamber states that it has to strongly consider the inclusion of "a positive determination to the effect that investigations would be in the interests of justice".[168] When the investigation has been triggered *proprio motu* by the Prosecutor, it is the Chamber's job to avoid manifestly ungrounded and inadequate investigations.[169] The Chamber considers this to be of invaluable importance to the credibility, functioning and legitimacy of the Court.[170] The Court has to consider the gravity of the alleged conducts, the potential victim's interests and the investigation being feasible and meaningful.[171]

The Chamber considered whether an investigation in the Afghanistan case would be contrary to the interests of justice.[172] It firstly noted that up until now, the OTP has not offered detailed submissions on this criterion and has just stated that an investigation would not obstruct it;[173] much like the box-ticking analogy. The lack of a definition of the 'interests of justice' criterion led the Chamber to base its factors on the effective prosecution of mass atrocities, given that these are the Statute's overarching objectives.[174] It found that the factors to

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[164] *Afghanistan case: Article 15 Decision,* 2019, para. 88.
[165] Ibid., para. 29.
[166] ICC Statute, 1998, Art. 53(1)(a); *Afghanistan case: Article 15 Decision,* 2019, para. 31.
[167] *Afghanistan case: Article 15 Decision,* 2019, para. 31; *Kenya case: Article 15 Decision,* 2010, para. 32.
[168] Ibid, 2019, para. 35.
[169] Ibid., para. 32.
[170] Ibid., para. 34.
[171] Ibid., para. 35.
[172] Ibid., paras. 87- 96.
[173] Ibid., para. 87.
[174] Ibid., para. 89.

consider are whether "prospectively it appears suitable to result in the effective investigation and subsequent prosecution of cases within a reasonable time frame".[175] The Chamber maintained that "an investigation can hardly be said to be in the interests of justice if the relevant circumstances are such as to make such investigation not feasible and inevitably doomed to failure".[176] The Chamber was therefore of the view that the Court should focus only on cases which have a high prospect of being successful and meaningful.[177] The Chamber also considered the allocation of the Court's resources as another element contributing to a fruitful investigation.[178] Given that the preliminary investigation into the situation in Afghanistan took eleven years and given the political landscape, the Chamber found it likely that the cooperation that the Prosecutor would obtain in this situation will be scarce and that there would be prospective difficulties with finding relevant and available suspects.[179] The Chamber did not deem a successful investigation likely and ruled that this would not be in the interests of justice.[180] Hence, it did not authorise an investigation into the situation in Afghanistan.[181]

After more than 15 years of tip-toeing around the issue, it is amiable that the Chamber finally delved into the topic to shed some clarity on Article 53(1)(c). It is most controversial, however, that during its first decision in which the Pre-Trial Chamber gives meaning to the 'interests of justice' criterion, the Chamber simultaneously gives the Article 53(1)(c) such weight that it refuses to authorize an investigation into the case, solely based on the criterion. If the Pre-Trial Chamber had used its previous Article 15 decisions to give meaning to Article 53(1)(c), the Chamber's reasoning in the decision of the *Afghanistan case* would not only have carried more weight, but it would also have given the Prosecutor a fair chance to prepare proper arguments demonstrating how an investigation would satisfy the criterion. Seen as this definition of the 'interests of justice' criterion did catch the Prosecution off-guard and resulted

[175] *Afghanistan case: Article 15 Decision*, 2019, para. 89.
[176] Ibid., para. 90.
[177] Ibid.
[178] Ibid., para. 95.
[179] Ibid., para. 91.
[180] Ibid., para. 96.
[181] Ibid.

into an unprecedented reasoning of the Chamber, it is no surprise that the OTP requested an appeal of the decision on 7 June 2019.[182]

4.2 The Appeals Chamber Judgment

On 5 March 2020, the ICC Appeals Chamber delivered its judgment regarding the request for an investigation *proprio motu* into the situation in Afghanistan.[183] In its judgment, the ICC Appeals Chamber argued two important points; a procedural one, whether the Pre-Trial Chamber has authority to review Article 53(1)(c) and a substantive one, whether Article 53(1)(c) creates a positive obligation.

