The investigation phase in international criminal procedure: in search of common rules

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Chapter 3: Structure and scope of the investigation

INTRODUCTION ........................................................................................................................ 144

I. THE INVESTIGATION PHASE: DEFINITION AND DELINEATION ............................................ 145
   I.1. Minimum threshold for the commencement of the investigation ............................ 145
   I.2. The pre-investigation phase ..................................................................................... 151
   I.3. The investigation proper .......................................................................................... 169
      I.3.1. The ad hoc tribunals and the SCSL ................................................................. 169
      I.3.2. The International Criminal Court ...................................................................... 175
      I.3.3. The Extraordinary Chambers in the Courts of Cambodia .................................... 193
      I.3.4. The Special Tribunal for Lebanon ................................................................. 199
      I.3.5. The Special Panels for Serious Crimes ................................................................. 203
      I.4. Reactive vs. proactive investigations ....................................................................... 209

II. PROSECUTORIAL DISCRETION .............................................................................................. 232
   II.1. Introduction .............................................................................................................. 232
   II.2. The ad hoc tribunals: broad discretion ..................................................................... 238
   II.3. The Special Court for Sierra Leone (SCSL): ‘guided’ discretion ............................... 250
   II.4. The ICC: tempered legality ....................................................................................... 257
      II.4.1. General ................................................................................................................. 257
      II.4.2. Variables to be considered .................................................................................. 259
      II.4.3. Review of and control over prosecutorial discretion ........................................... 286
      II.4.5. Prosecutorial practice .......................................................................................... 295
   II.5. The Extraordinary Chambers in the Courts of Cambodia (ECCC): moderate legality 297
   II.6. The Special Panels for Serious Crimes (SPSC) .......................................................... 306
   II.7. The Special Tribunal for Lebanon (STL) .................................................................... 308
   II.8. Conclusions ................................................................................................................. 310

III. PRINCIPLE OF (PROSECUTORIAL) OBJECTIVITY ................................................................. 322
   III.1. Introduction ............................................................................................................... 322
   III.2. The ad hoc tribunals ............................................................................................... 326
   III.3. The Special Court for Sierra Leone ............................................................... 331
   III.4. The International Criminal Court .............................................................................. 332
   III.5. The Internationalised criminal tribunals ................................................................. 339

IV. DUE PROCESS OBLIGATIONS .............................................................................................. 345

PRELIMINARY FINDINGS .......................................................................................................... 352
This chapter explores the procedural design of the investigation phase at the different tribunals under review. Before embarking upon a detailed discussion of any investigative activities in the subsequent chapters, it is necessary to first delineate and define what ‘investigation’ means under international criminal procedural law. As with other chapters, the emphasis lies on identifying communalities and differences between the tribunals under review.

It is necessary to precisely determine the start and the end point of investigations in international criminal procedure. It needs to be examined from which moment on and under what conditions the Prosecutor may avail him or herself from the full gamut of investigative powers which are provided for under international criminal procedure. For example, it may be that a minimum level of suspicion is required in order to justify the use of these investigative measures. Furthermore, while international criminal investigations are traditionally reactive in nature, it needs to be investigated whether or not, and if so, to what extent, investigations can be proactive in nature.

For that purpose, in the first section of this chapter, whether or not any ‘minimum threshold’ exists for the commencement of investigations will be examined. Related to this is the question whether or not any investigative activity may precede the determination that such a threshold has been met. Whereas a ‘pre-investigation phase’ is clearly envisaged by the procedural rules of the ICC, it will be asked whether such a phase also exists at other tribunals under review. An outline of the structure of the investigation phase at the different international(ised) criminal tribunals will then be provided. Also the role and function of the different actors during this phase of proceedings will be scrutinised. This first section will conclude with a discussion on the nature (reactive vs. proactive) of investigations within international criminal procedure.

The second section of this chapter then seeks to determine whether the Prosecutor in international criminal proceedings enjoys discretion in selecting cases for investigation (and prosecution) or whether he or she is rather bound by a principle of legality. At the outset, considering the nature of crimes that these tribunals are dealing with, it seems logical to
assume that international Prosecutors should at least enjoy some degree of discretion. However, the level of discretion may vary amongst tribunals.

In the third and fourth section, some important normative principles will be discussed. Firstly, it will be examined to what extent the international Prosecutor should only gather incriminating evidence and information in the course of the investigation, or whether he or she is bound by a principle of objectivity, requiring the Prosecutor to investigate à charge and à décharge. Secondly, it will be asked to what extent the Prosecutor and other participants are bound by ethical considerations of due diligence in the conduct of investigations.

This chapter concludes with an overview of any common rules or shared practices that could be identified.

I. THE INVESTIGATION PHASE: DEFINITION AND DELINEATION

I.1. Minimum threshold for the commencement of the investigation

§ The ad hoc tribunals

The ad hoc tribunals’ Statutes include an explicit threshold for the commencement of investigations. A ‘sufficient basis to proceed’ should exist. It is clear from the wording that this evidentiary threshold is not concerned with the appropriateness of the investigation. Neither the statutory documents, nor the jurisprudence further elucidate the content of this threshold. A contextual reading clarifies that this threshold should be lower than the threshold provided for under Article 17 (4) ICTR and 18 (4) ICTY Statute for the preparation of the indictment. Furthermore, some hints on the interpretation of this threshold by the ICTY Prosecution may be found in an expert report the Prosecutor requested on the politically delicate issue of the NATO bombing campaign against the Federal Republic of Yugoslavia. A committee had been tasked to advise the Prosecution “whether or not there existed a sufficient basis to proceed with an investigation with regard to allegations that war crimes had been

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1 Article 18 (1) ICTY Statute; Article 17 (1) ICTR Statute. No such threshold is to be found in the Statute or the RPE of the Special Court.
committed by NATO personnel and leaders in the course of the air campaign against the Federal Republic of Yugoslavia.\textsuperscript{3} The committee proposed the following test:

“(a) Are the prohibitions alleged sufficiently well-established as violations of international humanitarian law to form the basis of a prosecution, and does the application of the law to the particular facts reasonably suggest that a violation of these prohibition may have occurred? And (b), upon the reasoned evaluation of the information by the committee, is the information credible and does it tend to show that crimes within the jurisdiction of the Tribunal may have been committed by individuals during the NATO bombing campaign.”\textsuperscript{4}

The report states that the same criteria were applied by the Prosecution to “activities of other actors in the territory of the Former Yugoslavia.”\textsuperscript{5} Hence, it follows that the test formulated above at least reflects the test that was applied by the OTP. Importantly, since no judicial control is exerted over the Prosecutor’s decision to commence an investigation and in the absence of relevant jurisprudence, it is up to the Prosecutor to interpret the ‘sufficient basis to proceed’ threshold. From such a minimum threshold for the commencement of an investigation follows the existence of a phase immediately preceding it.\textsuperscript{6}

\textit{§ The International Criminal Court}

Unlike the \textit{ad hoc} tribunals, the ICC Statute and RPE expressly provide for a pre-investigative phase.\textsuperscript{7} The threshold to move from a preliminary investigation to a full-blown investigation differs from the ‘sufficient basis to proceed’ threshold at the \textit{ad hoc} tribunals. Rather, the ICC Statute requires a ‘reasonable basis to proceed’. This threshold is found in Article 15 (3), (4) and (6) ICC Statute with regard to \textit{proprio motu} investigations; in the \textit{chapeau} of Article 53...
(1) ICC Statute as well as in Rule 48 ICC RPE. This raises the question whether this threshold is the same in all of these provisions.

Under Article 53 (1) (a) a different threshold is included, ‘reasonable basis to believe’, adding to the complexity. It is unclear how the ‘reasonable basis to proceed’ requirement in the *chapeau* of Article 53 (1) ICC Statute and the ‘reasonable basis to believe’ threshold under Article 53 (1) (a) mutually relate. A textual interpretation of Article 53 (1) hints that a ‘reasonable basis to proceed’ exists once the different criteria of subparagraphs (a) – (c) are met. Such understanding has been confirmed by the jurisprudence. Pre-Trial Chamber II held that the ‘reasonable basis to believe’ test in Article 53 (1) (a) is subsumed by the ‘reasonable basis to proceed’ standard referred to in the opening clause of Article 53 (1) of the Statute, since the former is only one element of the latter. Hence, there is a strong presumption that the ‘reasonable basis to proceed’ requirement is met when the requirements under Article 53 (1) (a) – (c) ICC Statute are fulfilled. This conclusion is supported by the *travaux préparatoires*. A contextual interpretation in light of other thresholds that are found in the Statute further sheds light on the correct understanding of the threshold. Article 15 (3) ICC Statute is concerned with only one triggering mechanism (*proprio motu* investigations by the ICC Prosecutor), more precisely with the assessment of the information received by the Prosecutor and the question whether this information reveals the existence of a ‘reasonable basis to proceed’. It follows from Rule 48 ICC RPE that in this determination, the Prosecutor should equally consider the criteria under Article 53 (1) (a) – (c) ICC Statute. Hence, it appears that

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10 Ibid., par. 26.

11 Report of the Preparatory Committee on the Establishment of an International Criminal Court, Addendum: *Draft Statute for the International Criminal Court and Draft Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the establishment of an International Criminal Court*, U.N. Doc. A/CONF.183/2/Add.1, 14 April 1998, p. 75 (a *nota bene* is included, highlighting that the ‘term ‘reasonable basis’ in the opening clause is also used in the criteria listed in paragraph 2 (i). If the latter is retained, a broader term in the opening clause might be necessary in order to cover all the criteria listed under paragraph 2.*).
similar considerations underlie the ‘reasonable basis to proceed’ threshold in Article 15 (3) and in the chapeau of Article 53 (1) ICC Statute.

As acknowledged by Pre-Trial Chamber II, it would be illogical to dissociate the threshold in Article 15 (3) and Article 53 (1) from the threshold provided for under Article 15 (4) ICC Statute, which deals with the authorisation of a proprio motu investigation by the Pre-Trial Chamber. The Pre-Trial Chamber refers to the fact that these thresholds are used in the same or related articles and that they share the same purpose: the opening of a formal investigation. This conclusion finds support in the travaux préparatoires. Moreover, Pre-Trial Chamber II argued that the meaningful exercising of a supervisory function by the Pre-Trial Chamber in case of a proprio motu initiative by the Prosecutor presupposes that “the Chamber applies the exact standard on the basis of which the Prosecutor arrived at his conclusion.” This relationship between Article 15 and 53 ICC Statute is further confirmed by Rule 48 ICC RPE.

Clearly, a ‘reasonable basis to proceed’ requires less certainty than the ‘sufficient basis for a prosecution’ threshold in Article 53 (2) ICC Statute. Similarly, the threshold is lower than the ‘reasonable grounds to believe’ prerequisite for the issuance of an arrest warrant or the existence of substantial grounds to believe as required for the confirmation of the charges. One author labels it “the first step of a stairway which becomes stricter with every step taken towards trial and requires more profound evidence with each level.” It has been suggested

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13 Ibid., par. 21. Confirming F. RAZESBERGER, The International Criminal Court: The Principle of Complementarity, Frankfurt am Main, Peter Lang, 2006, p. 70 (holding that the ‘initiation of the investigation’ has the same meaning in both articles so that the ‘reasonable basis’ requirement under Article 15 (3) and Article 53 (1) ICC Statute applies to the same phase in the investigation process).


16 Article 61 (7) ICC Statute.

that the ‘reasonable basis to proceed’ threshold, in the manner it has been applied by the Court, is in fact the same as the ‘reasonable grounds to believe’ standard which is required for the issuance of an arrest warrant. The difference is that the evidence required should be directed to the individual, rather than to the situation or to events.18

In comparison, it seems that the ‘sufficient basis to proceed’ (the ad hoc tribunals) and the ‘reasonable basis to proceed’ threshold (ICC) do not differ that much. Such a view is supported by the drafting history of the provisions. During the 1996 PrepCom debates, the same threshold (‘sufficient basis to proceed’) which is found in the Statutes of the ad hoc tribunals was first proposed.19 In draft Article 12, the formulation ‘a sufficient basis to proceed’ was used, while in draft Articles 13 and 54 (1) a ‘reasonable basis to proceed’ was required.20 A nota bene was included in Article 12 that “[t]he terms "sufficient basis" used in this article (if retained) and "reasonable basis" in article 54, paragraph 1, should be harmonized.” From there, it could arguably be reasoned that both concepts (‘sufficient basis to proceed’ and ‘reasonable basis to proceed’) are not that different from each other. However, future case law (primarily by the ICC Pre-Trial Chambers) may further elucidate the meaning of the ‘reasonable basis to proceed’ threshold. In contrast, since the ‘sufficient basis to proceed’ threshold is not subject to direct judicial supervision, the exact understanding thereof by the Prosecutors of the ad hoc tribunals remains enigmatic.

According to an ICC Pre-Trial Chamber, the ‘reasonable basis to proceed’ threshold serves to prevent “unwarranted, frivolous, or politically motivated investigations.”21 This finding regarding the purpose of this minimum threshold is confirmed by the travaux préparatoires: this threshold was inserted “to prevent any abuse of the process not only by the Prosecutor but

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also by any of the other triggering parties.” While some authors argue that this threshold is purely evidentiary in nature, it will be shown further on in this chapter, that this threshold also includes the appropriateness of the investigation. Several factors which are subsumed in this threshold (in particular the ‘interests of justice’) are in fact discretionary in nature.

§ Other international(ised) criminal tribunals

Also at the ECCC, the investigation phase consists of two subsequent stages. Prior to the commencement of the judicial investigation, preliminary investigations are normally conducted by the Co-Prosecutors. No minimum threshold is provided for the commencement of preliminary investigations. Only when the Co-Prosecutors have ‘reason to believe’ that crimes within the jurisdiction of the Extraordinary Chambers have been committed, shall they order the opening of a judicial investigation. Similar to the ad hoc tribunals, no judicial review of this finding is normally provided for. One notable exception is the scenario when a disagreement arises between the two Co-Prosecutors on the presence of ‘reasons to believe’. In this regard, reference is to be made to the disagreement between the national and the international Co-Prosecutor on the submission of new introductory submissions for Cases 003 and 004 (and thus the question whether ‘reasons to believe’ existed pursuant to Rule 53 (1) ECCC IR). In the absence of further clarification within the Internal Rules or the jurisprudence of the Extraordinary Chambers of the meaning of this threshold, discretion to define it is left with the Co-Prosecutors.

The statutory documents of the SPSC, the SCSL and the STL do not require the existence of a sufficient or reasonable basis for the commencement of a formal investigation. No standard of proof for the initiation of the investigation is provided for.

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25 Rule 53 (1) ECCC IR.
26 Rule 71 ECCC IR; Article 7 ECCC Agreement.
28 As will be discussed, infra, Chapter 3, II.5.
§ Conclusion

From the above, it emerges that a standard of proof for the commencement is only provided for at the ad hoc tribunals, the ICC and the ECCC. A comparison can be drawn with national criminal justice systems. Also at the national level, only some criminal justice systems provide for such standard of proof. For example, in Germany, the opening of a formal investigation (Ermittlungsverfahren) is required once there are ‘sufficient factual indications’. Hence, the sanctioning of the start of a formal investigation presupposes the existence of an ‘initial suspicion’ (Anfangsverdacht). This threshold implies that according to factual circumstances, and taking into account criminal experience, a participation of the person concerned in the alleged criminal offence(s) seems possible. Likewise, other national jurisdictions established such minimum threshold for the commencement of full investigations. In turn, other countries, such as the United States, do not seem to provide for such standard of proof.

1.2. The pre-investigation phase

§ The ad hoc tribunals and the SCSL

The powers to investigate and to prosecute are vested with the Prosecutor. Hence, it is the Prosecutor who initiates the investigation. No preference is included regarding the notitia criminis. The Prosecutor can initiate investigations ex officio or on the basis of information from ‘any source’. There is no possibility for third parties to initiate investigations. This

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29 § 152 (2) StPO.
31 Consider e.g. Article 224 (1) of the Criminal Procedure Act of the Kingdom of Norway (‘A criminal investigation shall be carried out when as a result of a report or other circumstances there are reasonable grounds to inquire whether any criminal matter requiring prosecution by the public authorities subsists’).
33 Article 16 (1) of the ICTY Statute and Article 15 (1) of the ICTR and SCSL Statutes.
35 Article 18 (1) ICTY Statute and Article 17 (1) ICTR Statute expressly refer to information received from governments, United Nations organs, intergovernmental and non-governmental organizations. No similar provision can be found in the SCSL Statute.
power is left with the Prosecutor alone. The identification, in the previous section, of a minimum threshold for the commencement of the investigation presupposes the existence of a phase immediately preceding this phase. This phase may be labelled the ‘pre-investigation phase’. However, unlike the ICC’s procedural set-up (which will be discussed subsequently), the ICTY, ICTR and SCSL Statute and RPE do nowhere explicitly regulate it. As a minimum, it should comprise of the analysis and evaluation of information and materials in order to assess whether the minimum threshold for the commencement of the investigation has been reached in a particular case.

36 Cassese provides three possible explanations for this omission, to know (1) the fact that there already existed numerous reports on the alleged crimes, making such a right of complaint superfluous; (2) the risk that the availability of such mechanism would have triggered proceedings regarding alleged crimes of minor importance and (iii) that such right might have enabled states to act on political grounds or could have prompted states to make use of criminal justice for their own ends. See A. CASSESE, International Criminal Law (2nd Ed.), Oxford, Oxford University Press, 2008, p. 396.


38 At least one author argues that in the absence of an explicit regulation of this pre-investigation, it may not be sensible to separate it from the investigation phase proper. However, it is argued that such distinction is necessary to properly delineate the investigation phase proper. Compare C. SAFFERLING, International Criminal Procedure, Oxford, Oxford University Press, 2012, p. 231.


40 Article 18 (1) ICTY Statute and Article 17 (1) ICTR Statute.

At the ICC, the pre-investigation is regulated by Articles 15 (1) (2) (3) and (6) and 53 (1) of the ICC Statute as well as by Rules 48 and 104 ICC RPE. While only Article 15 (6) explicitly refers to a ‘preliminary examination’, the existence of a phase immediately preceding the investigation proper follows from the existence of a minimum threshold for the commencement of the investigation proper. It constitutes a phase which can be distinguished from the investigation proper.\(^{42}\)

It follows from the ICC Statute as well as the ICC RPE that the preliminary examination starts once the dormant jurisdiction of the Court is triggered and irrespective of the manner in which the jurisdiction of the court is triggered: either on the basis of information received on crimes or upon a referral.\(^ {43}\) Therefore, while the ICC Statute uses the term ‘preliminary examination’ only if the Prosecutor proceeds on the basis of his or her \textit{proprio motu} powers, a formal investigation does also not follow automatically in case of a referral.\(^ {44}\) It is for the Prosecutor to decide whether or not to open an investigation.\(^ {45}\) In all instances, the Prosecutor should assess the seriousness of the information received.\(^ {46}\) Furthermore, irrespective of the triggering mechanism, in assessing whether the minimum threshold for the opening of an investigation proper has been fulfilled, the same criteria should be considered.\(^ {47}\) What differs is the procedural presumption.\(^ {48}\) With regard to referrals, it follows from the ICC Statute that the Prosecutor ‘\textit{shall} […] initiate an investigation \textit{unless} he or she determines that there is no reasonable basis to proceed’. Judicial review by the Pre-Trial Chamber is limited to a

\(^{42}\) See e.g. I. STEGMILLER, The Pre-Investigation Stage of the ICC, Berlin, Duncker & Humblot GmbH, 2011, pp. 58, 65.
\(^{45}\) ICC, Policy Paper on Preliminary Examinations, 2013, par. 76.
\(^{46}\) Rule 104 (1) ICC RPE, Article 15 (2) ICC Statute.
\(^{47}\) Article 15 (3) ICC Statute \textit{juncto} Rule 48 ICC RPE and Article 53 (1) ICC Statute.
determination not to proceed, not of an affirmative decision to proceed.\footnote{Article 53 (1) ICC Statute \textit{chapeau} and \textit{in fine}.} Hence, in such a case, there is a strong presumption in favour of the finding of a ‘reasonable basis’, thereby limiting prosecutorial discretion in case of a referral. In contrast, when the Prosecutor assesses information received, the starting point is that there will be no initiation of the investigation: the Prosecutor needs authorisation by the Pre-Trial Chamber to proceed with an investigation.\footnote{Article 15 (3) ICC Statute.} From the above, it emerges that irrespective of the triggering mechanism, the pre-investigative phase is – at least in theory – almost identical.\footnote{ICC, Corrigendum to “Judge Fernández de Girondi’s Separate and Partially Dissenting Opinion to the 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”, \textit{Situation in the Republic of Côte d’Ivoire}, Case No. ICC-02/11-15-Corr, PTC III, 5 October 2011, par. 24.}

Provided that a preliminary examination or pre-investigative stage is provided with respect to all triggering mechanisms, it should be asked whether and to what extent the Prosecutor can start a preliminary examination in the absence of a communication. In other words, is the \textit{notitia criminis} a \textit{conditio sine qua non} for the conduct of a preliminary examination? From the combined reading of Article 15 (1) (2) and (6), it seems to follow that this question should be answered in the affirmative.\footnote{Confirming, see H. OLÁSOLO, The Prosecutor of the ICC before the Initiation of Investigations: a Quasi-Judicial or Political Body?, in \textit{International Criminal Law Review}, Vol. 3, 2003, pp. 124 – 125; M. BERGSMO and J. PEJIĆ, Article 15, in O. TRIFTERER (ed.), \textit{Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article}, München, Verlag C.H. Beck, 2008, p. 586. \footnote{I. STEGMILLER, The Pre-Investigation Stage of the ICC, Berlin, Duncker & Humblot GmbH, 2011, p. 192 (who concludes that such approach would be too stringent where the purpose of Article 15 was to allow the Prosecutor to start investigations on his own).} Such reading has been questioned.\footnote{I. STEGMILLER, The Pre-Investigation Stage of the ICC, Berlin, Duncker & Humblot GmbH, 2011, p. 192 (who concludes that such approach would be too stringent where the purpose of Article 15 was to allow the Prosecutor to start investigations on his own).} It is pointed out that Article 15 (1) refers to ‘information’, rather than ‘information received’. However, a contextual interpretation of this provision, in light of Article 15 (2) and Article 15 (6) ICC Statute contradicts such interpretation. Indeed, these two latter provisions respectively refer to ‘information received’ and ‘information provided’.\footnote{H. OLÁSOLO, The Prosecutor of the ICC before the Initiation of Investigations: a Quasi-Judicial or Political Body?, in \textit{International Criminal Law Review}, Vol. 3, 2003, p. 126 Other arguments provided by the author why the communication of the \textit{notitia criminis} is presupposed seem less convincing: (1) the author argues, in referring to the three triggering mechanisms, that the possibility for the Prosecutor to \textit{pro proprio motu} start an investigation presupposes the communication of the \textit{notitia criminis} (this seems to be a circular argument) and (2) that the lack of limitations to the Prosecutor’s possibility to conduct preliminary investigations would undermine the delicate balance reached at the Rome conference.} Other authors agree that a communication is presupposed but add that the threshold is very low and may include the
Prosecutor receiving information by watching the news. In turn, the Prosecutor holds the view that no formal communication is required and he or she "proactively monitor[s] information on crimes potentially falling within the jurisdiction of the Court."

A related question is whether the Prosecutor is obliged to proceed with a preliminary examination in all cases where he or she receives information. According to Article 15 (1) ICC Statute, the Prosecutor ‘may’ initiate investigations proprio motu. From this wording, it could be concluded that the Prosecutor’s initiation right is discretionary. This interpretation has been adopted by the ICC OTP. One could argue that the discretion in Article 15 (1) relates to the formal investigation, which is to be distinguished from any preliminary investigation. However, this view seems to contradict Article 15 (6), from which it follows that Article 15 (1) and (2) are concerned with the preliminary examination. Less clear is how this discretion imbedded in Article 15 (1) should then be reconciled with Article 15 (2), which states that the Prosecutor ‘shall analyse the seriousness of the information received’. From this wording an obligation for the Prosecutor to properly assess all information submitted to the Prosecutor clearly follows. However, a threshold is embedded in Article 42 (1) ICC Statute, which speaks of ‘substantiated information’. Some authors even provide a different interpretation. Based on an understanding that the Prosecutor may not only proceed on the basis of information that was formally submitted (an understanding which was rejected by this author), they argue that the discretion referred to in Article 15 (1) is narrow (in light of Article 15 (2) - (6) ICC Statute) with regard to information that has formally been submitted.

58 OTP, Policy Paper on Preliminary Examinations, 2013, par. 73.
and that the Prosecutor enjoys “a wide range of discretion” when he or she initiates an investigation on his or her own initiative.63

In light of the broad mandate of the ICC, it is important to determine what the object is of the pre-investigation phase. It is clear that the triggering mechanisms are concerned with ‘situations’.64 However, this concept is nowhere further defined.65 Case law has clarified that ‘situations’ “are generally defined in terms of temporal, territorial and in some cases personal parameters.”66 They entail “the proceedings envisaged in the Statute to determine whether a particular situation should give rise to a criminal investigation as well as the investigation as such.”67 Situations are to be distinguished from ‘cases’ which include “specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects.”68 Such definitions are in line with the travaux préparatoires which intended that cases and situations were to be distinguished in negative terms: situations could not identify specific individuals for specific crimes.69 Where the Pre-Trial Chambers also held that a case refers to proceedings after the issuance of a summons to


64 See Articles 13 (a) and (b), 14, 15 (5) and (6), 18 (1) and 19 (3) ICC Statute. However, with regard to the proprio motu triggering of jurisdiction by the Prosecutor, it is to be noted that while Article 15 (5) and (6) refer to ‘situations’, other provisions are less clear. For example, Article 13 (c) ICC Statute refers to a ‘crime’, while Article 15 (4) refers to a ‘case’. It is clear that such formulation is the result of poor drafting and that ‘situations’ were intended. See e.g. I. STEGMILLER, The Pre-Investigation Stage of the ICC, Berlin, Duncker & Humblot GmbH, 2011, p. 99.


66 ICC, Decision on Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, Situation in the DRC, Case No. ICC-01/04-101, PTC I, 17 January 2006, par. 65; ICC, Decision Requesting Clarification on the Prosecutor’s Application under Article 58, Situation in the DRC, Case No. ICC-01/04-575, PTC I, 6 September 2010, par. 8; ICC, Decision on Victims’ Applications for Participation a/0010/06, a/0064/06 to a0070/06, a0081/06 to a0104/06 and a0111/06 to a0127/06, Prosecutor v. Kony, Otti, Odhiambo and Ongwen, Situation in Uganda, Case No. ICC-02/04-01/05-252, PTC II, 10 August 2007, par. 83, fn. 57.