4.2.1 The procedural argument

The procedural point referred to whether or not the Pre-Trial Chamber has the power to assess if the 'interests of justice' criterion has been satisfied. Rule 48 of the Rules of Procedure refers to Article 15(3) of the Statute requiring the Prosecutor to satisfy all criteria mentioned in article 53(1)(a) through (c), thereby including the 'interests of justice' element in part (c).[184] Despite the fact that in all previous decisions concerning the *proprio motu* initiation of an investigation, the Pre-Trial Chamber assessed the interest of justice criterion to a certain extent,[185] the Appeals Chamber ruled that these criteria are only something for the Prosecutor to consider.[186] All the Chamber has to consider, according to Article 15(4), is whether the Court has jurisdiction over the situation and whether the 'reasonable basis to proceed' criterion has been fulfilled regarding proof of grave crimes having been committed.[187] The

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[182] *Request 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*, International Criminal Court: Pre-Trial Chamber II [2019] ICC-02/17.

[183] *Afghanistan case: Article 15 Appeals Judgment,* 2020.

[184] ICC Rules of Procedure and Evidence, 2002, 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, paragraph 1 (a) to (c).**

[185] *Afghanistan case: Article 15 Appeals Judgment,* 2020, para. 24.

[186] Ibid., paras. 35-37.

Para. 37:

> "The Appeals Chamber considers that the 'interests of justice' factor set out in article 53(1)(c) of the Statute, while part of the Prosecutor's consideration under article 15(3) of the Statute as per rule 48 of the Rules, is not part of the pre-trial chamber's decision under article 15(4) of the Statute."

[187] *Afghanistan case: Article 15 Appeals Judgment,* 2020, paras. 34 & 39.

Para. 39:

> "[...] the Prosecutor is required only to provide a factual description of the crimes allegedly committed and a declaration that they fall within the jurisdiction of the Court."

Chamber is of the opinion that the 'interests of justice' element is neither a part of the question of jurisdiction, nor is it part of the 'reasonable basis to proceed' standard.[188] This dichotomy between these provisions creates a situation in which the Prosecutor has to consider the 'interests of justice' criterion,[189] but the Chamber has no power to assess whether this criterion has been fulfilled.[190]

In its argument the Appeals Chamber also relies on the object and purpose that the drafters of the Statute had in mind during the preparatory proceedings. It outlines that, given that rule 48 of the Rules of Procedure "requires the *Prosecutor* to consider all the factors under article 53(1) of the Statute, including the interests of justice, in deciding whether to request authorisation of an investigation […], there is no equivalent rule that would import these considerations for the purposes of a pre-trial chamber's determination".[191] The lack of such an explicit obligation of the Pre-Trial Chamber to consider elements of article 53(1), in the Appeal's Chamber opinion, shows that it was not the intent of the drafters to include such a review mechanism.[192] This reasoning is, however, flawed. If the Pre-Trial Chamber does not need to consider the 'interests of justice' criterion in its decision, because that criterion is part of Article 53(1), then the Chamber also should not consider whether there is a reasonable basis to proceed (Article 53(1)(a)) and whether a case is admissible (Article 53(1)(b)), because those factors are also part of the same provision. The Appeals Chamber, however, obviously does state that admissibility and a reasonable basis to proceeds are factors that the Pre-Trial Chamber should consider,[193] hence the Appeals Chamber contradicts its own reasoning.

The Appeals Chamber continues to rely on its interpretation of the object and purpose of Article 53(1). It claims that "a plain reading of the provisions, […] indicates that, for the purposes of exercising judicial control at this early stage of the proceeding, the pre-trial

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ICC Statute, 1998, Art. 15(4):

> If the Pre-Trial Chamber, upon examination of the request and the supporting material, consider that there is a **reasonable basis to proceed** with an investigation, and that the case appears to fall within the **jurisdiction** of the Court, it 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.

[188] *Afghanistan case: Article 15 Appeals Judgment*, 2020, paras. 34-35.

[189] ICC Statute, 1998, Art. 15(3); *Afghanistan case: Article 15 Appeals Judgment*, 2020, paras. 35-37.

[190] Ibid., 1998, Art. 15(4); Ibid, 2020.

[191] *Afghanistan case: Article 15 Appeals Judgment*, 2020, paras. 34-35.

[192] Ibid., para. 35.

[193] Ibid., paras. 34 & 39.

chamber need only consider whether there is a reasonable factual basis to proceed with an investigation, in the sense of whether crimes have been committed, and whether potential case(s) arising from such investigation appear to fall within the Court's jurisdiction".[194] The Appeals Court claims that this view fully reflects the concern of the drafters when assessing the balance of prosecutorial discretion, specifically during the negotiations about the *proprio motu* provision.[195] However, it has been very clear that the drafters were very keen on implementing a review mechanism, precisely because they wanted to restricted the otherwise immense scope of the prosecutorial discretion (as explained in Chapter 2).[196] Therefore, it is impossible for the drafters to agree with the notion that the 'interests of justice' criterion should not be reviewed.

Additionally, while the Appeals Chamber argues that 'a reasonable basis to proceed' and the 'interests of justice' criterion are distinctly different things, in reality they intertwine. As stipulated in Article 53(1), a 'reasonable basis to proceed' does not entail only (a) the reasonable basis that a crimes has been committed and (b) that it falls under the jurisdiction of the Court but also whether (c) it would not serve the interests of justice. Hence, when assessing the reasonable basis to proceed, as it is required to by Article 15(4), the Pre-Trial Chamber also should assess the 'interests of justice' criterion.

The Appeals Chamber Judgment has created a precedent in which there is no check on the 'interests of justice' criterion, which is a very important and strong part of prosecutorial discretion. Up until this case, the 'interests of justice' criterion has been used as a mere checking-box for the Prosecutor to establish its decision to initiate a formal investigation. Now that the Appeals Chamber has stated that it does not have the power to review this criterion, it begs the question what purpose the 'interests of justice' criterion serves in the ICC Statute. Not only has the ICC OTP not utilized its prosecutorial discretion to its fullest potential by empowering and defining the 'interests of justice' element throughout their prosecutions, but now the ICC Chambers have also neglected this opportunity to make use of a very powerful tool that could facilitate stability and trust in the Court.

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[194] *Afghanistan case: Article 15 Appeals Judgment*, 2020, para. 34.

[195] Ibid.

[196] See Section 2.2.

4.2.2 The substantive argument

The substantive point made in the Appeals Chamber judgement is one that focuses on the negative element in Article 53(1)(c); that the investigation would *not* serve the interests of justice.[197] From this it follows that it is only the Prosecutor pursues a case or initiates an investigation into a situation that would actively contradict the interests of justice, criterion (c) would not be fulfilled. The Appeals Chamber hence derived the conclusion that Article 53 does not create a positive obligation for a case to have to contribute to the 'interests of justice' in order for it to be pursued. Hence, it is only when the Prosecutor declines to initiate an investigation because it would not serve the interests of justice, that the Pre-Trial Chamber has the right to review that decision.[198]

Regardless of whether Article 53(1)(c) creates a positive obligation, it is problematic to satisfy a criterion that has not been properly defined. The Appeals Chamber criticised the Pre-Trial Chamber for abusing its discretion and not correctly analysing the 'interests of justice' criteria,[199] but it did not address how it *should* be analysed.

Additionally, it seems that there is no informal consensus within the branches of the Court as to what it entails to satisfy this criterion. In OTP reports and policy papers the perception of what constitutes the 'interests of justice' changes, which demonstrated the diverging views of what the 'interests of justice' criterion entails.[200] As already mentioned in the previous Chapter, various Prosecutors at the ICC in the past have had opposite views regarding whether or not Article 53(1)(c) includes considerations regarding peace, security and stability within the region.[201] The *Afghanistan case* demonstrates that the scope of this discrepancy includes not only to the Prosecutor's Office, but extends to the diverging views of the Pre-Trial Chamber and the Appeals Chamber regarding the meaning of the 'interests of justice'. In its 2007 policy paper on the 'interests of justice', the OTP stresses that Article 53(1)(c) gives priority to the first two provisions of Article 53(1), hence the 'interests of justice' criterion

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[197] ICC Statute, 1998, Art. 53(1)(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.

[198] Ibid., 1998, Art. 53(3)(b); *Afghanistan case: Article 15 Appeals Judgment,* 2020, para. 29.