67 ICC, Decision on Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, Situation in the DRC, Case No. ICC-01/04-101, PTC I, 17 January 2006, par. 65.

68 Ibid., par. 65; ICC, Decision on the Prosecutor’s Application for a Warrant of Arrest, Article 58, Prosecutor v. Lubanga, Situation in the DRC, Case No. ICC-01/04-01/06, PTC I, 10 February 2006, par. 21.

appear or a warrant of arrest, it logically follows that the pre-investigation is concerned with situations and not cases.  

It is important to consider to what extent the Prosecutor is bound, during the pre-investigative phase, by the delineation of the situation by a referring party. Several principles, such as the principles of objectivity and impartiality as well as the principle of prosecutorial independence, militate against an inflexible approach with regard to situations referred to the Court. For example, it follows from the independence of the Prosecutor as laid down in Article 42 (1) ICC Statute that the referring party cannot dictate the boundaries of the situation. Also the OTP’s Policy Paper on Preliminary Examinations confirms that the principle of independence implies that the Prosecution is not bound by any limitation of the situation to certain individuals or certain parties. This is of particular importance with regard to self-referrals, where the risk of an “asymmetrical self-referral” is clear. For example, when the government of Uganda referred the “situation concerning the Lord’s Resistance Army” to the ICC, the ICC Prosecutor responded that the referral was understood to refer to all crimes committed within the situation in Northern Uganda “by whomever committed”. Where a referral or information received by the Prosecutor is accompanied by a list of alleged perpetrators, this is not binding upon the Prosecutor. In a similar vein, it is important that the principle of objectivity and the obligation to cover all facts and evidence, as laid down in Article 54 (1) (a) ICC Statute, permeate the analysis at the pre-investigative stage.

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70 ICC, Decision on Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, Situation in the DRC, Case No. ICC-01/04-101, PTC I, 17 January 2006, par. 65.
71 See infra, Chapter 3, II.4.4.
73 OTP, Policy Paper on Preliminary Examinations, 2013, par. 27.
75 ICC, Letter from Prosecutor Moreno-Ocampo to President Kirsch, dated 17 June 2004, annexed to ICC, Decision Assigning the Situation in Uganda to Pre-Trial Chamber II, Situation in Uganda, Case No. ICC-02/04-1, Presidency, 5 July 2004.
76 OTP, Policy Paper on Preliminary Examinations, 2013, par. 27. Reference can be made to a list of persons allegedly bearing criminal responsibility by the U.N. International Commission of Inquiry for Darfur and a list of potential perpetrators identified by the Commission of Inquiry into the post-election violence with regard to the Kenya situation.
77 As acknowledged by the OTP, Policy Paper on Preliminary Examinations, 2013, par. 30 – 33.
It has been argued that since referrals and information received serve as *notitia criminis*, their function is to inform the Prosecutor who may then freely redefine the situation referred.\(^78\) Hence, delineation of the situation by the referring entity or by the information provider may not seem problematic at first. However, KRESS has argued that it is unclear whether ‘corrections’ to a referral can be made (unlike interpretation thereof, which is not problematic). Other commentators explicitly reject the possibility for the Prosecutor to *sua sponte* make changes to the parameters of the situation that was referred.\(^79\) However, it is clear that the Prosecutor may use the information in the referral to proceed on the basis of his or her *proprio motu* powers or, alternatively, to solicit a revised referral.\(^80\) Hence, taking the example of the Uganda referral, it would have been preferable for the Prosecutor (taking into consideration the Prosecutor’s duty of independence), to request a revised referral by the Government of Uganda or to make use his or her *proprio motu* powers, subject to an authorisation by the Pre-Trial Chamber.

Article 16 ICC Statute allows the Security Council to defer investigations or prosecution in a resolution that is adopted under Chapter VII. However, insofar that Article 16 refers to ‘investigations’, it is unclear whether the pre-investigation phase is included. Nevertheless, it follows from Article 15 (6) that the ‘preliminary examination’ is to be distinguished from the investigation proper. Commentators are in agreement that this power leaves pre-investigative efforts unaffected and presupposes the existence of a formal investigation.\(^81\)


\(^79\) WCRO, The Relevance of a “Situation” to the Admissibility and Selection of Cases before the International Criminal Court, October 2009, p. 25 (“there is no evidence that the ICC Prosecutor may choose cases that fall beyond the terms of a State Party or Security Council referral” (emphasis in original)). See also ibid., p. 26 (“Based on the plain language of the Statute and the relevant drafting history, the Court’s jurisdiction is only as broad as its referral”).

\(^80\) Ibid., p. 25.

The Statute and the RPE do not regulate in detail the method for the conduct of the preliminary examination. However, some limited investigative powers are explicitly provided for. Firstly, the Prosecutor may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organisations, or other reliable sources.82 This information is then critically evaluated by the Prosecution.83 In addition, he or she may receive written or oral testimony at the seat of the Court.84 It is stipulated that the procedural rules on the recording of the questioning during the investigation apply mutatis mutandis.85 The Prosecutor should ensure the confidentiality of the testimony received or take other necessary measures pursuant to his or her duties under the ICC Statute.86 When the Prosecutor considers that there is a serious risk that testimony may not be available later (during a possible formal investigation), he or she may request the Pre-Trial Chamber ‘to take such measures as may be necessary to ensure the efficiency and integrity of the proceedings’ which may include the appointment of a counsel or a Judge to protect the rights of the Defence during the taking of the testimony.87 Other investigative powers are not mentioned. It is clear that these are only at the Prosecutor’s disposal after the start of the investigation proper.88

As far as the power to receive written or oral testimony at the seat of the Court is concerned, it has been argued that this power should be given a liberal interpretation. This would entail that testimony may also be received at one of the field offices.89 However, other commentators hold more convincingly that the power should be interpreted restrictively and be limited to the premises in The Hague.90 Indeed, a textual interpretation suggests that the addition ‘at the seat of the Court’ excludes field offices. In addition, a contextual reading, in light of Article 3 (1) ICC Statute (defining the seat of the Court) supports such view. Nevertheless, it is clear that this finding does not impact on the power of national authorities to take evidence (outside any

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82 Rule 104 (2) ICC RPE, Article 15 (2) ICC Statute.
83 OTP, Policy Paper on Preliminary Examinations, 2013, par. 27.
84 Article 15 (2) ICC Statute and Rule 104 (2) ICC RPE.
85 Rules 47, 104 (2), 111 and 112 ICC RPE. See the detailed discussion thereof, infra, Chapter 5.
86 Rule 46 ICC RPE.
87 Rule 47 (2) ICC RPE.
88 Consider e.g. Article 54 ICC Statute.
89 Consider M. BERGSMO and J. PEJIĆ, Article 15, in O. TRIFTERER (ed.), Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article, München, Verlag C.H. Beck, 2008, p. 588 ("The term “seat of the Court” should include possible field offices and temporary arrangements which the Office of the Prosecutor may establish"). At present, the ICC website mentions two field offices, to know: the DRC and Uganda. See http://www.iccasp.int/en_menus/icc/about%20the%20court/practical%20information/Pages/field%20offices.aspx, last visited 2 February 2014).
90 Consider e.g. F. RAZESBERGER, The International Criminal Court: The Principle of Complementarity, Frankfurt am Main, Peter Lang, 2006, pp. 62 – 63 and 66.
obligation incumbent on them to do so) and to deliver such testimony to the Court in The Hague.  

It emerges from the practice of the ICC Prosecutor that the Prosecutor has interpreted his or her powers at this stage in a broad manner. In particular, the Prosecutor, on a regular basis, undertakes ‘field missions’ to monitor a situation. Furthermore, on several occasions, the Prosecutor received diplomatic missions at the seat of the Court and entered into a dialogue with different stakeholders in the conflict.

A related question is whether or not Part 9 of the ICC Statute applies to the pre-investigative stage. At first, such liberal interpretation does not seem to be precluded by the wording of Articles 86 and 93 ICC Statute, which outline the cooperation obligations for States Parties. These provisions refer to the obligations to ‘cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court’ and the obligation to provide assistance ‘in relation to investigations or prosecutions’. However, a narrow interpretation, according to which Part 9 only applies from the moment a reasonable basis has been established, has been adopted by the OTP. It was held in an informal expert paper by the OTP that, among others, such interpretation is “easier to reconcile with Article 15(2) than the broad interpretation, not least because it corresponds to the desire of States, during the negotiations, to limit the investigative powers of the Prosecutor prior to obtaining judicial authorisation in the case of proprio motu investigations.”

95 ICC, Policy Paper on Preliminary Examinations, 2013, par. 84 (“At the preliminary examination stage, the Office does not enjoy investigative powers, other than for the purpose of receiving testimony at the seat of the Court, and cannot invoke the forms of cooperation specified in Part 9 of the Statute from States”).
With regard to the process of the pre-investigation, it further follows from Article 15 (2) and Rule 104 (1) ICC RPE that irrespective of the triggering mechanism, the Prosecutor should analyse the seriousness of the information received. This preliminary assessment is conducted by the Prosecutor.\textsuperscript{97} The Pre-Trial Chamber has not been endowed with any investigative function at this stage.\textsuperscript{98} The analysis of the seriousness of the information received is solely evidentiary in nature.\textsuperscript{99} Since the pre-investigation stage should result in a decision whether or not to proceed with a formal investigation, the Prosecutor should consider the criteria mentioned in Article 53 (1) ICC Statute and determine whether or not a reasonable basis exists.

No particular time frame is provided for the conduct of the pre-investigation. According to the Prosecution, this was a deliberate choice made when drafting the ICC Statute.\textsuperscript{100} However, a ‘reasonable time’ criterion has been advanced by Pre-Trial Chamber III.\textsuperscript{101} It held that this obligation derives from Rule 105 (1) ICC RPE, according to which the Prosecutor should ‘promptly’ inform in writing the state which referred the situation, when deciding not to...

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\textsuperscript{97} ICC, Judgment on Victim Participation in the Investigation Stage of Proceedings in the Appeal of the OPCD against the Decision of Pre-Trial Chamber I of 7 December 2007 and in the Appeals of the OPCD and the Prosecutor against the Decision of Pre-Trial Chamber I of 24 December 2007, \textit{Situation in the DRC}, Case No. ICC-01/04-556 (OA4 OA5 OA6), A. Ch., 19 December 2008, par. 51 (“The initial appraisal of a referral of a situation by a State Party, in which one or more crimes within the jurisdiction of the Court appear to have been committed as well as the assessment of information reaching the Prosecutor and in relation to that the initiation by the Prosecutor of investigations \textit{proprio motu} are the exclusive province of the Prosecutor”).

\textsuperscript{98} ICC, Corrigendum to “Judge Fernández de Gurmendi’s Separate and Partially Dissenting Opinion to the Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Cote d’Ivoire”, \textit{Situation in the Republic of Cote d’Ivoire}, Case No. ICC-02/11-15-Corr, PTC III, 5 October 2011, par. 35.


\textsuperscript{101} ICC, Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic, \textit{Situation in the Central African Republic}, Case No. ICC-01/05-6, PTC III, 30 November 2006, p. 4 (“CONSIDERING that, in the view of the Chamber, the preliminary examination of a situation pursuant to article 53 (1) of the Statute and rule 104 of the Rules must be completed within a reasonable time from the reception of a referral by a State Party under articles 13 (a) and 14 of the Statute, regardless of its complexity”). In \textit{casu}, the pre-investigation phase had covered a period of almost two years, whereupon the Pre-Trial Chamber requested the Prosecutor to provide a report on the current status of the preliminary examination as well as an estimation when the pre-investigation phase will be concluded.
commence an investigation.\(^{102}\) Indeed, prolonged preliminary examinations may involve certain risks. It has been argued that when a general timeline is missing, the deterrent effect as well as the potential of preliminary examinations to encourage national proceedings may be diminished.\(^{103}\) Further, it may create the impression that non-legal factors were considered by the Prosecutor.\(^{104}\) Nevertheless, such pronouncements require further research on the effects of prolonged preliminary examinations. This clearly falls outside the scope of the present chapter. Moreover, as rightly noted by the ICC Prosecutor, it should be kept in mind that “the timing and length of preliminary examination activities will necessarily vary based on the situation.”\(^{105}\) For example, since the preliminary examination process with regard to the situation in Columbia included the monitoring of national proceedings, the preliminary examination process will necessarily be longer. Consequently, some flexibility should be built into the timeframe.

The Prosecution’s understanding on the method to be applied during pre-investigations is further detailed in the OTP’s ‘Policy Paper on Preliminary Examinations’.\(^{106}\) The Prosecution split up the pre-investigation phase into four sub-phases. First, the information received is reviewed to filter out information on crimes which manifestly fall outside the ICC’s jurisdiction. During the second and third phase, the information received (including communications that were not rejected during the first step as well as information in relation to referrals or Article 12 (3) declarations, open source information and testimony received at the seat of the Court) is further analysed, from the perspective of jurisdiction and admissibility respectively. From this, it follows that, to some extent, the Prosecution does distinguish between information received (which is vetted during a first subphase) and referrals (which are not subjected to this additional vetting process). According to the OTP, the formal commencement of the preliminary examination is to be situated at the beginning of phase

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\(^{102}\) Ibid., p. 3. The Pre-trial Chamber additionally considered that “[a] number of provisions of the Statute and Rules embrace the “reasonable time” standard as well as other related standards such as “without delay”, “promptly” or “in an expeditious manner” in relation to the exercise of their functions by the different organs of the Court. See inter alia articles 61 (1) and (3), 64 (2), 67 (1) (c) and 82 (1) (d), and rules 24 (2) (b), 49 (1), 101 (1), 106 (1), 114 (1), 118 (1), 121 (1) and (6) and 132 (1).”

\(^{103}\) C. GRANDISON, Update from the International and Internationalized Criminal Tribunals, in »Human rights Briefs, Vol. 19, 2012, p. 49.

\(^{104}\) Ibid., p. 49.

\(^{105}\) OTP, Policy Paper on Preliminary Examinations, 2013, par. 89.

\(^{106}\) Ibid., par. 77 – 88. Note that this process was also detailed in the “Annex to the “Paper on Some Policy Issues before the Office of the Prosecutor”: Referrals and Communications”. However, this document only applied prior to the adoption of the Regulations of the Office of the Prosecutor.
The last phase of the pre-investigation phase comprises of an assessment in light of the interests of justice before formulating a final recommendation whether or not there is a reasonable basis to initiate an investigation.

During the pre-investigation phase, the Jurisdiction, Complementarity and Co-operation Division (‘JCCD’) plays a major role, as well as the Services Section, which is responsible for the registration and storage of information and evidence.**\textsuperscript{108}** Within the JCCD, the Situation Analysis Section is responsible for the preliminary examination of information received.**\textsuperscript{109}** In all instances, the pre-investigation results in a detailed report by the JCCD (‘Article 53(1) report’) containing recommendations in order to assess whether or not to open a formal investigation.**\textsuperscript{110}** The preliminary investigation ends with a decision to continue with a formal investigation or to terminate proceedings.**\textsuperscript{111}**

The Policy Paper on Preliminary Examinations further outlines several ‘general principles’ that apply during the preliminary examination. These include the principle of independence,**\textsuperscript{112}** impartiality,**\textsuperscript{113}** including the prohibition of adverse distinctions on grounds prohibited under the Statute, the application of ‘consistent methods and criteria’**\textsuperscript{114}** and objectivity.**\textsuperscript{115}** While this policy paper to some extent clarifies the general principles with regard to the pre-investigation phase (e.g. the consistent application of methods and criteria), it does not further define them. Overall, this paper is a policy document, which legal value is low.

In case of a negative decision at the end of the pre-investigation phase, Article 15 (6) ICC Statute (and Rule 49 (1) ICC RPE) requires the ICC Prosecutor to inform the information provider. It appears that the Prosecutor has interpreted this obligation broadly, and also

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**\textsuperscript{107}Ibid., par. 80.**

**\textsuperscript{108}**Regulations 7 (a) and 10 (d) of the Regulations of the Office of the Prosecutor.

**\textsuperscript{109}**Consider e.g. ASP, Proposed Programme Budget for 2010 of the International Criminal Court, ICC-ASP/8/10, 30 July 2009, par. 145.


**\textsuperscript{111}**Articles 15 (3) and 53 (1) ICC Statute and Rule 48 ICC RPE.


**\textsuperscript{113}**Ibid., par. 28 - 29 and Article 21 (3) ICC Statute.

**\textsuperscript{114}**Regulation 24 of the Regulations of the OTP.

informs persons or entities when additional information was sought pursuant to Article 15 (2) ICC Statute. The said provision(s) only deal(s) with *proprio motu* investigations. However, a similar information duty follows from Rule 105 (1) ICC Statute.\textsuperscript{116}

§ Other international(ised) tribunals

At the ECCC, the exclusive competence to initiate prosecutions is vested with the Co-Prosecutors. They may commence prosecutions *proprio motu* or on the basis of a complaint.\textsuperscript{117} There is no preference regarding the *notitia criminis*. Information or complaints may be received from persons, organisations or from other sources that witnessed, have knowledge of or were a victim of the alleged crime.\textsuperscript{118} Furthermore, lawyers or victim associations are allowed to lodge a complaint on behalf of a victim.\textsuperscript{119}

With the lodging of a complaint, the prosecution is not automatically initiated. The procedural framework of the ECCC provides for a preliminary phase, immediately preceding the commencement of the investigation proper. This phase is not compulsory and the Co-Prosecutors may choose to forward the complaint directly to the Co-Investigating Judges.\textsuperscript{120} The preliminary investigation aims at determining ‘whether evidence indicates that crimes within the jurisdiction of the ECCC have been committed and to identify suspects and potential witnesses’.\textsuperscript{121} The preliminary investigation ends with the sending of the introductory submission to the Co-Investigating Judges, which triggers the start of the judicial investigation. The threshold for sending the introductory submission is ‘reason to believe that crimes within the jurisdiction of the ECCC have been committed’.\textsuperscript{122} A decision not to pursue a complaint does not have the effect of a *res judicata* and may be changed afterwards.\textsuperscript{123}

In the course of the preliminary investigation, a limited number of investigative powers are at the Co-Prosecutors’ disposal. They include the ability to summon and interview persons,

\textsuperscript{116} See *infra*, Chapter 3, II.4.3. (on Article 53 (3) ICC Statute).
\textsuperscript{117} Rule 49 (1) IR.
\textsuperscript{118} Rule 49 (2) ECCC IR; Article 23 new ECCC Law (the Co-Investigating Judges may obtain information from any institution, including the Government, United Nations organs, or non-governmental organisations).
\textsuperscript{119} Rule 49 (3) ECCC IR.
\textsuperscript{120} Rule 49 (4) ECCC IR.
\textsuperscript{121} Rule 50 (1) ECCC IR.
\textsuperscript{122} Article 23 new ECCC Law; Rule 53 (1) ECCC IR. See *infra*, Chapter 3, I.1.
\textsuperscript{123} Rule 49 (5) ECCC IR. The complainant should be informed of such decision within 30 days.
limited search and seizure powers and the competence to take suspects into custody. Unlike at the ICC, the power to interview persons is not limited to the taking of evidence at the seat of the Court. The Co-Prosecutors can rely on the assistance of judicial police officers. It is clear that these powers by far surpass the ‘passive’ powers at the ICC prosecutor’s disposal during the pre-investigative stage. Additionally, insofar that Rule 5 (2) ECCC IR also refers to the Co-Prosecutors, it seems to follow that also the Co-Prosecutors have the authority to request states (other than Cambodia) to provide judicial assistance. However, cooperation obligations are only incumbent on the government of Cambodia.

At the ICC and the ad hoc tribunals, the Prosecution is in charge of both the pre-investigation and the ‘formal’ investigation phase. In contrast, at the ECCC, the Co-Prosecutors are jointly in charge of the preliminary investigation, while the Co-Investigating Judges head over the judicial investigation. Afterwards, it will be for the Co-Prosecutors to prosecute the case at trial. This procedural design reflects the civil law style of proceedings at the pre-trial stage. However, it may be asked in how far such division of investigative efforts is the most efficient in practice. Staff of the Office of the Co-Prosecutors confirmed that this division leads to duplication of work. One staff member held:

“I think that the difficulty of this procedure is that it inevitably causes duplication. It is unavoidable. And we have seen it. The investigator necessarily has to gather information, do a preliminary investigation, understand what it is about, put it into an organized form […] and submit that the Co-Investigating Judges who have to then learn all that information from scratch, do a lot of that work again, and then go beyond.”

Other staff members of the Office of the Co-Prosecutors confirm that this procedural design in practice leads to duplication of investigative efforts when compared to the proceedings of

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124 Rules 50 (2)-(4) and 51 ECCC IR. Normally, at this stage, searches need the approval of the owner or occupant of the premises. Where the owner or occupier is absent, refuses access or in cases of emergency, searches need judicial approval by the president of the Pre-Trial Chamber (oral authorisation is possible in cases of emergency, if confirmed in writing within 48 hours).
125 Supra, Chapter 4, 1.2.
126 Rules 50 (2) and 15 (2) ECCC IR.
127 Article 25 ECCC Agreement.
128 Interview with a member of the OCP, ECCC-14, Phnom-Penh, 13 November 2009, p. 2.
other international criminal tribunals or to common law jurisdictions. In general, the prosecution staff were critical of this procedural constellation and consider it to be ineffective and cost-intensive.

Staff members of the Office of the Co-Investigating Judges agree that the procedural set-up of investigations in practice leads to the duplication of efforts, and a loss of efficiency. However, they consider that these problems follow from a lack of understanding of the proper role and function of the different organs in the proceedings. More precisely, staff of the OCIJ argue that the Co-Prosecutors may have overstepped their role by continuing investigations after sending the introductory submission.

"In fact, what they have done, because they are not used to trusting a Judge to do that for them, they basically ran a parallel investigation. Not in the sense of going out into the field and doing anything they are not allowed to do, but analyzing all of the material that is placed on the case-

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129 Interview with a member of the OCP, ECCC-11, Phnom-Penh, 9-11 November 2009, p. 2 (who notes that the investigation and the prosecution are conducted by the same organ which prevents the duplication of analysis units).

130 Interview with a member of the OCP, ECCC-11, Phnom-Penh, 9-11 November 2009, pp. 2, 9 ("Spreading out those responsibilities creates a difficulty in terms of effectiveness and cost. […] I think there is a problem in the sense of time. The time and money to have the Co-Prosecutors know the case, and to have the Co-Investigative Judges know the case and then have the Trial Chamber know the case to the level that you need to… I think it is an extra step in the process that is perhaps not as efficient as possible when you need to do things in a short period of time").

131 Consider e.g. Interview with a Legal Officer of the SCSL, SCSL-12, The Hague, 4 February 2010, p. 4 (the interviewee has a previous experience as a legal officer at the Office of the Co-Investigating Judges at the ECCC).

132 Interview with a member of the OCIJ, ECC-05, Phnom-Penh, 16 November 2009, p. 2 ("If all the actors limit their own role, then it works. If prosecutors are trying to extend their mandate to a more common law system and continue to investigate even though they have seized the investigative judges, then we may have a problem of duplication of work. If each of the different organs of the court stays within its own limits and role, it works fine"). Former international Co-Investigating Judge Lemonde gives the following example to illustrate this: "C'est que de fait on n'a pas vraiment appliqué le système, parce que petit à petit au stade de l'instruction on a, contraint et forcé en quelque sorte, introduit des éléments qui étaient davantage inspirés du « common law » que du « civil law », surtout à l'audience. Je ne sais pas si vous avez suivi un peu l'audience du procès Duch, mais là c'était caricatural. On avait l'impression qu'il n'y avait pas eu d'instruction. Les procureurs ne se sont pas servis de l'instruction et je trouvais ça regrettable. Par exemple on avait fait une reconstitution à Tuol Sleng et à Choeung Ek, une reconstitution entièrement enregistrée et les procureurs n'ont pas utilisé ça, alors que c'était une pièce essentielle. On voyait Duch avec les anciens prisonniers qui expliquaient exactement comment les choses s'étaient passées sur place. C'était évidemment pour le procès qu'on avait fait ça, pas pour le plaisir. Ils n'ont pas utilisé ça. La seule chose qu'ils ont trouvée à faire c'était de faire projeter un extrait du film de Rithy Panh sur S-21, qui est une fiction. On amène les gens sur place, mais pendant le cas judiciaire les procureurs ont utilisé une espèce de reconstitution cinématographique plutôt que les documents judiciaires qui étaient dans le dossier. C'est un exemple caricatural de la mauvaise utilisation du système en fait. Toujours est-il qu'à l'arrivée on a ces inconvénients du système de « civil law » plus les inconvénients du système de « common law » et finalement une expérience qui n'aura pas eu lieu parce que le procès tel qu'il aurait dû être organisé n'a pas eu lieu. On n'a finalement pas pu faire l'expérience que moi j'aurais préféré, c'était d'appliquer vraiment notre système." See Interview with Co-Investigating Judge Lemonde, ECCC-04, Phnom-Penh, 11 November 2009, p. 3.
file. Basically it is being done twice. We do it, and they do it. […] There is a lack of efficiency there.”

In the Duch case, this loss of efficiency was further exacerbated by the fact that a lot of evidence was later presented again at trial. When evidence had to be read in at trial, the Co-Prosecutors relied upon their own evidence, rather than on the evidence which was on the case file.

It was previously concluded that the statutory documents of the SPSC, the SCSL and the STL do not encompass the existence of a sufficient or reasonable basis for the commencement of a formal investigation. No standard of proof for the initiation of the investigation is provided for. Hence, no pre-investigation phase is envisaged by the procedural frameworks of these tribunals.

§ Conclusion

It follows that a pre-investigation phase is envisaged by several of the international(ised) criminal tribunals under review. While some tribunals explicitly regulate such pre-investigation phase (ICC and ECCC), the procedural rules of other tribunals (the ad hoc tribunals) do not expressly provide for it. There, the existence of this phase derives from the existence of a minimum threshold for the commencement of the investigation proper (full investigation). The failure, by the ad hoc tribunals, to further define this phase of proceedings is not exceptional when considered in light of existing national practices. For example, in Germany, as previously explained, preliminary investigations (Vorermittlungen) are conducted by the police and the Prosecutor to establish the existence or not of ‘simple suspicion’. Nevertheless, this phase is not regulated by the StPO.

133 Interview with a member of the OCII, ECCC-03, Phnom-Penh, 16 November 2009, p. 3. However, the interviewee additionally notes that there may be a grey area as to what Prosecutors can do after sending the Introductory Submission because all crimes are so intimately related to each other.