[199] Ibid., 2020, para. 49.

[200] ICC OTP Second Report of the Prosecutor to the Security Council, 2005, p. 6; ICC OTP Policy Paper on the Interests of Justice, 2007, p. 7-9; Varaki (2017) p. 461.

[201] Ibid., 2005, Ibid., 2007, Ibid., 2017.

will seldomly be used.[202] The Pre-Trial Chamber's decision not to authorize an investigation, solely because it is not in conformity with Article 53(1)(c) shows that the OTP and the Chamber do not attribute the same weight to the 'interests of justice' criterion.

This incoherency between the understanding of the different organs of the ICC on what constitutes the 'interests of justice' and its importance damages the Court. It is one thing for the Statute to provide leeway for various interpretations of a certain provision, but it is another issue altogether when an importance criterion has not been defined and is now being applied differently by organs of the Court. The ICC needs to have a coherent, stable and reliable practice in order to properly fulfil its mandate. Furthermore, it is important to consider that with the *ad hoc* tribunals being close to completing their mandate, the ICC is the leading institution and Court in the practice of international criminal law. If several (politically) sensitive cases, like the situation in Afghanistan, lead to more incoherency between the interpretation of the ICC's organs, it might prove a dangerous pattern that destabilizes effective the practice of international criminal law as a whole.

4.3 Analysis

The *Afghanistan case* could potentially be a turning point for the ICC. The sensitive political nature of the case could fight the Court's stigma of being untrustworthy and biased towards non-Western, because it would potentially prosecute American nationals. This could have easily been facilitated through explaining why such an investigation would 'serve the interests of justice'; the criterion could have served as an efficient tool to incorporate part of the Prosecution/Chamber's consideration of the sensitive nature of the situation. This case is an opportunity for the ICC to empower its mandate and image.

Instead, through its decision in the *Afghanistan case*, the ICC Appeals Chamber has effectively nullified a substantial part of the judicial review mechanism of the prosecutorial discretion of the Court. By ruling that the Pre-Trial Chamber should not review whether the investigation/prosecution of a case would (not) be in the interests of justice, the Chamber blocks itself from reviewing important financial, political and societal considerations. This decision has rendered the 'interests of justice' criterion as practically useless, given that thus far the OTP have only used it as a checking-box and Chambers will not review it.

[202] ICC OTP Policy Paper on the Interests of Justice, 2007, p. 1.

The ‘interests of justice’ criterion has too much potential to be pushed to the side in this manner. It could most likely contribute to solving the ICC’s issues with its reputation and help the Court regain the trust of the Member States and the international society. It should serve as a tool for both the Prosecution and the Chamber to facilitate additional legal analysis and justification for providing a certain opinion/decision. It adds another layer to the plain considerations whether the Court has jurisdiction over a situation and if there is evidence of a crime. For example, it allows the Court to strengthen its position that it will focus only on the most grave crimes by emphasizing its limited resources and ambitious mandate. It also gives room for explanation that the Court would not indulge in investigating a situation in which it might be potentially used for political gain and where the Court’s authority and image will suffer, because it is overreaching its mandate.

An example of this would be the current investigation into the situation in Myanmar.[203] By deciding that it has indirect jurisdiction over Myanmar through the crime of forcible transfer/deportation,[204] the Court has put itself in a controversial and unprecedented position with regard to jurisdictional boundaries.[205] It could have used the ‘interests of justice’ criterion to emphasize its position that it is following its mandate and that is in the interest of both the victims and the international community for it to pursue such crimes. Hence, it is important, and even natural, for the Court to put itself into such an unprecedented position regarding jurisdiction. Such an argument was made by the Court, but it was embedded into a fleeting two paragraphs when considering the question of jurisdiction.[206] The moment the Court states that it is in the ‘interest of justice’ to put itself into the ‘line of fire’ by developing its jurisdiction in order to fulfil its mandate, it will most definitely be a stronger stance.

[203] *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,* International Criminal Court: Pre-Trial Chamber III [2019] ICC-01/19.

[204] *Bangladesh/Myanmar case: Article 19(3) Decision*, 2018, para. 73.

[205] Ibid., para. 63-64.