134 A. BATES, Transitional Justice in Cambodia, Analytical Report, 2010, p. 132 (available at: http://projetatlas.univ-paris1.fr/IMG/pdf/ATLAS_Cambodia_Report_FINAL_EDITS_Feb2011.pdf, last visited 10 February 2014) (“In the Duch case, a twelve-month judicial investigation comprised the questioning of the accused over almost 24 days; the interviewing of more than 60 witnesses by investigators; a full site visit at both S-21 and Choeng Ek; and two days of in camera confrontation hearings between Duch and twelve of the key witnesses. The vast majority of this questioning had to be repeated at the trial”).

135 Interview with a member of the OCII, ECCC-03, Phnom-Penh, 16 November 2009, p. 2.

The set-up of this stage of proceedings differs considerably. At the ICC, the Prosecutor possesses a limited number of narrowly defined powers at this stage. It was shown how these powers have been given a liberal interpretation by the Prosecutor. In the absence of a clear definition of this phase at the ad hoc tribunals, it was concluded that this phase at least comprises of the analysis and evaluation of information and materials in order to assess whether the minimum threshold for the commencement of the investigation has been reached. In turn, it was illustrated how the powers of the Co-Prosecutors at the Extraordinary Chambers during this stage exceed the powers of the Prosecutors of the ICC and of the ad hoc tribunals. Rather than ‘passive’ powers, the Co-Prosecutors possess a number of additional investigative powers, such as limited search and seizure powers or the power to take suspects into custody. Furthermore, regarding the ICC, it was concluded that the application of cooperation obligations at this stage of proceedings remains uncertain. In turn, the Co-Prosecutors may rely on the support by the judicial police during this stage of proceedings.137

What remains to be answered is the question of how far the pre-investigative phase serves the same function at all courts and tribunals where such phase was identified. At the ECCC, the preliminary investigation aims at determining ‘whether evidence indicates that crimes within the jurisdiction of the ECCC have been committed and to identify suspects and potential witnesses’.138 If it follows from this investigation that the Co-Prosecutors have reason to believe that crimes within the jurisdiction of the ECCC have been committed, they shall sanction the opening of judicial investigation. In a similar vein, it emerges that the primary aim of the pre-investigative phase at the ICC and at the ad hoc tribunals respectively is to establish the presence of a ‘reasonable basis to proceed with an investigation’ or ‘sufficient basis to proceed’. Therefore, at all tribunals where a pre-investigative phase was found, it consists of a preliminary phase which seeks to confirm the presence or not of a minimum threshold to justify the opening of a full investigation (ICC, ad hoc tribunals) or a judicial investigation (ECCC), with the broad investigative powers it allows for. In this regard, this preliminary phase protects the interests of the persons targeted by this investigation. In addition, commentators refer to an additional ‘aim’ of the pre-investigative stage, which is to

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137 See Rules 15 (2), 50 and 51 ECCC RPE.
138 Rule 50 (1) ECCC IR.
protect against the spending of the scarce resources on an investigation which does not stand any chance of resulting in an actual prosecution.  

Since in most instances no judicial control is exerted over the Prosecutor’s determination that the threshold for the opening of a full (or judicial) investigation has been reached, the protective potential of this preliminary phase is limited. With regard to the ICC, only in the case where the ICC Prosecutor proceeds on the basis of his or her *proprio motu* powers, the decision to proceed with an investigation will be subject to judicial overview by the Pre-Trial Chamber. Furthermore, in case of a negative decision by the Prosecutor at the end of the pre-investigative phase, the Pre-Trial Chamber may exert control. It was previously shown how the minimum threshold for the commencement of investigations at the ICC seeks to prevent frivolous and unwarranted investigations. However, in the absence of any judicial overview in case the ICC Prosecutor proceeds on the basis of referral, it is solely for the Prosecutor to check whether the threshold has been reached.

I.3. The investigation proper

I.3.1. The *ad hoc* tribunals and the SCSL

It follows from the RPE of the *ad hoc* tribunals and the SCSL that the ‘investigation’ encompasses ‘all activities undertaken by the Prosecutor under the Statute and the Rules for the collection of information and evidence, whether before or after an indictment is confirmed’.

With regard to the starting point of the investigation, it was previously determined that a minimum threshold has to be met. As far as the ending point of the investigation phase is concerned, the aforementioned definition confirms that the investigation should not necessarily be completed at the time the indictment is confirmed. No temporal limitation is included. While the pre-trial phase formally starts with the confirmation of the indictment, investigations may continue past that stage. This is confirmed by the

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140 See in detail, infra, Chapter 3, II.4.3.

141 See supra, Chapter 4, 1.1.

142 Rule 2 ICTY, ICTR, and SCSL RPE.

143 See supra, Chapter 4, 1.1.

144 According to the Rules, the confirmation of the charges is the first procedural step under Part V (‘Pre-Trial Proceedings’).
jurisprudence. For example, in the Boškoski and Tarčulovski case, the Trial Chamber held that:

“It is the practice of most jurisdictions and the practice of this Tribunal that investigations should be conducted primarily before an indictment is issued or submitted for confirmation […] The Rules and the Statute of the Tribunal […] do not explicitly restrict investigations to the time of confirmation of an indictment. The nature and scope of the indictments tried in this Tribunal would make such a restriction unreasonable. In fact the Rules implicitly allow for the possibility that investigation[s] may be conducted after the confirmation of the indictment.”

Also various provisions in the RPE hint that the evidence gathering process may continue after the confirmation of indictment, during the trial phase, and, exceptionally, into the appeals phase. Pursuant to Rule 50 of the ICTY, ICTR, and SCSL RPE, the Prosecutor may, under certain conditions, seek leave to amend the indictment after confirmation. Additionally, Rule 73bis (F) ICTY RPE allows the Prosecutor to seek leave, after the commencement of the trial, to change the number of crime sites or incidents in relation to which evidence will be presented. This need to vary the number of incidents or crime sites “often may stem from investigation[s] conducted at a later stage.” Also the possibility for the Prosecutor to seek leave to change the (Rule 65ter) exhibit and witness lists after the commencement of trial, when the ‘interests of justice’ so allow, may be relevant in light of

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145 Consider e.g. ICTY, Decision on Prosecution Motion Seeking Leave to Amend the Indictment, Prosecutor v. Čermnik and Markač, Case No. IT-03-73-PT, T. Ch. II, 19 October 2005, par. 51; ICTR, Decision on Prosecutor’s Request for Leave to File an Amended Indictment, Prosecutor v. Niyitegeka, Case No. ICTR-96-14-I, T. Ch. II, 21 June 2000, par. 27; ICTR, Decision on the Prosecutor’s Request for Leave to File an Amended Indictment, Prosecutor v. Barayagwiza, Case No. ICTR-97-19-I, T. Ch. I, 11 April 2000, p. 4; ICTR, Decision on the Prosecutor’s Request for Leave to File an Amended Indictment, Prosecutor v. Nahimana, Case No. ICTR-96-11-T, T. Ch. I, 5 November 1999, par. 18.

146 ICTY, Reasons for Oral Decision Denying Boškoski Defence Motion to Stop Prosecution’s Continued Investigation and Continued Disclosure, Prosecutor v. Boškoski and Tarčulovski, Case No. IT-04-82-T, T. Ch. II, 10 May 2007, par. 4 (emphasis added). In casu, the Defence sought an order from the Trial Chamber to the OTP, among others to stop the Prosecution from conducting further investigations.

147 With leave from the Confirming Judge (or a Judge assigned by the President) where the case has not yet been assigned to a Trial Chamber or, where the case has been assigned, with leave from that Trial Chamber or a Judge thereof. See Rule 50 (A) (i) (b) and (c) ICTY RPE; At the ICTR and the SCSL only with leave from the Confirming Judge (or a Judge assigned by the President) prior to the initial appearance and with leave of the Trial Chamber from that moment. See Rule 50 (A) (i) ICTR RPE and Rule 50 (A) SCSL RPE.

newly discovered evidence during continued investigations. Indeed, the fact that investigations are on-going has been accepted as a relevant factor in the assessment of whether the ‘interests of justice’ necessitate the amendment of the list. Furthermore, the possibility for a party to re-open its case in exceptional circumstances and to present evidence it previously did not have access to may be relevant in light of continuing investigations. On appeal, the possibility to exceptionally present additional evidence on a fact or issue litigated at trial may be a further indication that the RPE implicitly allow for continued investigations. However, at the same time, jurisprudence has insisted that this latter mechanism is not intended to be an opportunity for the parties to remedy “failures or oversights” made during the pre-trial and trial phase and that “investigations should be carried out at the pre-trial stages.” The previous unavailability of the evidence must not

149 Rule 65ter (E) (ii) ICTY RPE juncto Rule 73bis (F) ICTY RPE allows for the amendment of the witness list, also after the start of the trial. Consider e.g. ICTY, Decision on Prosecution’s Motion to Amend Rule 65ter Witness List and on Related Submissions, Prosecutor v. Lukić and Lukić, Case No. IT-98-32/1-PT, T. Ch. III, 22 April 2008, par. 9. Also Rule 73bis (B) (v) juncto Rule 73bis (E) ICTR and SCSL RPE allow for the Prosecutor to add new witnesses to the list after the commencement of the trial, where such would be in the interests of justice. Similarly, the Rule 65ter (E) (iii) exhibit list may be amended in the interests of justice. See e.g. ICTY, Decisions on Appeals against Decision Admitting Material Related to Borovčanin’s Questioning, Prosecutor v. Popović et al., Case No. IT-95-88-AR73-1, A. Ch., 14 December 2007, par. 37; ICTY, Decision on Prosecution’s Motion for Admission of Evidence to Mladić Notebooks with a Separate Opinion from Presiding Judge Antonetti Attached, Prosecutor v. Šešelj, Case No. IT-03-67-T, T. Ch. III, 22 October 2010, par. 14; ICTY, Decision on Prosecution’s Third Motion for Leave to Amend its Rule 65ter Exhibit List, Prosecutor v. Mladić and Tadić, Case No. IT-98-21/1-T, T. Ch. III, 23 April 2007, p. 3. Also the ICTR has allowed for the amendment of the exhibit list under Rule 73bis (B) (v) after the commencement of the trial. See e.g. ICTR, Decision on Prosecutor’s Motion to Modify her List of Exhibits, Prosecutor v. Ndajambaye et al., Case No. ICTR-96-8-T, T. Ch. II, 14 December 2001, par. 11 (entertaining the request under Rule 54 ICTR RPE).

150 See ICTY, Decision on the Prosecutor’s Oral Motion for Leave to Amend the List of Selected Witnesses, Prosecutor v. Nahimana and Barayagwiza, Case No. ICTR-99-55-T, T. Ch. I, 26 June 2001, par. 20, quoted with approval in SCSL, Decision on Prosecution Request for Leave to Call Additional Witnesses, Prosecutor v. Norman et al., Case No. SCSL-04-14-T, T. Ch., 29 July 2004, par. 16.

151 See e.g. ICTY, Judgment, Prosecutor v. Delalić et al. (Celebići case), Case No. IT-96-21-A, A. Ch., 20 February 2001, par. 279; ICTY, Decision on the Prosecution’s Motion to Re-open its Case, Prosecutor v. Prlić et al., Case No. IT-04-74-T, T. Ch. III, 6 October 2010, par. 31; ICTY, Decision on Presentation of Documents by the Prosecution in Cross-Examination of Defence Witnesses, Prosecutor v. Prlić et al., Case No. IT-04-74-T, T. Ch. III, 27 November 2008, par. 20; ICTY, Decision on the Prosecutor’s Application to Re-open its Case, Prosecutor v. Hadžibalanović and Kubura, Case No. IT-01-47, T. Ch. II, 1 June 2005, par. 31; SCSL, Decision on Confidential Prosecution Motion to Reopen the Prosecution Case to Present an Additional Prosecution Witness, Prosecutor v. Brima et al., Case No. SCSL-04-16-T, T. Ch. II, 28 September 2006.

152 Rule 115 ICTY, ICTR, and SCSL RPE.


154 ICTY, Decision on Appellant Hassan Ngeze’s Motion for Approval of Further Investigations on Specific Information Relating to the Additional Evidence of Potential Witnesses, Prosecutor v. Nahimana et al., Case No. ICTR-99-52-A, A. Ch., 20 June 2006, par. 4; ICTR, Decision on Appellant Hassan Ngeze’s Motion for the
result from the lack of due diligence. Moreover, only in exceptional circumstances will the Registrar fund investigations at the appeal stage.

The jurisprudence further offered some explanations why prolonged investigations should be allowed. Firstly, a rigid and formalistic approach would sit uneasy with the prosecutorial duty “to prosecute an accused to the full extent of the law and to present all relevant evidence before the Trial Chamber.” Secondly, the Trial Chamber in Boškoski and Tarčulovski referred to the “nature and scope” of the investigations to justify continued investigations. However, the Chamber does not further explain why the “complex nature” or the “large scale” of the case necessitates the conduct of continued investigations after the confirmation of the indictment. It has been suggested that the ‘unique character’ of the investigations should not be relied upon too easily. Certainly, relevant arguments may be put forward, including difficulties to ensure the cooperation by relevant states. In his dissent in Milutinović et al., Judge Hunt argued that where the prosecutorial investigation continues throughout the trial phase, such is the result of the imperfect system and the necessary reliance on states to assist in the conduct of the investigation.

It is evident that the practice of continued investigations during the trial phase involves certain risks. In case the continued gathering of evidence results in the amendment of the indictment

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155 See e.g. ICTY, Judgement, Prosecutor v. Tadić, Case No. IT-95-1-A, A. Ch., 15 July 1999, par. 15.
156 See ICTR, Decision on Appellant Hassan Ngeze’s Motion for the Approval of the Investigation at the Appeal Stage, Prosecutor v. Nahimana et al., Case No. ICTR-99-52-A, A. Ch., 3 May 2005, pp. 3 – 4.
158 ICTY, Decision on Interlocutory Appeal on Motion for Additional Funds, Prosecutor v. Milutinović et al., Case No. IT-99-37-AR73-2, A. Ch., 13 November 2003, Dissenting Opinion of Judge David Hunt, par. 39.
or the presentation of additional evidence at trial, care must be taken that the Defence is informed of the nature and cause of the charges against him or her and has an adequate opportunity to prepare an effective defence. As emphasised by ICTY Trial Chamber II, “[t]he touchstone is fairness.”

The definition included in the RPE is limited to prosecutorial investigative acts, thereby excluding defence investigations from its scope (“all activities undertaken by the Prosecutor under the Statute and the Rules”). Such a limitation is unfortunate, given the adversarial style of proceedings at the ad hoc tribunals and the SCSL. As confirmed by the ICTY Appeals Chamber, the Defence is expected to conduct its own investigations, and in practice all defence teams conduct on-site investigations. Such limitation is reflective of the procedural frameworks of the ad hoc tribunals and the SCSL. These do not regulate the conduct of defence investigations save for some general references to it, including to the general power of the Trial Chamber in assisting the Defence in the conduct of its investigations. Moreover, the Defence is not an organ of the tribunal, in the sense of an independent body with its own budget. In this regard, the procedural set-up of the Special Court offered a welcome improvement vis-à-vis the ad hoc tribunals, insofar that it envisages a Defence Office. Nevertheless, since this office is not an independent organ and resorts under the

162 Rule 2 ICTY, ICTR and SCSL RPE (emphasis added).
163 ICTY, Decision on Prosecutor’s Appeal on Admissibility of Evidence, Prosecutor v. Aleksovski, Case No. IT-95-14/1, A. Ch., 16 February 1999, par. 18 (“The Appeals Chamber, however, points out that there is a firm obligation placed upon those representing an accused person to make proper enquiries as to what evidence is available in that person’s defence”). Not only does this follow from the manner in which the RPE conceive of the parties conducting their own pre-trial investigations, but also from the way in which the parties are conceived as competitors in a contest. See e.g. M. LANGER, The Rise of Managerial Judging in International Criminal Law, in «American Journal of Comparative Law», Vol. 53, 2005, pp. 859, 861. See J.I. TURNER, Defense Perspectives on Law and Politics in International Criminal Trials, in «Virginia Journal of International Law», Vol. 48, 2008, p. 554.
164 Rule 54 ICTY, ICTR and SCSL RPE and Rule 54bis ICTY RPE. Among others, the right for the Defence to conduct its own investigations follows from the right afforded to the accused person to have ‘adequate time and facilities for the preparation of his defence’, the general ‘right to a fair trial’ and from the right ‘to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him’; See Article 21 (4) (b) and (e) ICTY Statute, Article 20(4) (b) and (e) ICTR Statute and Article 17 (4) (b) and (e) SCSL Statute.
165 Rule 45 SCSL RPE.
Registry, it cannot operate fully independently.\textsuperscript{166} In addition, experiences of the Defence with this office were mixed, at best.\textsuperscript{167}

Lastly, from a normative point of view, it also follows that this definition is construed too narrowly since it limits the objective of the investigation to the collection of evidence and information. While most investigative acts will serve the purpose of gathering evidence, some prosecutorial investigative acts serve other goals, including the goal of ensuring the future execution of sentences.\textsuperscript{168}

Whereas judicial overview over the pre-trial stage \textit{sensu stricto} has gradually increased (cf. managerial judging), judicial intervention during the investigation stage of proceedings remains exceptional. Such intervention is only guaranteed at the very end of the investigation phase, when the indictment has to be confirmed. Only in cases where a transfer order, subpoena, summons or another order is needed, do the Judges intervene in the investigation, when requested to do so by the parties.\textsuperscript{169} Besides, if the Prosecutor wants to detain a suspect provisionally at the detention unit of the tribunal, judicial intervention is required in the form of an order by a Judge.\textsuperscript{170}


\textsuperscript{167} Interview with Mr. Jordash, Defence Counsel, SCSL-11, The Hague, 7 December 2009, p. 4 (“they were nothing more than an adjunct to the Registry designed to assist the defence, but in practice acted as a convenient vehicle for the Registry to continue as before” [...] “in truth the Defence Office were simply in bed with the Registry and did not stand up for the defence rights.” “So did we ever get help from the Defence Office? I cannot think of a time. Did they hinder our work? Almost always.”); SCSL, Interview with a Defence Counsel at the SCSL, SCSL-04, Freetown, 19-20 October 2009, p. 4 (“I think having it is a great achievement. In terms of what it actually achieved, it was very limited. It was set up as an afterthought initially. When the Special Court came into being, there was not even a budget line for the Defence Office. It was always kind of the poor cousin of everything else.” [...] “[D]uring the trials, you could read what you want in the annual report: that they provided legal advice and they helped draft motions, but none of that is actually true. They did not provide us with any legal advice. Actually, the Defence Office is a little bit better now. Our life with the […] team would have been considerably easier if we did not have a Defence Office. Not only were they not helpful, they actually hindered us from doing our jobs”); Interview with a Defence counsel at the SCSL, SCSL-03, Freetown, 20 October 2009, p. 6 “Q: Has the Defence Office been helpful? A: It has been difficult for our team to have any substantive academic input from the Defence Office. They have provided almost exclusively for us a logistics role. In Cambodia, I think things work differently”); Interview with a Defence counsel at the SCSL, SCSL-02, Freetown, 22 October 2009, p. 9 (Q: Did the Office really work together well with defence teams or not? A: They did as far as no research issues were concerned, but in terms of research issues they were not much of assistance. [...] Q: So they could not be of assistance with ad hoc research assignments? A: No. Administratively, they could be of assistance, for example to make travel arrangements and things like that, they were okay, but in terms of legal research and advice on submissions, no”).

\textsuperscript{168} See infra, Chapter 6.

\textsuperscript{169} Rule 54 ICTY, ICTR and SCSL RPE and Rule 39 (iv) ICTY, ICTR and SCSL RPE; see also Rule 54bis ICTY RPE.

\textsuperscript{170} Rule 40bis ICTY, ICTR and SCSL RPE.
I.3.2. The International Criminal Court

Once the minimum threshold for the opening of an investigation has been met, the pre-investigation ends and the investigation proper commences. Depending on the triggering mechanism, the initiation of the investigation *sensu stricto* follows a decision by the Prosecutor under Article 53 (1) ICC Statute (referral) or the decision by the Pre-Trial Chamber, pursuant to Article 15 (4) ICC Statute (*proprio motu*), authorising the commencement of the investigation proper. According to the ICC Statute, the Prosecutor is vested with the authority ‘for conducting investigations and prosecutions before the Court’.

However, neither the ICC Statute nor the ICC RPE further define the term ‘investigations’. The Appeals Chamber has defined the investigation as “an inquiry conducted by the Prosecutor into the commission of a crime with a view to bringing to justice those deemed responsible.”

During this investigation process, the Prosecutor can avail himself or herself of the full gamut of investigative powers under Article 54 ICC Statute. The individual investigative measures will be discussed in depth in subsequent chapters. Once the investigation has started, the Prosecutor is the organ which is primarily entrusted with the investigation of those crimes within the jurisdiction of the Court allegedly committed within the relevant situation. The object of investigations becomes more concrete and the Prosecutor should identify cases and decide whether one or more persons should be charged. It follows that during the

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171 Article 42 (1) ICC Statute; ICC, Judgment on Victim Participation in the Investigation Stage of Proceedings in the Appeal of the OPCD against the Decision of Pre-Trial Chamber I of 7 December 2007 and in the Appeals of the OPCD and the Prosecutor against the Decision of Pre-Trial Chamber I of 24 December 2007, *Situation in the DRC*, Case No. ICC-01/04-556 (OA4 OA5 OA6), A. Ch., 19 December 2008, para. 52 (“Manifestly, authority for the conduct of investigations vests in the Prosecutor”).

172 Ibid., para. 45; ICC, Judgment on Victim Participation in the Investigation Phase of the Proceedings in the Appeal of the OPCD against the Decision of Pre-Trial Chamber I of 3 December 2007 and in the Appeals of the OPCD and the Prosecutor against the Decision of Pre-Trial Chamber I of 6 December 2007, *Situation in Darfur, Sudan*, Case No. ICC-02/05-177 (OA OA2 OA3), A. Ch., 2 February 2009.

173 Article 54 (1) (a) ICC Statute.

174 See infra, Chapters 4 – 6.


176 See also Article 14 (1) ICC Statute.
investigation sensu stricto, investigations gradually become more specific, resulting into the identification of suspects. Step by step, the different elements of a case are selected.\textsuperscript{177}

Therefore, while pre-investigations had ‘situations’ as their object, during investigations, ‘cases’ are identified. With regard to the definition of a case, the only indication is to be found in the ICC Regulations of the Registry, which state that “the Registry shall open a case record upon receipt of an application requesting the issuance of a warrant of arrest or a summons to appear pursuant to article 58.”\textsuperscript{178} However, the formal act of opening a case record by the Registry does not exclude that a ‘case’ already exists at an earlier stage.\textsuperscript{179} It is recalled that Pre-Trial Chamber I defined a ‘case’ in \textit{Lubanga} as including “specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects.”\textsuperscript{180} Cases entail “proceedings that take place after the issuance of a warrant of arrest or a summons to appear.”\textsuperscript{181} The Pre-Trial Chambers added that “a case arising from the investigation of a situation will fall within the jurisdiction of the Court only if the specific crimes of the case do not exceed the territorial, temporal and possibly personal parameters defining the situation under investigation and fall within the jurisdiction of the Court.”\textsuperscript{182}


\textsuperscript{178} Regulation 20 (2) of the Regulations of the Registry.

\textsuperscript{179} Confirming, see C. \textsc{Safferling}, The Rights and Interests of the Defence in the Pre-Trial Phase, in \textit{Journal of International Criminal Justice}, Vol. 9, 2011, pp. 651 – 667.

\textsuperscript{180} ICC, Decision on Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, \textit{Situation in the DRC}, Case No. ICC-01/04-101, PTC I, 17 January 2006, par. 65; ICC, Decision on the Prosecutor’s Application for a Warrant of Arrest, Article 58, \textit{Prosecutor v. Lubanga, Situation in the DRC}, Case No. ICC-01/04-01/06, PTC I, 10 February 2006, par. 21. Compare with \textsc{Aranburu}, who defines a case as “comprising the whole of facts and charges attributed to one or several accused jointly, as stated in an indictment or warrant of arrest.” It consists of (1) the facts or criminal events; (2) the suspect or accused; (3) the charges, the legal characterisation of the facts; (4) the mode of responsibility and (5) the standard of evidence (depending on the phase of development of the case). See X.A. \textsc{Aranburu}, Gravity of Crimes and Responsibility of the Suspect, in M. \textsc{Bergsmo} (ed.), Criteria for Prioritizing and Selecting Core International Crimes Cases, Oslo, Torkel Opsahl Academic EPublisher, 2010, pp. 205 – 206.


\textsuperscript{182} Consider e.g. ICC, Decision on Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, \textit{Situation in the DRC}, Case No. ICC-01/04-101, PTC I, 17 January 2006, par. 65; ICC, Decision on the Prosecutor’s Application for a Warrant of Arrest, Article 58, \textit{Prosecutor v. Lubanga, Situation in the DRC}, Case No. ICC-01/04-01/06, PTC I, 10 February 2006, par. 21; ICC, Decision on the Prosecution’s Application for a Warrant of Arrest against \textsc{Omar Hassan Ahmad Al Bashir}, \textit{Prosecutor v. \textsc{Al Bashir, Situation in Darfur, Sudan}}, Case No. ICC-02/05-01/09-3, PTC I, 4 March 2009, par. 36; ICC, Decision
In *Mbarushimana*, the issue arose whether the case fell within the existent situation in the DRC. Pre-Trial Chamber I reiterated that “it is only within the boundaries of crisis for which the jurisdiction of the Court was activated that subsequent prosecutions can be initiated.” Importantly, the Pre-Trial Chamber underlined that a situation “can include not only crimes that had already been or were being committed at the time of the referral, but also crimes committed after that time, in so far as they are sufficiently linked to the situation of crisis referred to the Court as ongoing at the time of the referral.” The need of a sufficient link between a case and the situation is rooted in the complementarity regime underpinning the Court.

Likewise, Pre-Trial Chamber III, when authorising the investigation in the situation in Côte d’Ivoire, upheld the view that the temporal scope of the situation could also include crimes committed after the date of the referral insofar as they are sufficiently linked to the situation of crisis referred to the Court. The Pre-Trial Chamber added that the volatile situation in Côte d’Ivoire necessitated the inclusion of crimes “whose commission extends past the date of the application.”

However, this approach seems to be more limited than the approach taken by Pre-Trial Chamber I since only crimes that continue after the date of application (“continuing crimes (sic)”) are included and not crimes that take place after the date of the application.

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183 The question was first raised by the Pre-Trial Chamber and later by the Defence in a jurisdictional challenge. See ICC, Decision Requesting Clarification on the Prosecutor’s Application under Article 58, *Situation in the DRC*, Case No. ICC-01/04-01/12-1, PTC II, 13 July 2012, par. 14.


185 Ibid., par. 16; ICC, Decision on the Prosecutor’s Application for a Warrant of Arrest against Callixte Mbarushimana, *Prosecutor v. Mbarushimana, Situation in the DRC*, Case No. ICC-01/04-01/10-1, PTC I, 28 September 2010, par. 6.


187 Critical of this limitation, consider ICC, Corrigendum to “Judge Fernández de Gurmendi’s Separate and Partially Dissenting Opinion to the Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of
Pre-Trial Chamber II upheld yet a different interpretation when it held in the Kenya situation that a case “may only cover those crimes that have occurred up until the time of the filing of the Prosecutor’s Request.”190 The Pre-Trial Chamber reasoned that “[s]ince article 15(4) of the Statute subjects the Chamber’s authorization of an investigation to an examination of the Prosecutor’s Request and supporting material, it would be erroneous to leave open the temporal scope of the investigation to include events subsequent to the date of the Prosecutor’s Request.”191 One way of explaining this divergence would be to distinguish between the different triggering mechanisms. Understood in this way, the requirement of authorisation in Article 15 (4) ICC Statute in case the Prosecutor relies on his or her proprio motu powers would require a different definition of ‘situations’. This distinct interpretation would then be necessitated by the Pre-Trial Chamber’s supervisory functions.192 In the absence of a definition of the term ‘situations’ in the ICC Statute or the RPE, nothing seems to prevent such distinction being drawn. Nevertheless, it may well prove unworkable, and neglects the fact that unlike other international tribunals, the ICC often deals with conflicts that are ongoing. Moreover, RASTAN argued that, at least in the case of the Kenya situation, such temporal limitation would not have been necessary if the Pre-Trial Chamber had more clearly defined the material scope of the situation and had focused on the post-election violence and related events.193 In such case, the absence of a temporal limitation would not be at tension with the ICC Statute. Article 53 (1) (a) ICC Statute refers to ‘a crime has been or is being committed’.

In its decision on the Prosecutor’s application for a warrant of arrest in the Mudacumura case, Pre-Trial Chamber II, confusingly, seems to have adopted the view that the parameters of a

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191 Ibid., par. 206. The Pre-Trial accordingly defined the temporal scope of the situation as those events that took place between 1 June 2005 (which is the date of the Statute’s entry into force for the Republic of Kenya) and 26 November 2009 (which is the date of the filing of the Prosecutor's Request), since this was the last opportunity for the Prosecutor to assess the information available to him prior to its submission to the Chamber's examination (ibid., par. 207).

192 Ibid., par. 208.

193 R. RASTAN, The Jurisdictional Scope of Situations before the International Criminal Court, in «Criminal Law Forum», Vol. 23, 2012, pp. 22 – 23 (“rather than relying on temporal parameters for this purpose, the Chamber could have specified with greater emphasis the focus of the situation: i.e., crimes related to or connected with the post-election violence”).

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situation can also include crimes committed after the date of the referral of the situation which initially triggered the jurisdiction of the Court.\textsuperscript{194}

Overall, it seems that the approach of Pre-Trial Chamber I (and III) should be preferred. As one commentator notes, such approach “appears better suited to the many volatile situations that the Court will continue to confront.”\textsuperscript{195}

This definition of a ‘case’ confirms the existence of a process, whereby the facts are originally broad and gradually narrowed down.\textsuperscript{196} It is not clear why a case only exists after the ‘Article 58 stage’ of proceedings (issuance of a warrant of arrest or a summons to appear). Several commentators have convincingly argued that such definition is too narrow insofar that individuals will most likely already be the focus of investigations before the issuance of a warrant of arrest or a summons to appear.\textsuperscript{197} Moreover, Article 53 (2) has cases as its object, not situations. However, at this stage, no warrant or summons has yet been issued.\textsuperscript{198}

Hence, as has been suggested in the literature, it would be useful to introduce an additional distinction between cases in a narrower sense and cases in a broader sense.\textsuperscript{199} This entails that a case \textit{sensu stricto} only exists after the issuance of a warrant or summons. However, a case considered in the broader sense (or ‘case hypothesis’) exists already earlier during investigations.\textsuperscript{200}

It seems that the Prosecutor has defined a ‘case’ in a different manner than the Pre-Trial Chambers have. The Prosecutor speaks of “an identified set of incidents, suspects and

\textsuperscript{194} ICC, Decision on the Prosecutor’s Application under Article 58, \textit{Prosecutor v. Mudacumura, Situation in the DRC}, Case No. ICC-01/04-01/12-1, PTC II, 13 July 2012, par. 14.
\textsuperscript{197} C. SAFFERLING, International Criminal Procedure, Oxford, Oxford University Press, 2012, pp. 94 (arguing that the situation becomes a case somewhere between the identification of individuals and the decision to prosecute a case); I. STEGMILLER, The Pre-Investigation Stage of the ICC, Berlin, Duncker & Humblot GmbH, 2011, pp. 119 – 120, 419.
\textsuperscript{198} \textit{Ibid}., p. 418.
\textsuperscript{199} \textit{Ibid}., p. 419.
\textsuperscript{200} \textit{Ibid}., p. 419.
conduct.”

Elsewhere, the Prosecutor referred to “a specific incident in which crimes within the jurisdiction of the Court have been committed by identified perpetrators.”

Following an investigation, the Prosecutor can decide, on the basis of the materials and information collected, not to prosecute a case. If so, he or she has to inform the Pre-Trial Chamber and the referring party in writing and provide reasons. There is no corresponding obligation to inform the information provider. A threshold is included and there should be “sufficient basis for a prosecution” if the Prosecutor wants to proceed. From the negative formulation of the threshold under Article 53 (2) (“If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution”) it follows that it is presumed that one or more prosecutions will indeed follow from an investigation. The threshold has not yet been further defined in the jurisprudence. It has been argued that such threshold requires that “the evidence gathered would provide a basis on which a court can convict the suspect.”

Another commentator speaks of “reliable and admissible evidence so that there is a realistic chance of securing a conviction”.

The factors that may lead the Prosecutor not to proceed with a prosecution are to be found in Article 53 (2) (a) – (c) and to some extent mirror the factors the Prosecutor should consider when initiating an investigation. It follows that during the investigation, the Prosecutor should also consider these variables. Furthermore, these variables are not static, necessitating an ongoing consideration thereof. The threshold differs from the ‘reasonable basis’ test in

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201 ICC, Policy Paper on Preliminary Examinations, 2013, par. 43.
203 Article 53 (2) ICC Statute and Rule 106 ICC RPE.
207 Article 53 (1) (a) – (c) ICC Statute. These factors are not mere ‘guidance’ for the determination of sufficiency, as is argued by BERGSMO and KRUGER. See the discussion of these criteria, infra, Chapter 3, II.4.2. M. BERGSMO and P. KRUGER, Article 53, in O. TRIFTERER (ed.), Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article, München, Verlag C.H. Beck, 2008, p. 1073.
Article 53 (1) ICC Statute, insofar that it applies at a different stage.\textsuperscript{209} The travaux préparatoires show that such different formulation was a deliberate choice.\textsuperscript{210} At this stage, the threshold is stricter and more specific.

The fundamental problem with the threshold in Article 53 (2) ICC Statute is that the object of prosecution is not defined. One commentator notes that this threshold may refer to (1) a decision not to prosecute a particular individual, (2) a decision not to prosecute a certain group of persons in a given situation, (3) a decision not to prosecute certain crimes and (4) a decision not to bring any case at all.\textsuperscript{211} It will be for the Pre-Trial Chamber to further elucidate this threshold when it exercises its functions under Article 53 (2).\textsuperscript{212}

One commentator further divides the investigation phase into two chronological steps, to know (1) the distillation of one or more cases out of a situation and (2) the collection of incriminating and exonerating evidence with regard to an individual suspect.\textsuperscript{213} However, to this author, it seems incorrect to refer to consecutive steps in this regard. As previously explained, during the investigation, there is a gradual move from a general situation to one or more particular cases. Evidence may already be collected with regard to individuals, before all elements which constitute a case have been defined. Moreover, as will be discussed further, the ICC Prosecutor follows a ‘sequenced approach’, which implies that investigations continue with regard to the situation while cases are, one by one, gradually selected within this situation.\textsuperscript{214}

The Prosecutor’s investigation of a situation is conducted by a ‘joint team’, consisting of persons from within the three main divisions of the OTP (to know the Investigation Division, the Prosecution Division and the Jurisdiction, Complementarity, and Cooperation Division).\textsuperscript{215}

\textsuperscript{209} Confirming, consider e.g. F. RAZESBERGER, The International Criminal Court: The Principle of Complementarity, Frankfurt am Main, Peter Lang, 2006, p. 105.
\textsuperscript{214} See infra, Chapter 3, II.4.5.
In the course of the investigation, they will form case hypotheses, on the basis of the information that was already gathered during the pre-investigation phase and information and evidence collected during the investigation proper. These case hypotheses include information on specific incidents to be investigated and the person(s) who appear to be the most responsible. Additionally, they already include a tentative indication of possible charges and potentially exonerating circumstances.

Whereas most investigative acts that are undertaken aim at collecting evidence and material to establish the criminal liability of individuals, the discussion of the individual investigative acts will illustrate how these may also serve other goals, including the execution of a warrant of arrest or the restitution of property. In addition, investigations aim at the consideration by the Court of the individual circumstances of the convicted person, the gravity of the crime or the existence of mitigating or aggravating circumstances. At this juncture, it suffices to emphasise that investigative acts may serve different goals.

With regard to the end point of the investigations, neither the Statute nor the RPE seem to require that all investigative activities are over at the moment a decision is taken, pursuant to Article 53 (2), to prosecute one or more cases or not to prosecute. However, from an *a contrario* reading of Article 61 (4) ICC Statute, one could argue that investigations may not continue after the start of the confirmation hearing. The ICC Appeals Chamber has emphasised that “ideally, it would be desirable for the investigation to be complete by the time of the confirmation hearing.” It follows that these investigative activities “should largely be completed at the stage of the confirmation of charges hearing.” Additionally, it

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215 Regulation 32 of the Regulations of the OTP (the composition and size of the team may vary throughout the investigation); ICC, Transcript, *Prosecutor v. Katanga and Ngujo Chui, Situation in the DRC*, Case No. 01/04-01/07-T-81, T. Ch. II, 25 November 2009, pp. 7, 29 (decisions are made jointly by the three parts of the team).

216 Regulation 33 of the Regulations of the OTP.

217 Regulation 34 (1) of the Regulations of the OTP.

218 See *infra*, Chapter 6.

219 Article 78 ICC Statute and Rule 145 ICC RPE.

220 Article 61 (4) ICC Statute reads: ‘Before the hearing, the Prosecutor may continue the investigation and may amend or withdraw any charges’.

221 ICC, Judgment on the Prosecutor’s Appeal Against the Decision of Pre-Trial Chamber I Entitled: “Decision Establishing General Principles Governing Applications to Restrict Disclosure Pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence”, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06-568 (OA 3), A. Ch., 13 October 2006, par. 54.

222 ICC, Judgment on the Appeal of the Prosecutor against the Decision of Pre-Trial Chamber I of 16 December 2011 Entitled “Decision on the Confirmation of Charges”, *Prosecutor v. Mbarushimana, Situation in the DRC*, Case No. 01/04-01/10-514 (OA 4), A. Ch., 30 May 2012, par. 44; ICC, Decision on Defence Application
has been stated by Trial Chamber IV that post confirmation hearing investigations should be finished as soon as possible. The Appeals Chamber underlined that in case investigations have not been concluded, the Prosecutor has the possibility to request for the postponement of the confirmation of charges. Furthermore, if the Pre-Trial Chamber declines to confirm a charge, the Prosecutor may submit a new request, if such request is supported by additional evidence. However, there is no requirement in the Statute to have all investigations concluded. As stated by the Appeals Chamber, in some situations, “to rule out further investigation after the confirmation hearing may deprive the Court of significant and relevant evidence, including potentially exonerating evidence.” This holds particularly true for the ICC where situations of conflict are ongoing and new compelling evidence would only emerge after the confirmation hearing. Furthermore, it has been argued that such understanding would be more in line with the ICC Prosecutor’s obligation to establish the truth and to collect exculpatory evidence where “the relevance of a particular item of evidence or lead may only become apparent during the course of proceedings, when assessed against other evidence, including witness testimony, or in the light of the defence’s case.” The Appeals Chamber emphasised that there is no need for authorisation by the Pre-Trial Chamber for post-confirmation investigations.

From the above, it can be concluded that investigations may continue in the pre-trial phase sensu stricto and even in the trial phase. In practice, prosecutorial investigative efforts continue after the confirmation of charges. Nevertheless, as will be argued, it is important pursuant to Article 64(4) and Related Requests, Prosecutor v. Uhuru Muigai Kenyatta, Situation in the Republic of Kenya, Case No. ICC-01/09-02/11-728, T. Ch. V, 26 April 2013, par. 118.

223 ICC, Decision on the Re-interviews of six Witnesses by the Prosecution, Prosecutor v. Abakaer Nourain and Jerbo Janus, Situation in Darfur, Sudan, Case No. ICC-02/05-03/09-158, T. Ch. IV, 6 June 2011, par. 13.

224 Rule 61 (8) ICC Statute.

225 ICC, Judgment on the Prosecutor’s Appeal against the Decision of Pre-Trial Chamber I Entitled: “Decision Establishing General Principles Governing Applications to Restrict Disclosure Pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence”, Prosecutor v. Lubanga Dyilo, Situation in the DRC, Case No. ICC-01/04-01/06-568 (OA 3), A. Ch., 13 October 2006, par. 54.


227 ICC, Judgment on the Prosecutor’s Appeal against the Decision of Pre-Trial Chamber I Entitled: “Decision Establishing General Principles Governing Applications to Restrict Disclosure Pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence”, Prosecutor v. Lubanga Dyilo, Situation in the DRC, Case No. ICC-01/04-01/06-568 (OA 3), A. Ch., 13 October 2006, par. 53; ICC, Decision on the Re-interviews of six Witnesses by the Prosecution, Prosecutor v. Abakaer Nourain and Jerbo Janus, Situation in Darfur, Sudan, Case No. ICC-02/05-03/09-158T, Ch. IV, 6 June 2011, par. 14.

228 Consider e.g. ICC, Transcript, Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC, Case No. 01/04-01/07-T-81, T. Ch. II, 25 November 2009, pp. 45-46 (a Prosecution head of investigations testified that “a
that post-confirmation investigative efforts are limited by prosecutorial ethical obligations demanding that all investigations should be conducted expeditious and as effective as possible ab initio.\textsuperscript{229} As argued by Judge Kaul:

“the possibility, if not the risk, that [the] permission of post-confirmation investigations in practice might be too broadly interpreted by the Prosecutor, possibly as some kind of license to investigate whenever, even after confirmation, thus enabling the Prosecutor also to allow a phased approach for the gathering of evidence […]. This would in my view amount to a serious misinterpretation of the Appeals Chamber judgment of 13 October 2006.”\textsuperscript{230}

For example, Judge Kaul points out that it would risky (or even irresponsible) for investigatory efforts to be initially aimed at gathering sufficient evidence to fulfil the evidentiary standard for the confirmation of charges in the expectation that additional evidence may be gathered later to fulfil the ‘beyond reasonable doubt’ standard.\textsuperscript{231} It follows that relevant and convincing evidence which enables the Trial Chamber to consider whether criminal responsibility is proven ‘beyond reasonable doubt’ should be obtained as expeditious and effective as possible.\textsuperscript{232} These concerns later proved to be legitimate. On 23 April 2013, in the Kenyatta case, the Trial Chamber was concerned about “the considerable volume of evidence collected by the Prosecution post-confirmation”.\textsuperscript{233} It held that 24 out of 31 fact witnesses had been interviewed for the first time after the confirmation of charges. In addition, large amounts of documentary evidence were collected post-confirmation.\textsuperscript{234} The Trial Chamber reminded the Prosecution that the possibility to continue investigations post-confirmation “is not an unlimited prerogative”.\textsuperscript{235} The Prosecution should not collect evidence

\textsuperscript{229} Consider ICC, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, Muthaura, Muigai Kenyatta and Hussein Ali, Situation in the Republic of Kenya, Case No ICC-01/09-02/11-382-Red, PTC II, 23 January 2012, Dissenting Opinion by Judge Hans-Peter Kaul, par. 47 – 57; ICC, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, Prosecutor v. William Samoei Ruto, Henry Kiprono Kooge and Joshua Arap Sang, Situation in the Republic of Kenya, Case No. ICC-01/09-01/11-373, PTC II, 23 January 2012, Dissenting Opinion by Judge Hans-Peter Kaul, par. 42-52; see infra, Chapter 3, IV.

\textsuperscript{230} \textit{Ibid.}, par. 51.

\textsuperscript{231} \textit{Ibid.}, par. 52.

\textsuperscript{232} \textit{Ibid.}, par. 53.

\textsuperscript{233} ICC, Decision on Defence Application pursuant to Article 64(4) and Related Requests, Prosecutor v. Uhuru Muigai Kenyatta, Situation in the Republic of Kenya, Case No. ICC-01/09-02/11-728, T. Ch. V, 26 April 2013, par. 118.

\textsuperscript{234} \textit{Ibid.}, par. 122.

\textsuperscript{235} \textit{Ibid.}, par. 119.
post-confirmation that it could reasonably be expected to collect prior to the confirmation of charges.  

Similar to the *ad hoc* tribunals and the Special Court, the statutory documents of the ICC do not include any express investigative powers for the Defence. Nevertheless, one of the principal tasks of the defence team is to conduct separate investigations, in order to challenge the allegations raised by the Prosecutor. Of course, from the moment there is a formal case (issuance of a warrant of arrest or summons to appear), Article 57 (3) (b) ICC Statute provides that the Pre-Trial Chamber may upon request 'issue such orders, including measures such as those described in article 56, or seek such cooperation pursuant to Part 9 as may be necessary to assist the person in the preparation of his or her defence'. The second part of this provision entails a ‘necessity requirement’. This encompasses, for example, that it should not be possible to obtain the materials sought from another source. It follows from Rule 116 ICC RPE that an order at the request of the Defence will be issued when the Pre-Trial Chamber is satisfied '[t]hat such an order would facilitate the collection of evidence that may be material to the proper determination of the issues being adjudicated, or to the proper preparation of the person’s defence’ (‘relevance requirement’). Cooperation shall be sought if the Pre-Trial Chamber is satisfied ‘that sufficient information to comply with article 96, paragraph 2, has been provided’ (‘specificity requirement’). More problematic for the Defence, in light of the risk of exposing its strategy is the possibility for the Pre-Trial Chamber to consult the Prosecution before issuing an order. In the *Banda and Jerbo* case, the Pre-Trial dismissed the application of the Defence pursuant to Article 57 (3) (b) and concluded that any order would serve no purpose, since the Defence had stated its strategy not to challenge charges or evidence, or to present evidence, for the purposes of the confirmation hearing.

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236 Ibid., par. 121. Consider additionally ibid., Concurring Opinion of Judge Christine Van den Wyngaert, par. 2 (noting that “the Prosecution offers no cogent and sufficiently specific justification for why so many witnesses in this case were only interviewed for the first time post-confirmation”).

237 See e.g. ICC, Decision on “Defence Applications Pursuant to Article 53(3)(b) & 64(6)(a) of the Statute for an Order for the Preparation and Transmission of a Cooperation Request to the Government of the Republic of Sudan”, Prosecutor v. Abukar Nourain and Jerbo Jamus, Situation in Darfur, Sudan, Case No. ICC-02/05-03/09-169, T. Ch. IV, 1 July 2011, par. 17.

238 ICC, Decision on the “Defence Application pursuant to Article 57(3)(b) of the Statute to seek the Cooperation of the Democratic Republic of Congo (DRC), Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC, Case No. ICC-01/04-01/07-444, PTC I, 25 April 2008, pp. 6, 7, 11.

239 Rule 116 (1) (a) ICC RPE.

240 Rule 116 (1) (b) ICC RPE.

241 Rule 116 (2) ICC RPE.

242 The Pre-Trial Chamber added that after the confirmation hearing, in case the charges would be confirmed, the Defence could file a new application. However, such distinction between the pre- and post-confirmation stage of
Requests for cooperation are subsequently transmitted by the Registrar. To some extent, the possibility to request assistance by the Pre-Trial Chamber may help restore any imbalance between the Prosecutor and the Defence in the collection of evidence. It has been suggested that in order to expedite proceedings, the Defence should rely more often on Article 57 (3) (b), rather than to first send cooperation requests directly to states or with a covert letter from the Registry. What is not provided for is a provision allowing the Defence to request the Prosecutor to undertake certain investigative actions. However, nothing seems to prevent the Defence to address such requests to the Prosecutor. An ICC Trial Chamber suggested that as an alternative to the drastic remedy of a temporary stay of proceedings, “the defence may consider revealing one line of argument to the prosecution in order to facilitate the search for, and disclosure of, relevant evidence and the investigation thereof.” However, it is understandable that the Defence will be reluctant to disclose its lines of defence to the Prosecution. According to FRIMAN, the powers of the Pre-Trial Chamber include the possibility for the Pre-Trial Chamber to order investigative acts in case the Prosecutor rejected a request by the Defence for such measures. However, to instruct the Prosecutor to conduct


243 F. GUARIGLIA, K. HARRIS and G. HOCHMAYR, Article 57, in O. TRIFTERER (ed.), Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article, München, Verlag C.H. Beck, 2008, p. 1124 (stating that this provision “attempts to balance the situations of the accused person and the Prosecutor at the pre-trial stage, by providing –even if incompletely- some degree of “equality of arms” during this procedural phase”). Consider also ICC, Decision on the “Defence Application pursuant to Article 57(3)(b) of the Statute to Seek the Cooperation of the Democratic Republic of Congo (DRC), Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC, Case No. ICC-01/04-01/07-444, PTC I, 25 April 2008, Partly Dissenting Opinion of Judge Anita Ušacka, par. 6.

244 International Bar Association, Fairness at the International Criminal Court, August 2011, p. 36 (“This circuitous approach is resource intensive and needs to be revised”).

245 P.C. KEEN, Tempered Adversariality: The Judicial Role and Trial Theory in the International Criminal Tribunals, in «Leiden Journal of International Law», Vol. 17, 2004, p. 799 (the author states that “ICC subjects do have such powers, because they are necessarily implicit in the duties and mechanisms of control imposed on the Prosecutor”).


certain investigative acts would be at tension with his or her independence.\textsuperscript{248} Moreover, a proposal to expressly include such power was rejected during negotiations.\textsuperscript{249} Although the Defence will want to conduct on-site investigations, it follows from the case law of the ICC that the Defence does not possess “an all-encompassing right” to conduct on site investigations.\textsuperscript{250} Hence, in case defence teams are denied access to a territory and the collection of relevant evidence is impaired such does not automatically render the trial unfair.\textsuperscript{251}

With regard to the participatory rights of victims during the investigation, it should be noted that the Appeals Chamber held that there is no all-encompassing right for victims to participate during the investigation phase. This is because investigations do not constitute ‘judicial proceedings’ in the sense of Article 68 (3), but “an inquiry conducted by the Prosecutor into the commission of a crime with a view of bringing to justice those deemed responsible.”\textsuperscript{252} Moreover, where Article 42 (1) ICC Statute vests the Prosecutor with the authority to conduct investigations, reading participatory rights for victims in the investigation into the ICC Statute would contravene this provision.\textsuperscript{253} In holding so, the Appeals Chamber overturned the view held by the Pre-Trial Chamber that the victims’ participatory rights extended to the investigative stage.\textsuperscript{254} Nevertheless, in the absence of a general participatory

\textsuperscript{249} Ibid., p. 1126.
\textsuperscript{250} ICC, Decision on the Defence Request for a Temporary Stay of Proceedings, Prosecutor v. Abdallah Banda Abukar Nourain and Saleh Mohammed Jerbo Jamus, Situation in Darfur, Sudan, Case No. ICC-02/05-03/09-410, T. Ch. IV, 26 October 2012, par. 99.
\textsuperscript{251} Ibid., par. 100 (the Defence argued that it was unable to conduct interviews in order to identify and locate potential witnesses with knowledge of the facts relevant to the case and, with regard to the potential defence witnesses it could identify, was unable to interview them where the Sudanese government refused access to its territory).
\textsuperscript{252} ICC, Judgment on Victim Participation in the Investigations Stage of Proceedings in the Appeal of the OPCD against the Decision of Pre-Trial Chamber I of 7 December 2007 and in the Appeals of the OPCD and the Prosecutor against the Decision of Pre-Trial Chamber I of 24 December 2007, Situation in the DRC, Case No. ICC-01/04-556 (OA4 OA5 OA6), A. Ch., 19 December 2008, par. 45, 48, 58; ICC, Judgment on Victim Participation in the Investigation Phase of the Proceedings in the Appeal of the OPCD against the Decision of Pre-Trial Chamber I of 3 December 2007 and in the Appeals of the OPCD and the Prosecutor against the Decision of Pre-Trial Chamber I of 6 December 2007, Situation in Darfur, Sudan, Case No. ICC-02/05-177 (OA OA2 OA3), A. Ch., 2 February 2009, par. 7. Consider additionally: OTP, Policy Paper on Victims’ Participation, April 2010, p. 14.
\textsuperscript{253} ICC, Judgment on Victim Participation in the Investigations Stage of Proceedings in the Appeal of the OPCD against the Decision of Pre-Trial Chamber I of 7 December 2007 and in the Appeals of the OPCD and the Prosecutor against the Decision of Pre-Trial Chamber I of 24 December 2007, Situation in the DRC, Case No. ICC-01/04-556 (OA4 OA5 OA6), A. Ch., 19 December 2008, par. 52.
\textsuperscript{254} ICC, Decision on Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, Situation in the DRC, Case No. ICC-01/04-101, PTC I, 17 January 2006, par. 54 (holding
right for victims at the investigation stage, some provision is made in the ICC Statute for the
victims to convey information to the Prosecutor. 255 Besides, victims enjoy certain limited
participatory rights. 256 It is for the Pre-Trial Chamber to determine the participation of victims
in judicial proceedings during the investigation stage. 257

Further, the Appeals Chamber has acknowledged that while it is primarily for the parties to
lead evidence to the guilt or innocence of the accused, it follows from the Court’s authority
‘to request the submission of all evidence that it considers necessary for the determination of
the truth’ (Article 69 (3) ICC Statute) read together with Article 68 (3) and Rule 91 (3) on
victim participation that the possibility is left open for victims to request the Chamber to
submit all evidence it considers necessary for the determination of the truth. 258 This requires
that the evidence or issue is shown to affect the interests of the victims. 259 It is for the
Chamber to decide on a case by case basis and due regard should be paid to the rights of the
accused. 260 Similarly, the Appeals Chamber concurred with the Trial Chamber that the
legislative framework of the ICC does not exclude the possibility for the Trial Chamber to
receive submissions by the victims on the admissibility or the relevance of evidence. 261

that Article 68 (3) applies to the investigation of a situation), par. 63 (holding that generally, the personal
interests of victims are affected at the investigation stage) and par. 71 (holding that “[i]n the light of the core
content of the right to be heard set out in article 68 (3) of the Statute, persons accorded the status of victims will
be authorised, notwithstanding any specific proceedings being conducted in the framework of such an
investigation, to be heard by the Chamber in order to present their views and concerns and to file documents
pertaining to the current investigation of the situation in the DRC”). In more detail, consider B. MCGONIGLE
LEYH, Procedural Justice? Victim Participation in International Criminal Proceedings, Antwerp, Intersentia,

255 See Articles 15 (2) and 42 (1) ICC Statute.
256 See e.g. Article 15 (3) and Article 19 (3) ICC Statute.
257 ICC, Judgment of Victim Participation in the Investigations Stage of Proceedings in the Appeal of the OPCD
against the Decision of Pre-Trial Chamber I of 7 December 2007 and in the Appeals of the OPCD and the
Prosecutor against the Decision of Pre-Trial Chamber I of 24 December 2007, Situation in the DRC, Case No.
ICC-01/04-556 (OA4 OA5 OA6), A. Ch., 19 December 2008, par. 57. Consider ICC, Decision on Victim’s
Participation in Proceedings Related to the Situation in Uganda, Situation in Uganda, Case No. ICC-02/04-191,
PTC II, 9 March 2012; ICC, Decision on Victims’ Participation in Proceedings Related to the Situation in Libya,
Situation in Libya, Case No. ICC-01/11-28, PTC I, 24 January 2012; ICC, Decision on Victims’ Participation in
Proceedings Relating to the Situation in the Democratic Republic of the Congo, Situation in the DRC, Case No.
ICC-01/04-595, PTC I, 11 April 2011; ICC, Decision on Victims’ Participation in Proceedings Related to the
Situation in the Central African Republic, Situation in the CAR, Case No. 01/05-31, PTC II, 11 November 2010;
ICC, Decision on Victims’ Participation in Proceedings Related to the Situation in the Republic of Kenya,
Situation in the Republic of Kenya, Case No. 01/09-24, 3 November 2010.
258 ICC, Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I’s Decision on
Victims’ Participation of 18 January 2008, Prosecutor v. Lubanga Dyilo, Situation in the DRC, Case No. ICC-
01/04-01/06-1432 (OA 9 OA 10), A. Ch., 11 July 2008, par. 94 – 98.
259 Ibid., par. 99.
260 Ibid., par. 98 – 105.
261 Ibid., par. 101 – 102. What is required for victims to tender and examine evidence is (i) a discrete application,
(ii) notice to the parties, (iii) demonstration of personal interests that are affected by the specific proceedings,
However, what remains unclear from the reasoning by the Appeals Chamber is whether victims may only tender evidence which has previously been gathered by the parties or not. It remains to be seen whether victims are able to request the tendering and examination of evidence they have collected themselves. In this regard the Pre-Trial Chamber held in the *Katanga and Ngudjolo Chui* case that:

> "granting investigative powers, independent from those of the Prosecution, to those granted the procedural status of victim would not be consistent with the procedural system embraced by the Statute and the Rules. Therefore, if those granted the procedural status of victim find it necessary to undertake certain investigative steps, they must request the Prosecution to undertake such steps. In the view of the Single Judge, this is not only consistent with the procedural framework of the Statute and the Rules, but also corresponds with the manner in which those national systems from the Romano-Germanic tradition which provide for a procedural status of victim at the pre-trial stage of a case operate." 