[206] Ibid., para. 69-70.

5 Conclusion

Through the Appeals Chamber judgment in the *Afghanistan case*, the ICC has left both key components of the prosecutorial discretion unchecked. These components are embedded within the decision to start a preliminary investigation and the decision to prosecute/investigate, hence, their review is of paramount importance to create a healthy judicial balance.

However, with regard to the first component of prosecutorial discretion, the Prosecutor's *proprio motu* initiation of a preliminary examination, it is shown that the Pre-Trial Chamber has little to no influence on when such an examination will be initiated, with jurisdictional issues being the exception. This gives the Prosecutor free rein to determine which situations to preliminary examine and what factors to consider prior to making such a decision. Hence, the OTP's actions up until the formal request of an investigation remains within their discretion, without the possibility of review. The analysis of the *proprio motu* provision's *travaux préparatoires* has given us an insight into the object and purpose that the drafters meant to instil into the ICC Statute. During the drafting stage it was made very clear that States were keen on establishing a proper review mechanism in order to balance the power of the Prosecutor; their concern did not solely concern the *proprio motu* provision, but the scope of the prosecutorial discretion as a whole. Additionally, given that the ICC's mandate stems not from the UN Security Council or an international organ, but from a Statute with a significantly wider scope, the Court should also perform an *appropriateness* test when deciding to prosecute or not. Hence, it is a controversial development in the practice of the Court to set aside such judicial review mechanisms.

The second component is the 'interests of justice' criterion that constitutes a part of the decision to initiate an investigation/prosecution into a situation. So far, the ICC has adopted three distinct positions regarding the judicial review of the 'interests of justice' criterion by the Pre-Trial Chamber. Initially the OTP only mentioned the criterion as a formality within its Article 15 request and the criterion had more of a passive checking-box function. In the *Afghanistan case* the Pre-Trial Chamber actively reviewed the criterion and used is as a leading argument to prevent further investigation into the situation. The Appeals Chamber decision then actively dismissed any type of review of the 'interests of justice' criterion and ruled the opposite of the Pre-Trial Chamber, without elaborating on what constitutes the criterion. This incoherency damages the effective practice of the ICC, which has an inherent

negative effect on international criminal law as a whole, because it is the leading international criminal court.

Due to the precedent that the Appeals Decision of the *Afghanistan case* has created, another key-aspect of the prosecutorial discretion has been rendered unchecked. Realistically, if the Prosecutor wishes to investigate a sensitive situation that might damage the Court in financial, political or reputable terms, all he or she has to do it to *proprio motu* initiate a preliminary examination, deliver evidence of jurisdiction and of serious crimes being/ having been committed, and the prosecution will occur. The Court will not be able to review anything other than jurisdictional and evidential factors, while it is detrimental that the ICC also takes into account other factors that might significantly disadvantage the Court, such as practical considerations, subjective consideration and political considerations.

Furthermore, it was never the intention of the Statute's drafters and the Member States to create a Court without a proper checking mechanism on prosecutorial discretion. During the drafting procedure, it was clear that Member States were not comfortable with an unchecked international Prosecutor, hence the long debates regarding the judicial review mechanism that was supposed to balance out the discretionary power of the OTP. Now this whole review system has been rendered redundant.

In order to dispel the confusion around the prosecutorial discretion and facilitate an effective practice of international criminal law, the ICC should stop tip-toeing around the 'interests of justice' criterion. It should take a uniform position regarding not only what the criterion entails, but also how such a strong discretionary element can be appropriately balanced, which is something that the Appeals decision in the *Afghanistan case* does not provide. There should be a uniform understanding throughout the various organs of the Court (Prosecution, Chambers, Defence, etc.) what the role is of the criterion how it is to be reviewed and by whom. This will contribute greatly to the stability and, hence, the legitimacy of the Court. Up until now the criterion has caused great political controversy, while it was most likely meant precisely to prevent such conflict. The Court should use this already built-in system to explain and clarify itself more so that its future decisions are more understandable, legitimate and justifiable. For now, however the Appeals Chamber has misinterpreted its role as a judicial checking mechanism of prosecutorial discretion by dismissing the Pre-Trial Chamber's power to review the 'interests of justice' criterion.

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