The ICC Statute envisages several possibilities for *judicial intervention* during the investigation proper. These possibilities should be distinguished from the role played by the Pre-Trial Chamber during the pre-investigation stage. During the ‘full investigation’, the Pre-Trial Chamber may come to the assistance of the Prosecutor in the case where a state is clearly unable to execute a request for cooperation due to the unavailability of any authority or any component of its judicial system (failed state scenario). Additionally, Article 56 ICC Statute allows the Pre-Trial Chamber to take certain investigative measures at the request of the Prosecutor or on its own initiative for the collection or preservation of evidence in case of a ‘unique investigative opportunity’. The exercise of these powers at the Chamber’s own initiative must be preceded by consultations with the Prosecutor, so as to ascertain whether

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(iv) compliance with disclosure obligations and protection orders, (v) determination of appropriateness, and (vi) consistency with the rights of the accused and a fair trial (ibid., par. 104).

262 *Ibid.*, par. 100 (“If the Trial Chamber decides that the evidence should be presented then it could rule on the modalities for the proper disclosure of such evidence before allowing it to be adduced and depending on the circumstances it could order one of the parties to present the evidence, call the evidence itself, or order the victims to present the evidence”).

263 ICC, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07-474, PTC I, 13 May 2008, par. 83-84. Consider also ICC, Decision on Modalities of Victim Participation, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07-1788, T. Ch. II, 22 January 2010, par. 102 (“The Chamber must stress that the fact that the victims are authorised to present incriminating or exculpatory evidence during the trial does not, however, mean that they are entitled to conduct investigations in order to establish the guilt of the accused”).

264 See supra, Chapter 3, I.2.

265 Articles 54 (2) (b) and 57 (3) (d) ICC Statute; Rule 155 ICC RPE.
there is good cause why the Prosecutor did not request measures to be taken in relation to a unique investigative opportunity. The Chamber itself will only act *proprio motu* if it concludes that the Prosecutor’s failure to request such measures is unjustified.\(^{266}\) The Statute provides the Pre-Trial Chamber with a number of specific steps it can take in this regard, ‘as may be necessary to ensure the efficiency and integrity of the proceedings and in particular to protect the rights of the defence’. A non-exhaustive list of possible actions that can be taken is included in Article 56 (2) of the ICC Statute.\(^{267}\) This includes the ordering of the appointment of an *ad hoc* counsel to represent the general interests of the Defence for the purpose of certain investigative acts.\(^{268}\) However, the practice of the Court to date reveals that the Pre-Trial Chamber has not adopted an active role in the investigative stage.\(^{269}\)

Pursuant to Article 57 (3) (c) of the ICC Statute, the Pre-Trial Chamber may ‘[w]here necessary, provide for the protection and privacy of victims and witnesses, the preservation of evidence, the protection of persons who have been arrested or appeared in response to a summons, and the protection of national security information’. This open-ended provision could be interpreted as providing for broad and general powers for the Pre-Trial Chamber during the pre-trial phase and, on one interpretation, provide for a more interventionist bench.\(^{270}\) However, a contextual reading clarifies that this provision is an exception to the general duties and powers with respect to investigations conferred on the Prosecutor under Article 54. It must be read together with other provisions such as Article 68 ICC Statute on the protection and privacy of victims and witnesses and Article 72 on the protection of national security information. Consequently, its significance lies in clarifying certain competences of the Pre-Trial Chamber at the pre-trial stage.\(^{271}\) To exercise its functions under this provision, the Pre-Trial Chamber will depend on information it receives from the parties.

In particular, Regulation 48 stipulates that the Pre-Trial Chamber may request the Prosecutor

\(^{266}\) Article 56 (3) ICC Statute.

\(^{267}\) Article 56 (2) ICC Statute. Consider in particular Article 56 (2) (f) ICC Statute: ‘Taking such other action as may be necessary to collect or preserve evidence’; ICC, Decision on the Prosecutor’s Request for Measures under Article 56, *Situation in the Democratic Republic of Congo*, Case No. ICC-01/04-21, PTC I, 26 April 2005, p. 3.

\(^{268}\) Ibid., p. 3.

\(^{269}\) Confirming, see J. JACKSON, Finding the Best Epistemic Fit for International Criminal Tribunals, in *Journal of International Criminal Justice*, Vol. 7, 2009, p. 36 (noting that much of the time of the Pre-Trial Chamber has been spent on disclosure issues, rather than taking investigative steps).


to provide specific or additional documents in its possession, or summaries thereof, in order to exercise its function under, *inter alia*, Article 57 (3) (c).

Article 57 (3) (c) ICC Statute was relied upon by Pre-Trial Chamber I during the early life of the Court to organise a status conference with the Prosecution on the progress of the investigation in the DRC.\(^{272}\) However, status conferences are only provided for under the Rules in two instances: before the confirmation hearing to control the disclosure between parties and set the date for the hearing, and before the trial to set the date of the trial and to facilitate its fair and expeditious conduct.\(^{273}\) One commentator argues that by organising a status conference at this early moment during investigations, the Pre-Trial Chamber “shifted the equilibrium between legal traditions reached in Rome, arguably getting closer to being an Investigating Judge than provided in the Statute and the ICC RPE.”\(^{274}\) She argues that the decision was made in an attempt to speed up investigations and to ostensibly safeguard the rights of ‘prospective suspects’ to whom delay would be prejudicial.\(^{275}\) The Pre-Trial Chamber also exercised a more assertive role by requesting reports from the Prosecutor on its progress within the situation.\(^{276}\)

On the one hand, it may be argued that the interpretation by Pre-Trial Chamber I of Article 57 (3) (c) of the ICC Statute in this manner overextends the powers of the bench. The Pre-Trial Chamber’s primary function is to serve as a controlling organ, not an investigating body.\(^{277}\) Alternatively, the interpretation of the Pre-Trial Chamber might also be viewed as part of its

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\(^{273}\) Rule 121 and Rule 132 ICC RPE respectively.


\(^{275}\) Ibid., p. 193; see further D. Scheffer, A Review of the Experience of the Pre-Trial and Appeals Chambers of the International Criminal Court Regarding the Disclosure of Evidence, in «Leiden Journal of International Law», Vol. 21, 2008, p. 158, who remarks that: “Despite the logic that might underpin such an evaluation, it remains a huge leap for PTC I to intervene in the Prosecutor’s discretionary power as the investigator of a situation and determine, from the Judge’s relatively detached vantage point, that the investigation should be intensified or accelerated or broadened.”

\(^{276}\) ICC, Decision Requesting Information of the Preliminary Examination of the Situation in the Central African Republic, *Situation in the Central African Republic*, Case No. ICC-01/05-6, PTC III, 30 November 2006, p. 5. The PTC based its decision on Regulation 46 (2) of the Court Regulations.

\(^{277}\) D. Scheffer, A Review of the Experience of the Pre-Trial and Appeals Chambers of the International Criminal Court Regarding the Disclosure of Evidence, in «Leiden Journal of International Law», Vol. 21, 2008, p. 158. See further ICC, Judge Fernàndez de Gurmendi’s Separate and Partially Dissenting Opinion to the Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire, *Situation in Côte d’Ivoire*, Case No. ICC-02/11-15 TC, ICC, 3 October 2011, par. 19–20 (“the Pre-trial Chamber is not an investigative chamber. The Pre-trial Chamber has no investigative powers of its own, nor is it responsible for directing the investigation of the Prosecutor”).
supervisory functions and for ensuring that the rights and interests of the Defence are respected during the investigation. This role of the Pre-Trial Chamber in ensuring the rights and interests of the Defence may not be underestimated. The ICC Appeals Chamber confirmed that “the Pre-Trial Chamber has the primary responsibility of ensuring the protection of the rights of the suspects during the investigation stage of proceedings.”

The Pre-Trial Chamber may further intervene in the investigation to issue such orders and warrants requested by the Prosecutor for the purpose of the investigation or such orders or requests for state cooperation requested by the Defence. In addition, the Pre-Trial Chamber may intervene through the issuance of a warrant of arrest or of a summons to appear in case of challenges to the jurisdiction or the admissibility of a case, prior to the confirmation hearing, or through the supervision over the deprivation of liberty.

From the above, it appears that notwithstanding the extension of judicial control over the investigation, the Pre-Trial Chamber is not expected to exercise any functions akin to those of an investigative judge. Normally the Judges are not involved in the collection of evidence. There is no guaranteed intervention. Some exceptions were noted, including the powers of the Pre-Trial Chamber in relation to ‘unique investigative opportunities’. However, these powers are not comparable to the powers of an investigating judge since it is still the Prosecutor who is leading the investigation. It is not the function of the Pre-Trial Chamber to investigate crimes. The intervention aims at ensuring equality of arms and the rights of the Defence.

The functions of judicial intervention at this stage are mainly to (1) safeguard the rights and

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278 D. SCHEFFER, A Review of the Experience of the Pre-Trial and Appeals Chambers of the International Criminal Court Regarding the Disclosure of Evidence, in «Leiden Journal of International Law», Vol. 21, 2008, p. 158. SCHEFFER remarks that the line between prudent oversight and activist interventionism has yet to be fully drawn “but that the Pre-Trial Chamber started drawing it in its decision of 17 February 2005.”

279 See ICC, Judgment on the Appeal of Mr. Katanga against the Decision of Trial Chamber II of 20 November 2009 Entitled “Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings”, Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC, Case No. ICC-01/04-01/07-2259 (OA 10), A. Ch., 12 July 2010, par. 40.

280 Art. 57 (3) (a) and (b) ICC Statute.

281 Article 58 ICC Statute.

282 Article 19 (6) ICC Statute.

283 See infra, Chapters 7 and 8.


interests of the Defence, (2) to guarantee the rights of the suspect or accused and (3) to assist
the parties in the preparation of their cases, for example through the issuance of orders and
warrants or the ordering of specific investigations in ‘failed state’ scenarios.

I.3.3. The Extraordinary Chambers in the Courts of Cambodia

Following the preliminary investigation, the sending of the introductory submission by the
Co-Prosecutors to the Co-Investigating Judges triggers the start of the judicial investigation.
The ECCC agreement, ECCC Law and the ECCC IR do not define the ‘investigation’. It was
previously noted that the threshold for sending the introductory submission and the
commencement of the investigation proper is ‘reason to believe that crimes within the
jurisdiction of the ECCC have been committed’. 286 A judicial investigation is compulsory for
all crimes that fall within the jurisdiction of the Extraordinary Chambers. 287 The scope of the
judicial investigation is limited to the facts (and the persons) named in the introductory
submission by the Co-Prosecutors. 288 The Co-Investigating Judges cannot themselves extend
the scope (‘saisine’) of their investigation. When they discover new facts, they are to inform
the Co-Prosecutors and can only investigate these facts when the Co-Prosecutors decide to file
a supplementary submission. 289 At any moment during the investigation, the Co-Investigating
Judges can charge (‘mettre en examen’) suspects named in the introductory submission or any
other person against whom they have ‘clear and consistent evidence indicating that such
person may be criminally responsible for the commission of a crime mentioned in the
introductory or supplementary submission(s)’. 290 The Co-Investigating Judges conduct the
investigation in an impartial manner and can undertake all investigative actions ‘conducive to
ascertain the truth’.

Unlike at the ICC, the ad hoc Tribunals and the Special Court, a strict separation between the
investigation and prosecution phase is provided for. This is in line with civil law criminal
justice systems. Hence, there is a clear end point for the investigation phase. When the Co-
Investigating Judges consider their work finished, they notify the parties who can request

286 Rule 53 (1) ECCC IR.
287 Rule 55 (1) ECCC IR.
288 Rule 55 (2) and (4) ECCC IR.
289 Rule 55 (3) ECCC IR.
290 Rule 55 (4) ECCC IR.
further investigative actions. Consequently, the case file is sent back to the Co-Prosecutors. If the Co-Prosecutors decide that the investigation is concluded, they send a final submission to the Co-Investigating Judges to issue a closing order either indicting the person and sending him or her to trial or dismissing the case. Re-opening the judicial investigation is possible when new evidence is discovered after a dismissal order has been issued. It is for the Co-Prosecutors to decide to re-open the judicial investigation. Where a closing order has been issued sending the person(s) to trial, additional investigations may only be ordered by the Trial Chamber. Under the same conditions as the Co-Investigating Judges, the Trial Chamber may conduct on-site visits, interview witnesses, conduct searches, seize any evidence and order expert opinions. However, it is clear that the procedural framework of the ECCC provides for a system whereby the investigation is expected to be completed before the start of the trial phase. To the extent that such set-up proofs are workable, it may offer valuable counter-arguments against the assumptions underlying the procedural frameworks of the other international criminal tribunals that on-going investigations until the end of proceedings are unavoidable, considering the scope and nature of the crimes within the jurisdiction of these tribunals.

The inquisitorial style of investigations also impacts on the investigative opportunities of other actors. No fully-fledged defence investigation is provided for. In principle, the charged person is not expected to conduct its own investigation. According to the Co-Investigating Judges:

291 Rule 66 (1) ECCC IR. The parties have 15 days to request further investigative actions (such time limitation seemingly derives from Article 246 of the Cambodian Code of Criminal Procedure). However, in Case 002, the Co-Investigating Judges recognised the validity of requests that were filed late, as long as they were filed within 30 days after the notification of the parties. See ECCC, Order on Request for Adoption of Certain Procedural Measures, NUON Chea et al., Case No. 002/19-09-2007-ECCC-OCIJ, OCIJ, 25 November 2009, par. 16. More generally, it may be doubted whether the 15 day period is reasonable, especially where no time limitation is provided for the Co-Investigating Judges to respond to requests for investigative actions, filed by the parties pursuant to Rule 55 (10) ECCC IR (it follows from Rule 66 (2) ECCC IR that where the Co-Investigating Judges decide to reject such a request for further investigative action, such order ‘shall also reject any remaining requests, filed earlier in the investigation, which had not yet been ruled upon by the Co-Investigating Judges’). Further, it may be doubted whether a 15 day period is adequate in light of the magnitude of the investigations conducted before the ECCC. Consider the similar argumentation by the Defence of Nuon Chea: ECCC, Request for Adoption of Certain Procedural Measures, NUON Chea et al., Case No. 002/19-09-2007-ECCC/OCIJ, Defence, 5 November 2009, par. 45.

292 Rule 66 (5) and 67 (1) ECCC IR.

293 Rule 70 ECCC IR. In this regard, consider also Articles 251 and 265 of the Cambodian Criminal Code.

294 Rule 93 ECCC IR.

295 These investigative acts may be delegated to the judicial police upon the issuance of a rogatory letter, see Rule 93 (3) ECCC IR.
Before this Court, the power to conduct judicial investigations is assigned solely to the two independent Co-Investigating Judges and not to the parties. There is no provision which authorizes the parties to accomplish investigative action in place of the Co-Investigating Judges, as may be the case in other procedural systems.  

The Defence should avail itself of the ‘Rule 55 (10) ECCC IR (and Rule 58 (6)) mechanism’. It allows the Defence to request the Co-Investigating Judges to take an order or to undertake a certain investigative action. In having recourse to this mechanism, the Defence should (1) identify the specific action requested (‘specificity-requirement’), and (2) explain why the action is necessary for the investigation in ascertaining the truth (‘prima facie relevance-requirement’). These two requirements are cumulative. The Co-Investigating Judges enjoy broad discretion in the way they conduct their investigation nevertheless. Through the Rule 55 (10) vehicle, “the parties can suggest, but not oblige, the Co-Investigating Judges to undertake investigative actions.” Consequently, the Co-Investigating Judges will independently assess whether the requested investigative action is useful. Parties may conduct ‘preliminary inquiries as are strictly necessary for the effective exercise of their right to request investigative action’. The exact boundaries of what is to be considered ‘preliminary inquiries’, rather than an investigation, are to be determined in jurisprudence. For example, the Pre-Trial Chamber has clarified that the enquiry of non-public sources may amount to an investigation.  

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296 See the inter-office memorandum issued by the Co-Investigating Judges on 10 January 2008 as referred to in ECCC, Order Issuing Warning Under Rule 38, NUON Chea et al., Case No. 002/19-09-2007-ECCC-OCIJ, OCIJ, 25 February 2010, par. 8; ECCC, Decision on Co-Prosecutor’s Appeal against the Co-Investigating Judges Order on Request to Place Additional Evidentiary Material on the Case File which Assists in Proving the Charged Person’s Knowledge of the Crimes, NUON Chea et al., Case No. 002/1909-2007-ECCC-OCIJ, PTC, 15 June 2010, par. 11.
297 ECCC, Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, NUON Chea et al., Case No. 002/19-09-2007-ECCC/OCIJ (PTC24), PTC, 18 November 2009, par. 44; ECCC, Decision on the Appeal against the ‘Order on the Request to Place on the Case [File] the Documents Relating to Mr. Khieu Samphan’s Real Activity’, NUON Chea et al., Case No. 002/19-09-2007-ECCC/OCIJ (PTC 63), PTC, 7 July 2010, par. 21 – 22.
298 ECCC, Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, NUON Chea et al., Case No. 002/19-09-2007-ECCC/OCIJ (PTC24), PTC, 18 November 2009, par. 22.
299 Ibid., par. 22. The broad discretion of the Co-Investigating Judges is coupled with an obligation under Rule 55 (10) ECCC IR to set out the reasons, where they issue a rejection order.
301 ECCC, Decision on Co-Prosecutor’s Appeal against the Co-Investigating Judges Order on Request to Place Additional Evidentiary Material on the Case File which Assists in Proving the Charged Person’s Knowledge of the Crimes, NUON Chea et al., Case No. 002/1909-2007-ECCC-OCIJ, PTC, 15 June 2010, par. 12 (in casu, the Pre-Trial Chamber found that the action by the Co-Prosecutors amounted to the request for admission of
Orders by the Co-Investigating Judges denying a Rule 55 (10) request can be appealed. The Cambodian Code of Criminal Procedure provides the ‘Investigating Chamber’ with broad powers on appeal, including the power to ‘order additional investigative action which it deems useful’.

In contrast, the ECCC Pre-Trial Chamber limited the scope of the appeal where the Internal Rules explicitly refer only to appeals lodged against orders by the Co-Investigating Judges denying a request, and thereby excluded the power to order additional investigative actions. According to the Pre-Trial Chamber, “[t]his departure is justified by the unique nature of the cases before the ECCC, which involve large scale investigations and extremely voluminous cases, and where the Pre-Trial Chamber has not been established and is not equipped to conduct investigations.”

Therefore, the exercise of discretion will only be overturned where the decision rejecting the request for investigative action was: (1) based on an incorrect interpretation of the governing law, (2) based on a patently incorrect conclusion of fact, or was (3) so unfair or unreasonable as to constitute an abuse of the Co-Investigating Judges’ discretion.

The procedural design outlined above may have several benefits over party-led investigations in relation to the investigation of international crimes. It may offer a solution to the persistent difficulties in collecting evidence and the cooperation challenges experienced by the Defence. However, several problems are associated with the possibility for the parties to request investigative actions pursuant to Rule 55 (10) ECCC IR. Firstly, it is problematic that this provision does not include a strict time limitation for the Co-Investigating Judges to documents which had been the subject of identification as a result of permissible enquiries of public sources and not investigation”).

Article 262 of the Cambodian Code of Criminal Procedure. Rule 55 (10) and Rule 73 juncto Rule 74 (3) (b) ECCC IR.

ECCC, Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, NUON Chea et al., Case No. 002/19-09-2007-ECCC/OCJ (PTC24), PTC, 18 November 2009, par. 24 (Where the decisions on requests for investigative action are discretionary, involving questions of fact, the Pre-Trial Chamber considered that the Co-Investigating Judges “are in the best position to assess the opportunity of conducting a requested investigative action in light of their overall duties and their familiarity with the case files.” The Pre-Trial Chamber added that “it would be inappropriate for the Pre-Trial Chamber to substitute the exercise of its discretion for that of the Co-Investigating Judges when deciding on an appeal against an order refusing a request for investigative action.” What is missing in this reasoning is a clarification why the Internal Rules would set aside this power provided for under the Code of Criminal Procedure. The reference to the fact that “the Appeals Chambers of international tribunals have a very limited scope of review when dealing with appeals against discretionary decisions of a first instance decision” is strictly speaking irrelevant).

Ibid., par. 26.

respond to requests for investigative action. The Internal Rules only provide for two cumulative conditions, when the Co-Investigating Judges reject such request. They should issue a rejection order as soon as possible and, in any event, before the end of the judicial investigation. This allows the Co-Investigating Judges to choose not to respond until the end of the judicial investigation.\textsuperscript{307} However, one member of the Office of the Co-Investigating Judges opined that sometimes the relevance of a request would only become clear at the end of the judicial investigation, after other investigative actions have been undertaken.\textsuperscript{308} Secondly, the fact that the parties are not always aware of what is happening in the judicial investigation negatively impacts on the parties’ ability to request certain investigative actions.\textsuperscript{309} The magnitude of the case and the ‘haphazard’ way in which information would be placed on the case file reduce the usefulness of this mechanism.\textsuperscript{310} Thirdly, the limited role of the Defence leads to broadly formulated requests for investigative action by the Defence, which may be difficult to respond to.\textsuperscript{311} Finally, defence counsels are sometimes reluctant to cooperate with the Co-Investigating Judges and to request investigative action insofar that this may reveal their strategy.\textsuperscript{312}

Neither the ECCC Agreement nor the ECCC Law expressly envisage the participation of victims in the investigation. However, it follows from Rule 23 (1) ECCC Internal Rules that civil parties, being ‘parties’ in the proceedings\textsuperscript{313} have the right to ‘[p]articipate in criminal proceedings against those responsible for crimes within the jurisdiction of the ECCC by

\textsuperscript{307} Interview with Co-Investigating Judge Lemonde, ECCC-04, Phnom-Penh, 11 November 2009, p. 8 (“je suis prêt à admettre que ce n’est pas totalement satisfaisant du point de vue des droits de la défense. C’est vrai qu’en droit cambodgien ou en droit français, il y a des délais impératifs. Cela-dit, il faut aussi se mettre un peu à notre place, on est dans une situation qui est sans commune mesure avec celle d’un juge d'instruction français, ou d’un juge d'instruction cambodgien. Notamment, quand on est saisi de ces requêtes un peu ubuesques où on nous fait des demandes qui sont complètement décalées par rapport au droit applicable”); Interview with a member of the OCP, ECCC-11, Phnom-Penh, 9-11 November 2009, p. 16.
\textsuperscript{308} Interview with a member of the OCIJ, ECCC-03, Phnom-Penh, 16 November 2009, p. 15.
\textsuperscript{309} Interview with a Legal Officer of the SCSL, SCSL-12, The Hague, 4 February 2010, p. 4 (“how can the parties really ask for things when they did not really know what was happening in the investigation” (the interviewee has previous experience as a legal officer of the ECCC OCIJ)).
\textsuperscript{310} Interview with a member of the OCP, ECCC-14, Phnom-Penh, 13 November 2009, p. 10 (“In theory, you have an independent investigating organ and then you make requests to that investigative organ and, because you have access to the file, as long as your requests are reasonable and conducive to ascertaining the truth, they’re acted upon. And that actually is an honorable idea. In practice, in a massive case such as this, you have no idea what’s happening. You can make investigative requests which are irrelevant or may already be being dealt with or, for any number of reasons, your requests might become irrelevant or not useful at that stage of the investigation, so there’s a difficulty”); Interview with a Legal Officer of the SCSL, SCSL-12, The Hague, 4 February 2010, p. 4.
\textsuperscript{311} Ibid., p. 5.
\textsuperscript{312} Ibid., p. 5.
\textsuperscript{313} See ‘Glossary’ annexed to the ECCC IR.
supporting the prosecution’.314 This role reflects Cambodian criminal procedure.315 Unlike at the trial stage, the civil parties participate on an individual basis.316 Doubtless, their most important participatory right during the judicial investigation is their right to request the Co-Investigating Judges ‘to interview [them], question witnesses, go to a site, order expertise or collect other evidence on his or her behalf’ as well as to request to make such orders or undertake such investigative action as they consider useful pursuant to Rule 55 (10).317 With regard to ‘Article 55 (10)’ requests, the observations formulated with regard to defence requests equally apply. Similarly, a reasoned rejection order by the Co-Investigating Judges is appealable as of right. Importantly, a request can only be granted insofar as the subject matter thereof falls within the scope of the judicial investigations, as determined by the introductory and any supplementary submissions.318 However, when such a request concerns new facts, the Co-Investigating Judges are obliged to bring these new facts to the attention of the Co-Prosecutors. Like the charged person, civil parties lack the authority to expand the scope of the investigation. The Co-Investigating Judges can only investigate these new facts in case a supplementary submission is made by the Co-Prosecutors with regard to these facts.319

The civil parties may also be requested by the Co-Investigating Judges to participate in a confrontation with a charged person.320 At such occasion, they may put questions to the charged person, with the authorisation of the Co-Investigating Judges. A refusal should be noted in the written record.321 In addition, civil parties may request the Co-Investigating Judges to appoint additional experts to conduct new examinations or to re-examine a matter

314 One commentator noted that such definition of the role of the civil parties (‘supporting the Prosecution’) is overly broad and may result in defendants facing several opponents. See J.P. BAIR, From the Numbers who died to those who Survived: Victim Participation in the Extraordinary Chambers in the Courts of Cambodia, in «University of Hawaii Law Review», Vol. 31, 2009, p. 526.
315 Consider, e.g. Articles 134, 137–139 of the Cambodian Code of Criminal Procedure.
316 Rule 23 (3) ECCC IR.
317 Rule 59 (5) and 55 (10) ECCC IR.
319 Rule 55 (3) ECCC IR; ECCC, Decision on Appeal of Co-Lawyers for Civil Parties against Order on Civil Parties’ Request for Investigative Actions Concerning all Properties Owned by the Charged Persons, Nuon Chea et al., Case No. 002/19-09-2007-ECCC-OCIJ (PTC 57), PTC, 4 August 2010, par. 14.
320 Rule 58 (4) ECCC IR.
321 Rule 58 (5) ECCC IR.
already the subject of an expert report.\footnote{\textsuperscript{322}} Further participatory rights include their right to appeal certain orders by the Co-Investigating Judges in the course of the investigation\footnote{\textsuperscript{323}} and to participate in proceedings relating to pre-trial appeals.\footnote{\textsuperscript{324}} Finally, the Pre-Trial Chamber clarified that civil parties hold the right to participate in provisional detention appeals, even when they are not allowed to participate in the hearing before the Co-Investigating Judges.\footnote{\textsuperscript{325}}

It follows that the civil parties have active participation rights from the investigation onwards.\footnote{\textsuperscript{326}} However, such participatory rights are not automatic in nature and based on a request.\footnote{\textsuperscript{327}} The Pre-Trial Chamber emphasised that such understanding of the civil parties’ role recognises the goal of reconciliation their participation is intended to serve.\footnote{\textsuperscript{328}}

I.3.4. The Special Tribunal for Lebanon

Similar to the ad hoc tribunals, the STL RPE define the ‘investigation’ as encompassing ‘[a]ll activities undertaken by the Prosecutor under the Statute and Rules for the collection of information and evidence, whether before or after an indictment is confirmed’.\footnote{\textsuperscript{329}} This definition is identical to the definition that was found at the ad hoc tribunals. Therefore, the same observations apply here.\footnote{\textsuperscript{330}} In a similar vein, defence investigations seem excluded from the scope of this definition. A MoU that was signed between the tribunal’s Defence Office and the Lebanese Ministry of Justice defines ‘defence investigations’ as encompassing “all activities undertaken by the defence teams under the Statute and Rules for the collection of information and evidence in the context of their mission to represent a suspect or accused.”\footnote{\textsuperscript{331}}
It was concluded that the investigation is not preceded by a pre-investigation. Nevertheless, it has to be noted that the STL benefits from evidence which was previously collected by the United Nations International Independent Investigation Commission (‘UNIIIC’) established by the Security Council and from evidence gathered and handed over by the national authorities of Lebanon. Provision is made in the Statute and the RPE for the transition of the results of these investigations to the STL. To that extent, a request by the Pre-Trial Judge for deferral of the case of the attack against Prime Minister Rafiq Hariri and others shall be made upon application by the Prosecutor, within two months after assumption of office. The results of the investigations and a copy of the relevant court records and other probative material will be provided to the Prosecutor. This application was made on 27 March 2009. Also in relation to crimes connected to this attack, the Lebanese authorities should send the results of the investigation and the relevant court records to the tribunal upon its request. This information should allow the STL Prosecutor to subsequently decide whether these cases fall within the jurisdiction of the Court and to request the transfer of the case.

With regard to the admissibility of evidence collected by UNIIIC or the Lebanese authorities, Article 19 STL provides that the evidence collected ‘shall be received’ and that its admissibility will be decided on the basis of international standards on the collection of evidence.

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332 The UNIIIC was established pursuant to Security Council Resolution 1595, with the mandate “to assist the Lebanese authorities in their investigation of all aspects of this terrorist act, including to help identify its perpetrators, sponsors, organizers and accomplices.” See UNSC Res. 1595 (2005), par. 1. According to Article 19 (2) STL Agreement, the Special Tribunal ‘shall commence functioning on a date to be determined by the Secretary-General in consultation with the Government, taking into account the progress of the work of the International Independent Investigation Commission.’

333 See Article 17 (a) STL Agreement on the ‘coordinated transition’ of the activities previously conducted by the UNIIIC and Article 4 STL Statute (and Rule 17 (A) (ii) STL RPE) on the transfer of the results of investigations conducted by the Lebanese judicial authorities.

334 Article 4 (2) STL Statute and Rule 17 (A) and (B) STL RPE.

335 STL, OTP, Application by the Prosecutor to the Pre-Trial Judge under Article 4(2) of the Statute and Rule 17 of the Rules of Procedure and Evidence, 25 March 2009; STL, Order Directing the Lebanese Judicial Authorities Seized with the Case of the Attack against Prime Minister Rafiq Hariri and Others to Defer to the Special Tribunal for Lebanon, Case No. CH/PTJ/2009/01, PTJ, 27 March 2009.

336 Article 4 (3) STL Statute, Rule 17 (E) and (F) STL RPE.

337 As far as evidence collected by the UNIIIC is concerned, it should be noted that UN Security Resolution 1595 directed the Commission ‘to determine the procedures for its investigation, taking into account the Lebanese law and judicial procedures.’ See UNSC Res. 1595 (2005), par. 6. Consider also: Fourth report of the International Independent Investigation Commission established pursuant to Security Council Resolutions 1595 (2005), 1636 (2005) and 1644 (2005), U.N. Doc. S/2006/375, 10 June 2006, par. 7 (“During the reporting period, the Commission has also determined its own set of internal procedures, as provided in paragraph 6 of Security Council resolution 1595 (2005). It facilitates further standardization of the investigative work of the Commission and ensures due respect for applicable legal and professional standards. The procedure has, for example, standardized the conduct of interviews of witnesses and suspects, taking into account Lebanese law and relevant international standards, including international criminal procedure, so as to prepare for future legal proceedings before a tribunal, possibly of an international character”).
With regard to the end point of the investigation, it appears that, in line with other international criminal tribunals under review, the investigation formally ends with the confirmation of the indictment.\textsuperscript{338} Again, the dividing line between the investigation phase and the prosecution phase is not absolute and several provisions indicate that investigations may continue after the start of the prosecution phase. Examples of this possibility of continued investigations include the possibility to amend the indictment after confirmation,\textsuperscript{339} under certain conditions, or the possibility for parties to introduce additional evidence before the Appeals Chamber.\textsuperscript{340}

The twofold responsibility to investigate and prosecute persons responsible for crimes falling within the jurisdiction of the STL rests with the Prosecutor.\textsuperscript{341} The Prosecutor should act independently in the conduct of investigations as a separate organ of the tribunal and not seek or receive instructions from any government or other source.\textsuperscript{342} The powers of the Prosecution in the conduct of the investigation include the power to question suspects, victims and witnesses, to collect evidence, to conduct on-site investigations and to undertake ‘other measures as may appear necessary for the completing of the investigation and the conduct of the prosecution at trial’ (including measures for the protection of potential witnesses and informants).\textsuperscript{343} The Prosecution may be assisted by the Lebanese authorities.\textsuperscript{344} Further, the Prosecutor may seek assistance of states and international bodies and request such orders as are necessary from the Pre-Trial Judge or Chamber.\textsuperscript{345}

Whereas the Defence is expected to conduct its own investigations, its respective investigative powers, duties and responsibilities are largely left undefined by the STL Agreement, the STL Statute and the RPE.\textsuperscript{346} The Defence may benefit from the assistance of the Defence Office in the collection of evidence.\textsuperscript{347} Notably, a MoU has been concluded between the Defence Office and the Lebanese authorities which sets forth that defence teams may freely carry out

\begin{itemize}
\item Article 18 STL Statute and Rule 68 STL RPE.
\item Rule 71 STL RPE.
\item Rule 190 STL RPE.
\item Article 11 (1) STL Statute.
\item Article 11 (2) STL Statute.
\item Article 11 (5) STL Statute and Rule 61(i) and (ii) STL RPE.
\item Article 11 (5) STL Statute.
\item Rule 61 (iii) and (iv) STL RPE.
\item For example, ‘Part 4’ on the investigation and the rights of the suspects and accused persons, is drawn with the Prosecution investigations in mind. The suspects and accused are only mentioned insofar as they enjoy certain rights.
\item Article 13 (2) STL Statute.
\end{itemize}
investigations on the Lebanese territory as long as these do not include the use of coercive measures.\textsuperscript{348} This includes free access to sites, persons and documents necessary for the conduct of their investigations and the possibility directly to take the statements of witnesses and experts who have informed it of their willingness to testify.\textsuperscript{349} Further, the Defence may request the Pre-Trial Judge to issue such orders, summonses, subpoenas, warrants and transfer orders or requests as may be necessary for the purposes of the investigation.\textsuperscript{350} It follows from the MoU that such order should in particular be sought whenever the Defence needs assistance with regard to coercive measures, including a summons to appear or the execution of a search and seizure.\textsuperscript{351} The Head of the Defence Office may seek cooperation from any state, entity or person to assist the Defence.\textsuperscript{352} Lastly, the Head of the Defence Office may, upon request by the Defence, request the assistance of the Lebanese authorities to question witnesses, search premises, seize documents and other potential evidence, or undertake any other investigative measure in Lebanon, as long as these measures are necessary for the purpose of the investigation and as long as these requests are not frivolous or vexatious.\textsuperscript{353} These measures may be conducted by the Defence itself, by the Lebanese authorities or by a combination thereof.

The Pre-Trial Judge possesses exceptional yet important fact-gathering powers. These include powers in relation to ‘unique opportunities to gather evidence’ following the confirmation of the indictment as well as the power to collect evidence when a party or a victim participating in the proceedings, on a balance of probabilities, is not in a position to collect that evidence. The Judge may gather such evidence \textit{proprio motu} when it is imperative to ensure the interests of justice.\textsuperscript{354} Further, he or she holds the power to question anonymous witnesses.\textsuperscript{355}

\textsuperscript{348} Article 3 (1) of the Memorandum of Understanding Between the Government of the Lebanese Republic and the Defence Office on the Modalities of their Cooperation, 28 July 2010.
\textsuperscript{349} Article 3 (1) of the Memorandum of Understanding Between the Government of the Lebanese Republic and the Defence Office on the Modalities of their Cooperation, 28 July 2010.
\textsuperscript{350} Rule 77 (A) STL RPE and Rule 78 (B) STL RPE (summonses to appear).
\textsuperscript{351} Article 5 (1) of the Memorandum of Understanding Between the Government of the Lebanese Republic and the Defence Office on the Modalities of their Cooperation, 28 July 2010.
\textsuperscript{352} Rule 15 STL RPE.
\textsuperscript{353} Article 16 (C) STL RPE; Article 4 of the Memorandum of Understanding Between the Government of the Lebanese Republic and the Defence Office on the Modalities of their Cooperation, 28 July 2010.
\textsuperscript{354} Rule 89 (I); Rule 92 (A) and Rule 92 (C) STL RPE respectively. The decision of the Pre-Trial Judge to \textit{proprio motu} gather evidence is appealable as of right.
\textsuperscript{355} Rule 93 STL RPE. See the analysis of this investigative function, \textit{infra}, Chapter 5.
Unlike other tribunals that make provision for victims to participate in the investigation, the STL Statute and RPE clearly rule out any active role for the *victims* during the initial phase of proceedings.\(^{356}\) They can only participate *after* the review of the indictment, when most of the Prosecutor’s investigations have been completed. Prior to the confirmation of the indictment, the victim may transmit to the Prosecutor any information he or she considers necessary to determine the truth. In turn, following the confirmation of the indictment, victims may conduct their own investigations or participate in investigative acts.\(^{357}\) Overall, victims do not participate in the proceedings as *parties civiles*.\(^{358}\) The absence of any participatory rights at the investigation stage of proceedings forms an important deviation from Lebanese procedure, where victims can already participate before the confirmation of the indictment.\(^{359}\) While provisions on the taking of depositions, the questioning of anonymous witnesses and the exceptional gathering of evidence by the Pre-Trial Judge refer to the participation of victims, these participatory rights should be understood as to only apply after the confirmation of the indictment.\(^{360}\)

I.3.5. The Special Panels for Serious Crimes

In line with other international and hybrid criminal courts and tribunals, the TRCP defined the ‘investigation’ as encompassing ‘all the activities conducted by the Public Prosecutor under the present regulation for the collection of information and evidence in a case whether before or after the indictment has been presented.’\(^{361}\) With regard to the *starting point* of investigations, it was previously shown that no formal pre-investigation phase immediately preceded the investigation proper. Investigations were initiated by the Public Prosecutor

\(^{356}\) Rule 86 (A) STL RPE (‘If the Pre-Trial Judge has confirmed the indictment under Rule 68, a person claiming to be a victim of a crime within the Tribunal’s jurisdiction may request the Pre-Trial Judge to be granted the status of victim participating in the proceedings’) *juncto* Article 17 STL Statute.

\(^{357}\) This follows from the right of the victims to call witnesses and tender evidence at trial (Rule 87 (B) STL RPE).


\(^{359}\) For example, under Lebanese law, the civil parties can set in motion the criminal proceedings. See Article 59 of the Lebanese Code of Criminal Procedure.

\(^{360}\) See Rules 92, 93 or 123 STL RPE respectively. Concurring, see J. DE HEMPTINNE, Challenges Raised by Victim Participation in the Proceedings of the Special Court for Lebanon, in «Journal of International Criminal Justices», Vol. 8, 2010, 172 (fn. 35).

\(^{361}\) Section 1 (m) TRCP.
following the reporting of the crime.\textsuperscript{362} The TRCP did not include a preference regarding the notitia criminis. Any person could report the commission of a crime to the Public Prosecutor.\textsuperscript{363} Additionally, a system of mandatory reporting of crimes for public officers was provided for.\textsuperscript{364} 

Whereas it followed from the definition that investigations could be on-going after an indictment was presented, it may be argued with regard to the end point of the investigation, that it should normally be completed at that stage. For example, this followed from the wording of Section 24: ‘[u]pon completion of the investigation, if the result so warrants, the Public Prosecutor shall present a written indictment of the suspect to the competent District Court’. At the time the indictment was presented to the Court, the Prosecutor was required to make copies of all documentary evidence, all statements of witnesses whose testimony the Prosecutor intended to present at trial as well as all exonerating evidence, available to the Defence.\textsuperscript{365} 

Both the competence to conduct criminal investigations and the competence to prosecute were vested in the Public Prosecutor.\textsuperscript{366} The Public Prosecutor held the exclusive competence to conduct criminal investigations.\textsuperscript{367} In order to fulfil this duty, the Public Prosecutor was empowered to: (a) collect and examine evidence, (b) request the presence of and question persons being investigated, victims and witnesses, and (c) seek cooperation of any authority in accordance with its respective competence.\textsuperscript{368} The Public Prosecutor could rely on the assistance of the police and ‘any other competent body’.\textsuperscript{369} He or she had to conduct investigations independently, ‘without improper influence, direct and indirect, from any source, whether within or outside the civil administration of East Timor’.\textsuperscript{370} At all times, he or she had to fully respect the rights of persons.\textsuperscript{371} 

\textsuperscript{362} Section 13.3 TRCP.  
\textsuperscript{363} Section 13.1 TRCP.  
\textsuperscript{364} Section 13.1 TRCP.  
\textsuperscript{365} Section 24.4 TRCP.  
\textsuperscript{366} Section 3.1 UNTAET Regulation 2000/16.  
\textsuperscript{367} Section 7.1 TRCP.  
\textsuperscript{368} Section 7.4 TRCP. According to Section 7.3 TRCP, the Public Prosecutor ‘shall have all appropriate means to ensure the effective investigation and prosecution of crimes’.  
\textsuperscript{369} Section 7.5 TRCP.  
\textsuperscript{370} Section 4.2 UNTAET Regulation 2000/16.  
\textsuperscript{371} Section 7.6 TRCP.
Provided that the TRCP vested the exclusive responsibility to conduct investigations in the Public Prosecutor, and that he or she had a duty to investigate incriminating and exonerating circumstances equally, there seemed to be no room for a separate defence investigation. 372

Similar to the Defence at the Extraordinary Chambers, an important tool for the Defence was the possibility to request the Public Prosecutor or the Investigating Judge ‘to order or conduct specific investigations in order to establish his or her innocence’. 373 Although this rarely took place in practice the Defence was not precluded from conducting its own investigations. 374 No single defence witness was called in the first fourteen cases. 375 In this regard, the absence of qualified defence counsel in East-Timor may be noted. 376 Additionally, the Defence greatly suffered from institutional shortcomings, preventing in-depth defence investigations. 377 Notably, a separate Defence Lawyers Unit would only be created in September 2002. 378

Victims also held the right to request the Public Prosecutor to conduct certain investigative acts or to take specific measures to establish the guilt of the suspect. 379 The Public Prosecutor was bound to ‘respect the interests and personal circumstances of victims and witnesses’ in

372 For a confirming view, see e.g. JSMP, Digest of the Jurisprudence of the Special Panels for Serious Crimes, April 2007, p. 36: “in the practice of the SPSC the defence had no opportunity or resources to conduct independent professional investigations.”

373 Section 6.3 (e) TRCP.


377 See e.g. C. REIGGER and M. WIERDA, The Serious Crimes Process in Timor-Leste: In Retrospect, International Center for Transnational Justice, 2006, pp. 26 - 28 (http://www.ictj.org/sites/default/files/ICTJ-TimorLeste-Criminal-Process-2006-English.pdf, last visited 24 January 2014). At the beginning, a small Public Defenders Office was created, consisting of nine inexperienced Timorese public defenders. A separate Defence Lawyers Unit would only be created in September 2002, solely consisting of international lawyers. Consider also D. COHEN, Indifference and Accountability: The United Nations and the Politics of Justice in East-Timor, in «East-West Center Special Reports», Nr. 9, 2006, p. 38 (“In this context, the SCU represented an investigative “Goliath” in comparison with the paltry resources of the Defence Lawyers, which in April 2004, encompassed two UNV investigators and no other investigative support staff. It also lacked the kind of resources enjoyed by the Prosecution in regard to expert consultants on issues such as forensics, psychiatry, toxicology… and is thus limited in its ability to advance special defences or rebut scientific evidence adduced by the Prosecution”).


379 Section 12.6 TRCP.
the conduct of the investigations.\textsuperscript{380} When the Public Prosecutor decided to dismiss a case, the alleged victim had to be informed thereof and held the right to request a copy of the case and to petition the General Prosecutor.\textsuperscript{381} In turn, the General Prosecutor could either confirm the dismissal of the case or order the continuation of the investigation by another Prosecutor.\textsuperscript{382}

Lastly, with regard to the \textit{judicial role} during investigations, it should be mentioned that some investigative acts required a warrant or order by an Investigating Judge.\textsuperscript{383} Problematic was Section 10 of the TRCP, from which it followed that participation as an Investigating Judge of the SPSC did not disqualify the Judge from participating in the same matter as a trial Judge. This seems unacceptable since the Investigating Judge held some important powers during the investigation and decided on the deprivation of liberty. The extent and nature of these powers and responsibilities may imply that the Judge’s further involvement in the case raises ‘legitimate doubt’ as to his or her impartiality. Pursuant to the case law of the ECtHR, an investigating judge will normally be prevented from sitting on the bench of the same case.\textsuperscript{384}

\section*{§ Conclusion}

From the above, it appears that at most tribunals under review, the Prosecutor is in charge of the investigation. One exception are the ECCC, where the Co-Investigating Judges jointly control the judicial investigation. Those tribunals where the Prosecutor leads the investigation usually (with the exception of the ICC, where no definition was found in the statutory documents) define the investigation as comprising all investigative activities undertaken by the Prosecutor for the collection of information or evidence. This is surprising. Taking into

\begin{footnotesize}
\begin{enumerate}
\item Section 7.3 TRCP.
\item Section 19A.8 and 25.1 TRCP.
\item Section 25.2 TRCP.
\item See \textit{infra}, Chapter 6. Overall, the role of the Investigating Judge was not clearly defined in the TRCP. Such was particularly problematic where no figure of an investigating judge was provided for under the Indonesian criminal justice system. Consider C. REIGER and M. WIERDA, The Serious Crimes Process in Timor-Leste: In Retrospect, International Center for Transnational Justice 2006, p. 25; S. LINTON, Rising from the Ashes: The creation of a viable Criminal Justice System in East Timor, in «Melbourne University Law Reviews», Vol. 25, 2001, pp. 139 – 140.
\item On several occasions, the Court concluded to a violation of the Article 6 (1) ECHR (objective impartiality) where an investigative judge had previously been involved as an investigating judge in the same case. See e.g. ECHR, \textit{De Cubber v. Belgium}, Application No. 9186/80, Series A, No. 86, 26 October 1986; ECHR, \textit{Hauschildt v. Denmark}, Application No. 10486/83, Series A, No. 154, 24 May 1989. However, what matters to the Court is the extent and nature of the pre-trial measures undertaken by the judge. For example, the Court confirmed that the judge can be involved at the pre-trial stage, and can undertake certain pre-trial measures, where those are of a preparatory nature and designed to complete the case file before the hearing. See ECHR, \textit{Fey v. Austria}, Application No. 14396/88, Series A, No. 255-A, Judgment of 24 February 1993.
\end{enumerate}
\end{footnotesize}
consideration the more adversarial style of proceedings of most of these courts and tribunals, both parties are required to gather their own evidence.385

The procedural frameworks of the tribunals under review equally fail to provide for the necessary investigative powers, this matter being unregulated. This further disregards the obligation for the Defence to collect its own evidence and information. In the archetypical adversarial ‘dispute model’, a partisan Prosecutor, who investigates a prosecution case, should be confronted by a Defence having procedurally equal investigative tools in order to enable it to autonomously investigate its case.386 In the absence of such explicit regulation, the right for the Defence to conduct its own investigations derives from several other principles, including the equality of arms principle and the general right of the accused to have adequate time and facilities for the preparation of his or her defence. At least to a certain extent, imbalances between the Prosecutor and the Defence in the collection of evidence and information are restored by the possibility for the Defence to request a Judge or Chamber for assistance.

Only at the ECCC, defence investigations going beyond what is understood to be ‘preliminary inquiries’ were found to be prohibited. Such prohibition should be understood in light of the inquisitorial style of investigations. Traditionally, inquisitorial systems limit the role of the Defence during investigations since it is held that optimal investigative strategies require an independent viewpoint, instead of a narrow partisan perspective.387 This is based on the belief


386 As far as defence investigations are concerned, it should be noted that the ‘expectation’ that the defence conducts a separate investigation, does not mean that such corresponds to the actual practice. Consider in that regard: S. FIELD and A. WEST, Dialogue and the Inquisitorial Tradition: French Defence Lawyers in the Pre-Trial Criminal Law Process, in «Criminal Law Forum», Vol. 14, 2003, pp. 261 – 262 (referring to research conducted in England showing a failure by defence counsel “to play the extensive, autonomous investigative role the adversarial system demanded of them”). See M. MCCONVÍLLE, J. HODGSON, L. BRIDGES and A. PAVLOVIĆ, Standing Accused: The Organisation and Practices of Criminal Defence Lawyers in Britain, Oxford, Clarendon Press, 1994.

387 M.R. DAMAŠKA, The Faces of Justice and State Authority: A Comparative Approach to the Legal Process, New Haven and London, Yale University Press, 1986, pp. 161-162 (Damaška adds that “officials in charge of the proceedings will refuse to rely exclusively, or even principally, upon informational channels carved by persons whose interests are affected by the prospective decision”). This does not imply that in all inquisitorial criminal justice systems, all defence investigations will be prohibited. On Germany, consider e.g. T. WEIGEND and F. SALDITT, The Investigative Stage of the Criminal Process in Germany, in E. CAPE, J. HODGSON, T. PRAKKEN and T. SPRONKEN, Suspects in Europe: Procedural Rights at the Investigative Stage of the Criminal Process in the European Union, Antwerpen – Oxford, Intersentia, 2007, p. 91 (noting that, although the criminal code is silent on this issue, the Defence is not prevented from conducting its own investigations, may
that the ‘objective truth’ can only be established when the investigation is assigned to non-partisan investigators. Rather than expecting the Defence to organise a fully-fledged investigation, the role of the Defence during the investigation is restricted to safeguarding the interests of the suspect or accused person and checking whether state officials stick to the rules.

Solely the ECCC and the SPSC were found to provide for the possibility for the Defence to request the (Co-)Investigating Judge(s) or the Public Prosecutor to undertake certain investigative acts. This further reflects the primarily civil law-nature of pre-trial proceedings at these tribunals. In light of the existing inequalities between the parties in the proceedings before other international(ised) criminal tribunals (ICC, the ad hoc tribunals and the SCSL), it may be asked whether the adoption of this traditional civil law-feature by other tribunals may be worth our consideration. However, it is evident that this feature is at tension with the more adversarial pre-trial arrangements which can be found at these tribunals. It encompasses a limitation of the ‘two investigations’ approach and presupposes a Prosecutor which does not solely act as a partisan actor in the conduct of investigations. It will be explained further on in this chapter that the ICC Prosecutor is bound by a principle of objectivity in the conduct of investigations. Hence, and in the absence of any express provision for the Defence to address requests for investigative action to the Prosecutor, honouring such requests would not conflict with the role of the ICC Prosecutor in the conduct of investigations.

With regard to the temporal limitation of the investigation, it was found that at these tribunals where the Prosecution heads over the investigation, he or she is, under certain conditions, interview witnesses before trial or summon them at trial. When compulsory measures are required, the Defence may request the Ermittlungsrichter or the Prosecutor to take evidence).


390 See infra, Chapter, 3, III.
allowed to continue its investigations after the start of the prosecution phase proper. In particular, sufficient care should be taken that the rights of the defendant are respected.

Where the ICC provides several avenues for victims to participate in the investigation stage, their legal representatives are not allowed to independently gather information and evidence. In turn, where victims at the ECCC can participate in the judicial investigation as *parties civiles*, their limited role has been defined in the Internal Rules. Finally, at the STL, victims are precluded from participating in the investigation phase. Nevertheless, they may gather information and evidence after the confirmation of the indictment.

Further, it appears that at most tribunals, the level of judicial control over the investigation is limited. Exceptions are the ECCC, where the investigation is led by the Co-Investigating Judges as well as the SPSC, where judicial authorisation is required for the use of coercive measures by the Public Prosecutor. With regard to the other international(ised) criminal tribunals, a trend can be noted towards more judicial intervention. As an example, although the Pre-trial Chamber (ICC) and the Pre-Trial Judge (STL) mostly intervene on the request of one of the parties, several self-standing powers were identified. For example, the Pre-Trial Chamber and the Pre-Trial Judge may, in case of a ‘unique investigative opportunity’ or ‘unique opportunities to gather evidence’ respectively, gather evidence *proprio motu*, when certain conditions are fulfilled. Such judicial powers share the same function in so far as they assist the parties with the preparations of their respective cases. The recognition by the ICC’s case law of the primary responsibility of the ICC Pre-Trial Chamber in ensuring the protection of the rights of the suspects during the investigation stage of proceedings is even more important.

I.4. Reactive vs. proactive investigations

As a consequence of the fight against organised crime and terrorism, *national criminal justice systems* have evolved. Law enforcement is no longer purely reactive in nature and

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391 See also C. BUISMAN, Ascertainment of the Truth in International Criminal Justice, 2012, p. 356 (“The powers of the judiciary remain, however, limited in conducting investigations”).

392 On this issue, see also infra, Chapter 6.
increasingly becomes proactive. Criminal law has been mobilised to serve preventive functions. Many national criminal justice systems allow for the use of certain investigative measures or techniques to investigate crimes ante-delictum. This evolution goes hand in hand with an evolution towards the expansion of the criminalisation of preparatory acts. Here, proactive investigations are narrowly defined as those investigations regarding crimes that have not yet been committed. These investigations are specifically useful to map criminal organisations. Currently, there is agreement that the attribution of such a preventive function to criminal justice systems is acceptable. At the core of this evolution are new investigative techniques, such as covert (or secret) surveillance, which lend themselves to proactive application. These new techniques are often covert in nature and risk infringing upon the personal rights of persons affected or third persons (the right to


394 It should be noted that some countries still prohibit the use of proactive coercive measures by law enforcement officials. Proactive investigative fall outside the realm of criminal investigations. “These countries seem to adhere to a clear-cut distinction between criminal law (reactive) and police/administrative law [intelligence] (proactive).” See J.A.E. VERVAELE, Special Procedural Measures and the Protection of Human Rights, in «Utrecht Law Review», Vol. 5, 2009, p. 82.


396 Consider e.g. C. BRANTS and S. FIELD, Les méthodes d’enquête proactive et le contrôle des risques, in «Déviance et Sociétés», Vol. 21, 1997, p. 403. Other definitions are possible. Another approach is to look at proactive investigations as those investigations concerning crimes that have not yet been committed or have not yet been discovered. Such approach is used in Belgian criminal procedural law (see infra, fn. 403 and accompanying text). It follows that investigations into crimes that have been committed but have not been discovered are also considered proactive in nature. In such instances, investigations are not a reaction to a crime. See B. VANGEEBERGEN and D. VAN DALELE, De uithol ling van de proactieve recherche, in «Nullum Crimen», Vol. 3, 2008, p. 328. Yet another approach is to define proactive investigations in terms of the special investigative techniques that are applied. However, such definition is not correct, where proactive investigations are not necessarily limited to these techniques. See ibid., p. 329. Lastly, proactive investigation may refer to criminal investigative activities before there is a reasonable suspicion that a crime has been committed. See e.g. M.F.H. HIRSCH BALLIN, Anticipative Criminal Investigation: Theory and Counterterrorism Practice in the Netherlands and the United States, The Hague, T.M.C. Asser Press, 2012, p. 85.


respect for the private life). Additionally, these investigations take place when no suspects have yet been identified. Before addressing the availability (or not) of such proactive powers at the international echelon, a brief overview of national approaches is useful. Below, the evolution towards anticipative criminal investigations will shortly be illustrated from a comparative perspective. As a caveat, this overview is limited to law enforcement and does not discuss the availability of proactive powers to the intelligence community, nor does it address the possibility or not to transfer and exchange of information between law enforcement services and the intelligence community.

In Belgium, proactive investigative efforts are allowed for during the preliminary investigation (‘information’ or ‘opsporingsonderzoek’). The Belgian Code of Criminal Procedure defines proactive investigations as the ‘collection, registration and processing of data and information with regard to crimes that have not yet been committed or have not yet been discovered’. Several conditions apply. These include a ‘reasonable suspicion’ requirement and a proportionality requirement, in that proactive investigations are only allowed with regard to those crimes that are committed or will be committed by a criminal organisation or those crimes for which a wiretap is allowed. Hence, proactive investigative efforts are limited to the most serious crimes. Further, a prior written authorisation by the Procureur du Roi is required. Lastly, all proactive efforts should have a judicial purpose.

They should have the prosecution of criminals as their aim. However, this does not imply that every proactive investigation should necessarily lead to a prosecution. As part of proactive investigative efforts, special (secret) investigative measures can be used, including

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400 C. BRANTS and S. FIELD, Les méthodes d’enquête proactive et le contrôle des risques, in «Déviance et Société», Vol. 21, 1997, p. 402 («Elles ont ceci en commun : elles ne sont efficaces que si elles restent secrètes»).

401 In this regard, several authors speak of “criminal law without suspects”. See e.g. J.A.E. VERVAELE, Special Procedural Measures and the Protection of Human Rights, in «Utrecht Law Reviews», Vol. 5, 2009, p. 76; I. ONSEA, De bestrijding van georganiseerde misdaad: de grens tussen waarheidsvinding en grondrechten, Antwerpen, Intersentia, 2008, p. 95.

402 See Article 28bis § 2 Sv., as introduced by the law of 12 March 1998. This phase of proceedings is to be distinguished from the ‘verkennend onderzoek’. While such phase is not expressly provided for in Belgium, such phase is referred to in a confidential circular. It only comprises of the consultation of literature, open sources, etc. and is passive in nature. See ‘vertrouwelijke gemeenschappelijke omzendbrief COL 04/2000 van de Minister van Justitie en het College van Procurateurs-generaal betreffende proactieve recherche, 2 mei 2000’, as referred to by ONSEA. See I. ONSEA, De bestrijding van georganiseerde misdaad: de grens tussen waarheidsvinding en grondrechten, Antwerpen, Intersentia, 2008, pp. 98-99.

403 Article 28bis § 2 Sv. (author’s translation).

404 Nevertheless, the list of crimes for which the use of proactive investigations are allowed is getting longer. See P. DE HERT and A. JACOBS, National Report: Belgique, in «Revue internationale de droit pénal», Vol. 80, 2009, p. 54 (CD-Rom Annex).
observation, the use of infiltration, undercover agents or the use of informants. These measures can be ordered by the Procurateur du Roi. Where some special investigative measures require the authorisation by an Investigating Judge, they cannot be used in the course of proactive investigations. It appears that additional material requirements of legality, proportionality and subsidiarity (reactive investigative acts do not suffice) are to be found in a confidential circular letter.

Similarly, the Dutch CCP envisages proactive investigations. This includes the possibility to investigate criminal acts that are being organised or indications that terrorist offences will be committed. More than in Belgium, the Dutch normative framework on proactive

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406 Consider Article 47ter – undecies Sv. In case special investigative measures are used proactively the elements required by Article 28bis § 2 Sv. should be present. Consider e.g. Articles 46ter § 1 and 47sexties § (1°) Sv. For some time, the use of special investigative measures, during the reactive or proactive phase of criminal investigations, was not expressly regulated (with the exception of the interception of communications). In general, see e.g. H. BERKMOES and D. LYBAERT, Proactieve politie bevoegdheden en (bijzondere) middelen in de strijd tegen de georganiseerde criminaliteit, in «Custodes», 1999 (1), pp. 33–52. A legislative framework was only adopted in 2003. See Loi concernant les méthodes particulières de recherche et quelques autres méthodes d’enquête - Wet 6 Januari 2003 betreffende de bijzondere opsporingsmethoden en enige andere onderzoeksmethoden, M.B. - B.S., 12 May 2003.

407 These include the ‘systematic observation with the use of technical means to look inside private dwellings’ or ‘discrete visual checks’ (entering of a private place, without the knowledge of the inhabitant). See Article 56bis Sv. Originally, Article 27septies Sv. allowed for the Prosecutor to request the investigative judge to authorise the observation with the use of technical means to look inside private dwellings, without the need to open a judicial investigation and to transfer the dossier to the investigating judge (mini-instructie). However, the Constitutional Court concluded that where the impact of such investigative measure on privacy rights is comparable to that of the search of a private home or the use of a wiretap -which coercive measures necessitate the opening of a judicial investigation- the opening of a judicial investigation should be required for the observation with the use of technical means to look inside private dwellings. See GH, arrest Nr. 202/2004, 21 December 2004, B.5.7.3 – B.5.7.8. As a consequence, Article 28septies Sv. was replaced. In a similar vein, the Constitutional Court found that discrete visual checks (Article 89ter Sv.) require the opening of a judicial investigation. See ibid., B.13.5 – B.13.10.


409 Article 132a Sv. Note that until 2007, this provision stated that investigations could be proactive in nature and that the criminal investigation commences when there is a reasonable suspicion that a crime has been planned or committed while these crimes result in a serious infringement of the legal order. However, following the Act of 2006 to Broaden the Possibilities to Investigate and Prosecute Terrorist Crimes, the threshold was removed from Article 132a Sv. See M.F.H. HIRSCH BALLIN, Anticipative Criminal Investigation: Theory and Counterterrorism Practice in the Netherlands and the United States, The Hague, T.M.C. Asser Press, 2012, p. 76, fn. 163; p. 86.
investigations is the direct result of past abuses.\textsuperscript{410} It was clear that the traditional reactive form of investigations was ill-suited to fight organised crime.\textsuperscript{411} Notably, a number of special investigative techniques can be resorted to with regard to organised crime, once there exists a ‘reasonable suspicion that offences are being planned or being committed’ and ‘which crimes result in a serious infringement of the legal order considering their nature or relation with other crimes and for which crimes pre-trial detention can be imposed as to the law’.\textsuperscript{412} The latter part of this formulation in fact embodies the principle of proportionality. These investigative measures can be imposed proactively. Furthermore, the threshold for the use of a number of special coercive measures has further been lowered in relation to terrorist offences.\textsuperscript{413} ‘Indications’ suffice for the application of these special investigative measures, which include observation or infiltration, with regard to the prevention of terrorist crimes.\textsuperscript{414} In addition, new proactive investigative techniques were made available specifically for the investigation of terrorist crimes.\textsuperscript{415} These include the possibility to request information from databases\textsuperscript{416} as well as the possibility to request stored identification material.\textsuperscript{417} From the foregoing, it follows that the use of coercive measures, including special investigative methods, is possible during the proactive investigation, against non-suspects.\textsuperscript{418} Proactive

\textsuperscript{410} See e.g. T. PRAKKEN, Chronique scandaleuse van het Strafprocesrecht, in «NJB», 1990, pp. 1815 – 1822; M. VAN TRAA, Enquête Opsporingsmethoden: Eindrapport, 1996, p. 413 (referring to a ‘crisis in the investigation’); S. BRAMMERTZ, La recherche proactive en droit comparé et dans les instruments internationaux, in «Custodes», 1999 (1), p. 129. However, it has been argued that in many jurisdictions, the regulation of the proactive phase of investigations is a result of ‘incidents’. See P.J.P. TAK, G.A. VAN EKEMA HOMMES, E.R. MANUNZA and C.F. MULDER, De normering van bijzondere opsoringsmethoden in buitenlandse rechtstelsels, Den Haag, Ministerie van Justitie, 1996, p. 16.


\textsuperscript{412} See Chapter V Sv., in particular Article 126a Section 1 Sv.

\textsuperscript{413} See Title Vb, Article 126za - 126zs Sv., inserted following the Act of 20 November 2006 to expand proactive investigations with regard to the prevention of terrorist crimes.

\textsuperscript{414} See e.g. Article 126zd section 1 under a (observation) Sv. and Article 126ze (infiltration) Sv. ‘Indications’ require the availability of information suggesting the actual or future commission of a terrorist offence. They may include rumours, anonymous information or can be the result of a general risk assessment by the intelligence. See e.g. P. BAL, M. KUIJER and K. VEEGENS, Netherlands, in «Revue internationale de droit pénal», Vol. 80, 2009, p. 236 (CD-Rom Annex); J.A.E. VERVAELE, Special Procedural Measures and the Protection of Human Rights, in «Utrecht Law Review», Vol. 5, 2009, p. 84; M.F.H. HIRSCH BALLIN, Anticipative Criminal Investigation: Theory and Counterterrorism Practice in the Netherlands and the United States, The Hague, T.M.C. Asser Press, 2012, pp. 173 – 174 (adding that ‘terrorist thoughts’ per se would not be sufficient).


\textsuperscript{416} Article 126h Sv. (the authorisation of the examining magistrate is required).

\textsuperscript{417} Article 126i Sv.

investigative efforts should aim at ‘making prosecutorial decisions’ and hence, should aim at initiating criminal proceedings.\textsuperscript{419}

In Germany, the police, rather than the prosecutor, are in charge of proactive investigations (\textit{Vorfeldermittlung}) which precede the criminal investigation. In turn, the criminal investigation is headed over by the prosecutor. This phase of proceedings, including the competences of the police, is not regulated in the StPO, but in the laws on police conduct which exists at the level of the different \textit{Länder}.\textsuperscript{420} However, while proactive investigations are limited to serious crimes, it is not clear what facts justify proactive investigative acts.\textsuperscript{421} In turn, the distinction between proactive and reactive investigations is determined by the presence or not of \textit{Anfangsverdacht}, from which moment the principle of legality dictates the opening of a preliminary investigation.\textsuperscript{422} From this moment, the dossier has to be transferred from the police to the prosecutor. German law expressly provides for the formal and material requirements for proactive investigative acts.\textsuperscript{423}

Not all civil law jurisdictions provide for proactive investigations as part of criminal law enforcement. As an example, one can refer to France, which nowhere explicitly regulates proactive investigations.\textsuperscript{424} Proactive investigative acts are considered part of administrative law, rather than criminal prosecutions.

In common law criminal justice systems, proactive investigative efforts are traditionally considered less problematic. These criminal justice systems often do not distinguish between

\textsuperscript{419} Article 132a Sv.
\textsuperscript{421} I. ONSEA, De bestrijding van georganiseerde misdaad: de grens tussen waarheidsvinding en grondrechten, Antwerpen, Intersentia, 2008, pp. 136 -137.
\textsuperscript{422} On the principle of legality, see infra, Chapter 3, II.1.
\textsuperscript{423} S. BRAMMERTZ, La recherche proactive en droit comparé et dans les instruments internationaux, in «Custodes», 1999 (1), p. 131; I. ONSEA, De bestrijding van georganiseerde misdaad: de grens tussen waarheidsvinding en grondrechten, Antwerpen, Intersentia, 2008, p. 132, p. 137 (referring to the example of Nordrhein-Westfalen, where the \textit{Polizeigesetz} states that the principle of proportionality should be respected in the conduct of proactive investigations).
reactive and proactive investigations. This should be understood, as was discussed earlier, in light of the absence of codification. What is not explicitly prohibited by law the police is allowed to do. In turn, in civil law criminal justice systems, every infringement on fundamental rights needs a basis in the law.

As far as the US is concerned, criminal investigations are traditionally reactive in nature. The proactive application of investigative methods such as searches or wiretapping which fall under the Fourth Amendment is restricted by the ‘probable cause’ requirement that a crime has been committed or is being committed. Nevertheless, other avenues are available. For example, a powerful investigative tool which can be applied proactively and secretly is found in Title III of the Omnibus Crime Control and Safe Streets Act (‘Wiretap Act’). It allows for secret surveillance, in case there exists a ‘probable cause’ that serious crimes are about to be committed. In such a case, a federal judge may issue a warrant allowing surveillance. Hence, Title III allows for the use of invasive surveillance techniques in a proactive manner with regard to serious felonies. Later, the U.S. Patriot Act expanded the list of crimes for which surveillance is possible under Title III as well as the techniques and instances in which Title III powers can be relied upon. Further, when information is intercepted by means of an informant or undercover agent, the consent of this informant or undercover agent does away with these requirements under Title III. This consent deprives the other party of a reasonable expectation of privacy. Therefore, these techniques can be used without fulfilling the requirements of the Fourth amendment.
A similar trend towards anticipative investigations can be witnessed at the international (regional) level. As an example, one can refer to the Schengen Information System (SIS) in Europe, which lends itself to proactive application.\footnote{Other examples can be thought of. For example, Article 46 of the Convention Implementing the Schengen Agreement allows for the autonomous exchange of information between police regarding the ‘combat of future crime and prevention of offences against or threats to public policy and public security’. Such information may be gathered proactively.} Data may be entered into this database in relation to persons and vehicles for the purpose of discreet surveillance or of specific checks. This alert may relate to instances ‘where there is clear evidence that the person concerned \textit{intends to commit} or is committing numerous and extremely serious criminal offences or where an overall assessment of the person concerned, in particular on the basis of past criminal offences, gives reason to suppose \textit{that that person will also commit extremely serious criminal offences in the future}.’\footnote{Article 99 of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (‘Convention implementing the Schengen Agreement’), 19 June 2000, Official Journal L 239, 22/09/2000 P. 0019 – 0062 (emphasis added).}

No parallel evolution can yet be noticed in the law of international criminal procedure. International criminal justice is mostly reactive in nature.\footnote{See e.g. C. BASSIOUNI, Introduction to International Criminal Law, Ardsley, Transnational Publishers, 2003, pp. 583, 588.} Traditionally, international(ised) criminal tribunals are set up in the wake of a conflict.\footnote{However, on a closer look, it appears that at the ICTY, investigations were conducted while the conflict was still raging.} This is different with regard to the ICC, which may come into play much earlier, at a moment in time when the conflict is still ongoing. The Statute’s preamble emphasised that the Court is:

\begin{quote}
'[d]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes'.\footnote{Fifth preambular paragraph ICC Statute (emphasis added).}
\end{quote}

This preambular paragraph seems to appeal to the preventive effects of the Court. These effects may not only include the specific and general deterrence of sentences imposed by the Court but also the possibility of the Court investigating crimes in a proactive manner. The idea of such proactive role for the Court may surprise in light of the subsidiary nature of the Court.\footnote{H. VAN DER WILT, Boekbespreking (bespreking van: H. Olásolo, The Role of the International Criminal Court in Preventing Atrocity Crimes Through Timely Intervention: From the Humanitarian Intervention

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approach may serve a useful purpose with regard to crimes within the jurisdiction of international criminal courts insofar that these require the presence of “a collective effort” and of an “organisational context”. Hence, it is worthwhile to examine whether, and to what extent, the ICC Prosecutor may be proactive in the conduct of investigations.

At the outset, it should be clarified that the present undertaking does not seek to answer the question to what extent the ICC contributes to general crime prevention. Also not discussed here is proactivity as a guiding principle that informs the Prosecution’s interpretation and application of complementarity. Likewise, the Prosecutor’s interactions with domestic jurisdictions (‘positive complementarity’ (assistance to states in complying with their duties to investigate and prosecute) and ‘cooperative complementarity’ (division of the burden of adjudication in cases of substantial capacity problems)) are not at issue here. Finally, also not discussed here is the potential of the inclusion of certain preparatory crimes, such as incitement to genocide, in the ICC Statute for the prevention of the commission of further crimes. Leaving these questions apart, it appears that the proactive application by the ICC Prosecutor of his or her investigative powers has not received much attention.

Looking at this issue in a chronological order, the first question which arises is whether (and to what extent) the ICC Prosecutor can be proactive during the pre-investigation phase. At first, it appears that this question should be answered in the negative. It is to be recalled that the investigative measures at the Prosecutor’s disposal at that stage of the proceedings are very limited with the notable exception of the receipt of oral and/or written witness evidence at the seat of the Court. However, it was concluded that these powers have been interpreted broadly by the Prosecutor so as to also allow for regularly conducting field missions, receiving delegations in The Hague or entering into a dialogue with different stakeholders. These actions fall short of the use of typical proactive investigative techniques such as covert surveillance nevertheless. Clearly, these forms of investigative measures are not at the Prosecutor’s disposal during the pre-investigation phase.

While the Prosecutor is so prevented at this stage from using proactive investigative techniques, nothing prevents him or her from analysing information that has been acquired through the use of such methods by states or other organisations. Indeed, the type of information the Prosecutor may seek or receive at this pre-investigative stage is not further determined. Moreover, the source of the information received by the Prosecutor is irrelevant under Article 15. Consequently, such information may include information that was gathered by States or other actors as a result of proactive investigative efforts. It may consist of intelligence information or information gathered by law enforcement officials through proactive investigative efforts. Such a finding is important, as anticipative investigative efforts at the national level are often triggered by intelligence information. It will be important in this regard to know whether or not the Prosecutor is in a position to conclude ‘confidentiality agreements’ (pursuant to Article 54 (3) (e) ICC Statute), or cooperation agreements (pursuant to Article 54 (3) (d) ICC Statute) with information providers at that stage. A textual interpretation seems to contradict such a view. Article 54...
regulates the duties and powers of the Prosecutor with regard to ‘investigations’. Hence, the powers enumerated in Article 54 only become available after the commencement of the ‘full’ investigation. This may well prove to be an important handicap for the Prosecutor, and render illusory any prospects of receiving intelligence information.

As stated above, the Prosecutor should analyse all information received. While the Prosecutor may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organisations, pursuant to Article 15 (2) ICC Statute, it is to be recalled that Part 9 of the ICC Statute does not apply to such requests by the Prosecutor. Hence, it follows that it is for the information provider to decide what information is submitted to the Prosecutor.

The Prosecutor’s powers at this stage are limited to the powers above. There is no room for a more active investigative role for the Prosecutor. In sum, it appears that the proactive investigative tools at the Prosecutor’s disposal during this phase of proceedings are slim. This is not to say that some of these powers may not reveal to be powerful tools to prevent the commission of further crimes. To the contrary, the knowledge that the Prosecution is monitoring the situation may have an important impact on the ground.

For example, in case the Prosecutor receives ‘substantiated’ information that the commission of a crime within the jurisdiction of the court is attempted, this would require the Prosecutor to sanction the opening of a preliminary examination. During this preliminary examination, the Prosecutor may take into consideration in how far national authorities take steps to prevent the completion of these crimes.

In this regard, the Prosecutor may use Article 25 (3) (f) ICC Statute as a carrot towards the authorities, according to which:

‘a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the

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451 See supra, Chapter 3, I.2.  
452 H. OLÁSOLO, The Role of the International Criminal Court in Preventing Atrocity Crimes Through Timely Intervention: From the Humanitarian Intervention Doctrine and Ex Post Facto Judicial Institutions to the Notion of Responsibility to Protect and the Preventative Role of the International Criminal Court, Inaugural Lecture as Chair in International Criminal Law and International Criminal Procedure at Utrecht University, 18 October 2010, (http://responsibilitytoprotect.org/Professor-Olasolo-Inagural-Lecture-at-Utrecht-University-English-Version.pdf, last visited 10 February 2014), p. 7 (Olásolo gives the example of Afghanistan, where the opening of a preliminary examination resulted in a change of the airstrike policy of the NATO and the United States and into the United States’ reaffirmation of support to internal investigation mechanisms).  
453 Ibid., p. 6.
attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.’

During the investigation phase *sensu stricto*, things are more complicated. Before moving from the pre-investigative to the investigation stage, several factors have to be considered by the Prosecutor or by the Pre-Trial Chamber in authorising a request by the Prosecutor to *proprio motu* open an investigation into a situation. It follows from Article 53 (1) (a) ICC Statute that in initiating an investigation into a situation, the Prosecutor shall consider whether ‘information […] provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed’. A textual interpretation of this provision seems to exclude any basis for proactive investigations. According to the definition provided, proactive investigative efforts precede the commission of the crime. Hence, as an example, the situation when a crime ‘is about to be committed’ seems excluded from the realm of the provision.

Prior to the moment in time when a crime within the jurisdiction of the Court is or is being committed, there is no possibility to proceed to the investigation proper. Only the limited investigative powers referred to in the preceding paragraphs are at the Prosecutor’s disposal. In a similar vein, the wording of Article 13 (a) and (b) and Article 14 (1) ICC Statute, with respect to referrals, refers to situations in which one or more crimes within the jurisdiction of the Court appear to have been committed.

The French text of Article 53 (1) ICC Statute refers to ‘*une base raisonnable pour croire qu’un crime relevant de la compétence de la Cour a été ou est en voie d’être commis*.’ The latter part of this phrase ‘en voie de’ indicates ‘*que quelque chose est en cours et se modifie dans un sens déterminé*’ (*in the process of being committed*). While one could argue that such a formulation is somewhat broader than the English version of the ICC Statute, it is clear that such phrase is not sufficiently broad as to include crimes that will likely be committed (*‘des crimes qui probablement seront commis’*). It follows that a full-blown investigation in a situation cannot be initiated before crimes within the jurisdiction of the Court have been committed or are being committed. In other words, no investigation into a situation can be *fully* proactive in nature.

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454 These factors will be discussed at length, see *infra* Chapter 3, II.4.2.
455 Consider *Trésor de la langue française informatisé* (last visited, 28 October 2012).
The follow-up question then is whether, and to what extent investigations *sensu stricto* can be partly proactive in nature. It is important here to refer back to the question whether cases (within an existing situation) may also include crimes that were committed after the date a situation was referred to the Court. It was concluded above that the interpretation by Pre-Trial Chambers I and III stands to be preferred, allowing such an inclusion, as long as there exists a sufficient *nexus* with the ‘situation of crisis’ that was referred.\(^\text{456}\) Notably, it was held that such interpretation better responds to the on-going conflicts the ICC may be dealing with.\(^\text{457}\) This interpretation also better serves the Court’s preventive functions. It opens the door for a shift from reactive to proactive investigative efforts. When the jurisdiction of the Court is triggered with regard to a situation of crisis, the Prosecutor may proactively monitor the situation. Notably, this preventive function of the Court’s Statute was recently emphasised by the Appeals Chamber when it interpreted Article 12 (3) ICC Statute as to not prevent the *prospective* acceptance of jurisdiction by a state, giving the Court jurisdiction in respect of any future events that may constitute crimes within the jurisdiction of the Court.\(^\text{458}\)

As will be discussed, the Prosecutor’s powers are couched in broad terms.\(^\text{459}\) Hence, nothing prevents him or her from resorting to special investigative techniques, including the use of covert surveillance in conducting investigations. From the commencement of the investigation proper, the full gamut of investigative powers (some of whom will be discussed in depth in the following chapters) is at the Prosecutor’s disposal. For now, it suffices to point out that the broad evidence-gathering powers at the Prosecutor’s disposal do not prevent the use of covert coercive measures in a proactive manner.\(^\text{460}\) However, as will be explained later, that the Prosecutor can only exceptionally execute such covert coercive measures directly on the territory of the state concerned should be considered. Even in the exceptional (failed state) scenario, such direct execution is only possible with the authorisation of the Pre-Trial Chamber.\(^\text{461}\) Even then, it may be difficult for the Prosecutor to conduct investigations on the ground. The ICC additionally allows the Prosecutor to conduct certain on-site investigations

\(^{456}\) See *supra*, Chapter 4, I.3.

\(^{457}\) See *supra*, Chapter 4, I.3., fn. 195 and accompanying text.


\(^{459}\) See *infra*, Chapters 4-6.

\(^{460}\) Article 54 (3) ICC Statute.

\(^{461}\) Article 57 (3) (d) and Article 99 (4) ICC Statute. See *infra*, Chapter 6.
directly on the territory of the state concerned when such can be done on a voluntary basis.\textsuperscript{462} However, this scenario seems not to apply in the case covert investigative techniques are resorted to, as the person is by nature unaware of these investigative measures being used.\textsuperscript{463}

Admittedly, whether the scenario outlined above is strictly proactive in nature, rather than reactive, is open to discussion. After all, the \emph{initiation} of the investigation was reactive in nature and based on the consideration that crimes within the jurisdiction of the Court appeared to have been committed or are being committed. The statutory threshold for the commencement of the investigation prevents fully proactive investigations. However, this threshold is ‘selective’, in the sense that once this threshold has been established, nothing prevents the Prosecutor from investigating other crimes within the jurisdiction of the Court, as long as these crimes are sufficiently connected to the situation of crisis. The triggering of jurisdiction with regard to ‘situations’, rather than with regard to crimes in fact is a distinguishing feature of the ICC’s procedural framework.

The ICC Prosecutor can even enlarge the proactive impact of his or her investigations. One can take the example where the Prosecutor receives information that an inchoate offence (for example incitement to genocide\textsuperscript{464}) within the jurisdiction of the Court has been committed by the authorities of a certain state. If proactive efforts by the Prosecutor during the preliminary examination, seeking to prevent the completion of this crime have no effect, the Prosecutor may seek the opening of a full investigation. This is possible upon the finding that there is a reasonable basis to believe that certain preparatory offences, such as incitement to genocide, or an attempt to commit a crime within the jurisdiction of the Court, has been or are being committed. In the above example, once there is a reasonable basis to believe that the authorities incite to genocide, the Prosecutor should see whether the other requirements for the opening of an investigation have been fulfilled and seek to open an investigation \emph{proprio motu}. From the moment the Pre-Trial Chamber authorises the start of an investigation, the full gamut of prosecutorial powers becomes available and may be used proactively in preventing

\textsuperscript{462} Article 99 (4) ICC Statute.


\textsuperscript{464} Article 25 (3) (e) ICC Statute. However, consider DAVIES who does not agree that incitement to genocide is an inchoate offence under the ICC Statute. He argues that it follows from its inclusion in Article 25 that it is only a mode of liability. Hence, the prosecution of incitement to genocide is not possible when the genocide has not been completed. See T.E. DAVIES, How the Rome Statute Weakens the International Prohibition on Incitement to Genocide, in «Harvard Human Rights Journal», Vol. 22, 2009, pp. 246, 270.
the possible future completion of the crime of genocide. In a similar vein, States Parties or the Security Council may refer situations in which one or more preparatory offences with regard to crimes within the jurisdiction of the Court appear to have been committed. This course of action enhances the proactive capabilities of the Prosecutor. Of course, as a caveat, it should be realised that such a course of action may not be realistic in light of the scarce resources available to the Prosecutor.465

Nothing withholds the Prosecutor from not proceeding with a prosecution upon completion of the investigation.466 Hence, if a person attempts the commission of a crime but, as a consequence of the Prosecutor’s investigation, later abandons his effort (scenario of Article 25 (3) (f) ICC Statute), then there is no ground to proceed.

One important consequence of the criminalisation of preparatory offences is that investigations become more reactive in nature. Hence, investigations instigated on the basis of a reasonable basis to believe that one of these preparatory offences has been committed are reactive in nature, but at the same time serve proactive goals, to know the prevention of future crimes. This illustrates that the line between proactive and reactive investigations cannot neatly be drawn. While these investigations are reactive in nature, nothing prevents them from turning into proactive ones. From a chronological perspective, it is difficult to precisely indicate the moment investigations may become proactive in nature. While in national jurisdictions such a proactive phase would precede the reactive investigation, it is clear that at the ICC, a partly proactive investigation should always follow a reactive pre-investigative phase.

The proactive application of investigative measures may have certain consequences that were not envisaged. Article 55 (2) of the ICC Statute reserves certain procedural rights to persons against whom ‘there are grounds to believe that [the] person has committed a crime within the jurisdiction of the Court’.467 These safeguards would not apply to proactive investigative acts.

466 Article 53 (2) ICC Statute.
467 These persons will be referred to with the more general term ‘suspects’. 
Hence, persons that are affected by these acts should not be informed, prior to questioning, that here are grounds to believe that they have committed a crime within the jurisdiction of the Court, nor should they be informed that they hold the right to remain silent, or that they have the right to assistance by counsel and to be questioned in the presence of counsel. Persons that are affected by proactive investigative techniques only benefit from the rights of persons during an investigation that are to be found in Article 55 (1) of the ICC Statute. As a caveat, it is not unthinkable that persons that are targeted by proactive investigative measures qualify as being ‘substantially affected’ in the autonomous meaning of the ECtHR’s jurisprudence and hence enjoy the safeguards of Article 6 ECHR. In such a case they would for example enjoy a right to remain silent.

Whereas the discussion above solely focused on the use proactive investigative techniques with regard to the ICC, it may be asked in how far proactive powers could serve any useful purpose with regard to other international(ised) criminal tribunals. For most tribunals under review, the question should be answered in the negative, provided that their jurisdiction *ratione materiae* is limited to past abuses. At the ICTY, covert coercive investigative techniques which lend themselves to proactive application have been relied upon. Reference can be made to the practice of using informants to gather evidence.\(^{468}\) However, the proactive use of this technique is prevented by the Prosecutor’s interpretation of the ‘sufficient basis to proceed’ threshold for the commencement of the investigation and hence for the availability of the Prosecutor’s investigative powers.\(^{469}\) Furthermore, Article 15 ICTY Statute excludes such a possibility by limiting the Prosecutor’s authority to the ‘investigation and prosecution of persons responsible for serious violations of international humanitarian law committed…’

From the foregoing, it follows that the jurisprudence of the ICC could be interpreted as allowing for investigations into situations to become partly proactive in nature. If one subscribes to this (limited) proactive potential of ICC criminal investigations, one should enquire what rules or principles should guide the proactive application of the Prosecutor’s powers. The importance thereof is easily understood. It is clear that the proactive use of certain special investigative measures may be a delicate issue in the absence of any express regulation and where no minimum threshold (‘reasonable suspicion’) exists with regard to the

\(^{468}\) ICTY Manual on Developed Practice, p. 20 (“The informant is an individual who will provide confidential information but who will not be expected to be called as a witness”).

\(^{469}\) See *supra*, Chapter 3, I.1.
The proactive application of these coercive investigative techniques by the ICC Prosecutor. The only threshold which is provided at this stage is the one required to move from the pre-investigative to the investigative stage and which has ‘situations’ as its object. This is the ‘reasonable basis to proceed’ threshold, which was discussed earlier, and which is grounded, among others, on the existence of a ‘reasonable basis to believe that a crime within the jurisdiction of the court has been or is being committed’.470 As will be discussed further on, no specific threshold applies in general to the use of non-custodial coercive investigative measures.471

Guidance as to what should be considered the guiding principles for the proactive application of investigative measures at the international level may be found in a resolution adopted by the participants of the XVIIIth International Congress of Penal Law (‘AIDP Resolution’), as well as in human rights law.472 The AIDP Resolution firstly requires that it is made clear that anticipative investigative efforts aim to establish reasonable grounds in order to initiate a criminal investigation against the organisation and/or its members.473 Hence, all proactive investigative efforts should have a judicial purpose. This requirement was also identified in the foregoing comparative overview of national approaches.474 If the ICC’s procedural framework is understood as to allow for anticipative investigative efforts, then this requirement would not cause difficulties. Proactive investigative efforts would in any case remain limited by the required nexus with the situation of conflict. In this manner, general and unlimited forms of information gathering in the absence of a judicial purpose would effectively be prevented.

Secondly, where and insofar as these investigations interfere with the right to privacy, it will be necessary for such proactive investigative powers to be precisely defined. In the absence of any provision on proactive investigative powers in the ICC’s Statute or RPE, it is clear that the current regulation is not in conformity with such legality requirement. This issue will be discussed in great detail further on, when the coercive powers of the ICC Prosecutor are

470 See supra, Chapter 3, I.1.
471 See infra, Chapter 6.
473 Ibid., p. 549 (par. 10).
474 See supra, Chapter 3, I.4. (consider e.g. the discussion of the Belgian and Dutch approaches to proactive investigations).
addressed. In addition, the resolution notes that since proactive investigative efforts interfere with the right to privacy, it follows that investigative efforts should be proportionate to the aims pursued, require judicial approval (normally *ex ante*), and should be in conformity with a principle of subsidiarity. Further on in this study, it will be shown that these are formal and material conditions which generally apply to the use coercive measures. Nevertheless, there is absolutely no reason why investigative measures which seriously affect human rights should not be subject to the same stringent safeguards (judicial authorisation, proportionality, subsidiarity) when they are used during a proactive phase of the criminal investigation, rather than during the reactive phase of the criminal investigation.

Additionally, the AIDP Resolution requires independent and impartial judicial supervision over the anticipative use of intrusive measures. On the one hand, in the context of the ICC, it would seem logical to confer such supervising role to the Pre-Trial chamber. As the ICC Appeals Chamber held, “the Pre-Trial Chamber has the primary responsibility of ensuring the protection of the rights of the suspects during the investigation stage of proceedings.” The general power the Pre-Trial Chamber holds to issue, at the request of the Prosecutor “such orders and warrants as may be required for the purposes of an investigation” may then be interpreted as providing the legal basis for such requirement. On the other hand, it seems unlikely that states would agree to such understanding of the Pre-Trial Chamber’s role, since it would disturb the compromise reached in Rome. The AIDP Resolution further suggests that every person who has been the subject anticipative investigative efforts is to be duly notified thereof and that a judicial remedy is installed.

To a certain extent, these ‘guiding principles’ are in line with requirements that follow from human rights law. It is self-evident that proactive investigative efforts are often intrusive in

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475 See *infra*, Chapter 6.
477 See *infra*, Chapter 6.
479 ICC, Judgment on the Appeal of Mr. Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled “Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings”, *Situation in the DRC, Prosecutor v. Katanga and Ngudjolo Chui*, Case No. ICC-01/04-01/07-2259 (OA 10), A. Ch., 12 July 2010, par. 40.
nature. Where use is made of covert investigative techniques, it is easily understood that proactive investigative efforts impact upon the right to a private life. The impact of proactive investigative efforts on the right to privacy was considered by the ECtHR in the Lüdi v. Switzerland case. This judgment can be interpreted as allowing for the use of coercive measures (eavesdrop) in the context of proactive investigative efforts. It concerned the interception of communications and the pseudo-purchase of drugs by an undercover agent. These investigative acts were conducted proactively, during “the preliminary stage of an investigation, where there is good reason to believe that criminal offences are about to be committed.” While the Commission first held that the use of the undercover agent lacked sufficient legal basis, the ECtHR concluded that the use of an undercover agent, alone or together with the interception of communications, did not violate Article 8 ECHR. Rather, the Court concluded that there was no violation of the right to privacy because the person involved knew he was engaged in a criminal act. It seems to follow from this reasoning that a person forfeits his or her right to privacy whenever engaging in a criminal activity. It implies that when an individual is involved in a criminal activity, he or she cannot reasonably expect the protection of this right. This limitation of the right to privacy is known in the US jurisprudence as the ‘reasonable expectation of privacy’ doctrine.

However, this interpretation is entirely problematic with regard to proactive investigations. These investigative efforts aim at preventing the future commission of crimes. The information law enforcement personnel seeks, should (ex post) justify the intrusions on the

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481 The right the privacy can be found in Article 17 ICCPR, Article 8 ECHR and Article 11 of the ACHR (see also Article 12 of the UDHR and Article 7 of the EU Charter of Fundamental Rights). The right is not included in the ACHPR.
485 Ibid., par. 36.
486 Ibid., par. 39 (“Mr. Lüdi must therefore have been aware from then on that he was engaged in a criminal act punishable under Article 19 of the Drugs Law and that consequently he was running the risk of encountering an undercover police officer whose task would in fact be to expose him”).
487 The doctrine was first introduced by Judge Harlan in his concurring opinion in the Katz case. He argued that for there to be a right to privacy, a twofold requirement must be fulfilled: “first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’” See Katz 389 US 347 (1967). Consider also: T. BLOM, Privacy, EVRM en (straf)rechtshandhaving, in C.H. BRANTS, P.A.M. MEVIS and E. PRAKKEN (eds.), Legitieme strafvordering, Rechten van de mens als inspiratie in de 21e eeuw, Intersentia, Groningen – Antwerpen, 2001, pp. 119 – 137.
privacy of the individuals concerned.\textsuperscript{488} The concept of ‘reasonable expectation of privacy’ should be faulted insofar that it starts from the criminal intentions (or not) of the person concerned. The consequence thereof is that in a case where the proactive investigation would not result in information on the criminal activities of the person concerned, this may entail that the person had a ‘reasonable expectation of privacy’ and that therefore, a violation of the right to privacy took place.\textsuperscript{489} Hence, this ‘reasonable expectation of privacy’ doctrine should be abandoned.\textsuperscript{490} Every individual enjoys a right to privacy, and such irrespective of the question whether or not the person concerned should have had a reasonable expectation of privacy or not.

Overall, with regard to intrusions to the right to a private life (Article 8 ECHR), it appears that the ECtHR does not distinguish between intrusions by proactive coercive investigative measures and the use of coercive measures in reactive investigations. Instead, the Court focuses on the question whether the persons involved were offered sufficient protection against arbitrary interferences with their right to privacy as guaranteed under Article 8 ECHR.

Equally problematic with regard to the proactive application of investigative measures is that it remains unclear to what use information so gathered may be put. For example, what should happen with information gathered through proactive investigative methods when no criminal proceedings ensue? This information, including the way it was gathered by the Prosecution, will never be scrutinised in the course of trial proceedings.\textsuperscript{491} Also here, human rights law may prove instructive.

On several occasions, the storing, retention and use of personal data by law enforcement officials has been scrutinised by the ECtHR.\textsuperscript{492} In the leading \textit{Marper v. UK} case, the Grand
Chamber of the ECtHR held that “the mere storing of data relating to the private life of an individual amounts to an interference within the meaning of Article 8.” The Court has found several forms of personal information stored, including fingerprints, cellular samples or DNA profiles to constitute “data relating to the private life” and hence to constitute an interference of Article 8 ECHR. While the retention of such personal data usually serves a legitimate purpose since it aims at the prevention of crime, the Court has emphasised in its case law that the private character of information stored calls for strict control by the Strasbourg Court over the storage and use of the personal data without the person’s consent. The retention of personal data should be proportionate and should strike a fair balance between public and private interests.

In any case, a legal basis, offering adequate legal protection against arbitrariness, is required. Clear and detailed rules, both on the scope and application of measures are required. Appropriate safeguards must be provided to prevent any use of information gathered which is inconsistent with Article 8 ECHR. This requires detailed regulations as to the types of information that are stored and a clear regulation as to the categories of people against whom surveillance measures, such as the gathering and keeping of information may be taken. Moreover, the circumstances in which such information may be taken should be detailed and strict limitations as to the length such information can be stored should be

amounts to an interference with Article 8 ECHR); ECtHR, Rotaru v. Romania, Application No. 28341/95, Reports 2000-V, Judgment (Grand Chamber) of 4 May 2000, par. 46 (holding that “both the storing by a public authority of information relating to an individual’s private life and the use of it and the refusal to allow an opportunity for it to be refuted amount to interference with the right to respect for private life secured in Article 8 § 1”); ECtHR, Amann v. Switzerland, Application No. 27798/95, Judgment (Grand Chamber) of 16 January 2000 par. 65 – 67 (storing of personal information amounted to an interference with Article 8 ECHR); ECtHR, Leander v. Sweden, Application No. 27798/95, Reports 2000-II, Judgment (Grand Chamber) of 16 February 2000, par. 48 (both the storing and release of information on the person’s private life as well as the denial to the person concerned of an opportunity to refute the data constituted an interference with the right to privacy); ECtHR, S. and Marper v. The United Kingdom, Application Nos. 30562/04 and 30566/04, Judgment (Grand Chamber) of 4 December 2008, par. 66 – 86 (holding that “the mere storing of data relating to the private life of an individual amounts to an interference within the meaning of Article 8” and that retention of both cellular samples and DNA profiles as well as the use and storage of fingerprints concern data relating to the private life and hence constitute an interference with the right to privacy).

493 See the references in fn. 492 above.
494 ECtHR, S. and Marper v. The United Kingdom, Application Nos. 30562/04 and 30566/04, Judgment (Grand Chamber) of 4 December 2008, par. 104.
495 Ibid., par. 118.
496 Ibid., par. 95.
497 Ibid., par. 95.
498 ECtHR, Rotaru v. Romania, Application No. 28341/95, Reports 2000-V, Judgment (Grand Chamber) of 4 May 2000, par. 59.
provided for.\textsuperscript{499} The ECtHR has underlined the special importance of these safeguards with regard to the automatic processing of information, not least when such data is used for police purposes.\textsuperscript{500} Such guarantees should ensure that data is relevant and not excessive and that information does not permit identification for a longer period than required for the purpose for which information is stored. Furthermore, they should offer sufficient protection against misuse or abuse thereof and should indicate the persons authorised to consult the files, the nature of the files and the use that can be made of the information obtained.\textsuperscript{501}

More detailed guidance in this regard may be found at the regional level. The 1981 Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (‘Data Protection Convention’) of the Council of Europe has the protection of the right to privacy with regard to the automated processing of personal data as its purpose.\textsuperscript{502} It contains a number of basic principles regarding the storing of personal data, including requirements that information gathered is adequate, relevant and not excessive in relation to the purpose for which it is stored. This implies a principle of subsidiarity.\textsuperscript{503} Information should be accurate, obtained and processed fairly and lawfully, and stored for specific purposes. It may not be used in a manner which is incompatible with this purpose.\textsuperscript{504} Moreover, the information may not be stored longer than necessary for the purpose for which the information is stored in an identifiable form.\textsuperscript{505}

Within the EU, Directive 95/46/EC of 24 October 1995 with regard to the processing of personal data and on the free movement of such data (‘Data Directive’) should be

\textsuperscript{499} Ibid., par. 57.
\textsuperscript{500} Ibid., S. and Marper v. The United Kingdom, Application Nos. 30562/04 and 30566/04, Judgment (Grand Chamber) of 4 December 2008, par. 103.
\textsuperscript{501} Ibid., par. 103.
\textsuperscript{502} Article 1 of the 1981 Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (‘Data Protection Convention’), CoE, ETS No. 108, 28 January 1981. The Data Protection Convention defines ‘personal data’ as ‘any information relating to an identified or identifiable individual (“data subject”)’.
\textsuperscript{504} Article 5 (a) – (d) Data Protection Convention.
\textsuperscript{505} Article 5 (e) Data Protection Convention.
mentioned.\textsuperscript{506} Similar to the Data Protection Convention, this Directive has the protection of the right to privacy as its object. Furthermore, a Framework Decision regulates the protection of personal data in criminal matters. Notably, it expressly includes the principles of legality, legitimate purpose and proportionality.\textsuperscript{507}

It is evident that there is no such adequate legal basis for the storage of proactively gathered information within the procedural framework of the ICC. From the ICC RPE, it follows that the Prosecutor is responsible for the retention, storage and security of information or evidence obtained in the course of investigations by his or her office.\textsuperscript{508} Moreover, the ICC Statute outlines the Prosecutor’s general power to take or to request the taking of measures to ensure the preservation of evidence.\textsuperscript{509} All information or evidence collected by the Prosecution is subsequently stored in an evidence database, within the OTP.\textsuperscript{510} However, further safeguards on how this information and evidence is to be stored and to what use this information and evidence can be put to are entirely lacking.

For example, it is unclear how long information will stay within the OTP’s evidence database (for example after an acquittal) and what use can be made of the information stored therein. This lack of clarity is particular problematic with regard to the disprove of suspicions or the discontinuance of proceedings against a person and with regard to acquittals. In \textit{Marper v. UK}, the Grand Chamber of the ECtHR concluded that the indiscriminate retention of personal data of persons suspected but not convicted of criminal offences, irrespective of the gravity or nature of the offence, in the absence of any time limitation and with only limited possibilities for having data removed upon acquittal, was disproportionate.\textsuperscript{511} Within Europe, the UK was the only country allowing for the indefinite and systematic storage of personal data and cellular material of persons who had been acquitted or, in respect of whom, criminal

\textsuperscript{508} Rule 10 ICC RPE.
\textsuperscript{509} Article 54 (3) (f) ICC Statute.
\textsuperscript{510} Regulation 23 of the Regulations of the OTP. Every item or page should be given an evidence information number.
\textsuperscript{511} ECtHR, \textit{S. and Marper v. The United Kingdom}, Application Nos. 30562/04 and 30566/04, Judgment (Grand Chamber) of 4 December 2008, par. 105-126.
proceedings had been discontinued. In most European states, this material should, leaving aside some exceptions, be removed immediately or shortly after a discharge or acquittal. The retention of personal data after an acquittal or after proceedings are discontinued would likewise violate the basic principles of data protection in Europe which were outlined above. Personal data cannot longer be stored than necessary in light of the purpose for which it was stored. After the acquittal or discontinuance of the prosecution, it seems that the purpose for which the data was gathered disappears.

In a similar vein, the retention of evidence and information upon the conviction of the accused may violate the right to privacy. The principles outlined above, in particular the principle of proportionality, are again important in this respect. One commentator argues that since the danger of repetition “can never be totally ruled out”, the storage and retention for a certain amount of time would be acceptable. Indeed, especially since it follows from the ICC’s fifth preambular paragraph that the future prevention of crimes within the jurisdiction of the Court is one of the goals of the prosecutions, the storage and retention of information for a limited amount of time should be allowed for. However, it will be necessary to introduce time limitations, otherwise the retention and storage may become disproportional. For example, the EU Framework Decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters requires ‘appropriate time limits […] for the erasure of personal data or for a periodic review of the need for the storage of data’.

II. PROSECUTORIAL DISCRETION

II.1. Introduction

Divergent approaches exist in national criminal justice systems with regard to the question whether the Prosecutor is under a duty or holds discretion in investigating and prosecuting cases. Two different understandings are respectively referred to as the ‘principle of

512 Ibid., par. 47.
513 Ibid., par. 108.
515 Article 5 of the Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters.
516 Consider A. PERRODET, The Public Prosecutor, in M. DELMAS-MARTY and J.R. SPENCER (eds.), European Criminal Procedure, Cambridge, Cambridge University Press, 2002, p. 441 (adding that such depends “on whether the public interest in prosecuting and the general will as expressed by the rules of criminal law are considered to be the same thing or two different things”).
opportunity’ (or the ‘principle of expediency’) and the ‘principle of legality’ and will be briefly discussed below. It will be shown how these two approaches do not correspond to the traditional common law/civil law divide.

The subsequent section tries to elucidate which of these two approaches prevails in international criminal procedure. It is not the purpose here to provide a detailed discussion on the selection of cases at the different tribunals under review. However, in order to provide a clear understanding of the approach in international criminal procedure, some attention will be paid to the role of judges and other actors in the exercise of prosecutorial discretion.

The principle of legality (also known as the Legalitätsprinzip) compels the prosecuting authority to investigate upon the communication of the notitia criminis and to prosecute whenever sufficient evidence is available. It implies that the investigation and prosecution are considered to be quasi-jurisdictional functions, and not a means to implement policies. It is the approach which is typically found in many civil law countries, including Germany or Italy. In all systems where the principle of mandatory prosecution reigns, various exceptions limit its application nevertheless. In Italy, this principle has been constitutionally anchored. However, the system has in practice led to a ‘prioritisation’ of cases notwithstanding the obligation to prosecute all cases and discretion is present in many of the

517 A. MCDONALD and R. HAVEMAN, Prosecutorial Discretion – Some Thoughts on ‘Objectifying’ the Exercise of Prosecutorial Discretion by the Prosecutor of the ICC, Expert Consultation Process on General Issues Relevant to the ICC: Office of the Prosecutor, 15 April 2003, p. 2 (the author labels the principle of legality ‘yes, if’ and prosecutorial discretion as the option of ‘no, unless’).
520 K. AMBOS, The Status, Role and Accountability of the Prosecutor of the International Criminal Court: A Comparative Overview on the Basis of 33 National Reports, in «European Journal of Crime, Criminal Law and Criminal Justice», Vol. 8/2, 2000, p. 100 (illustrating how even national criminal justice systems that strictly adhere to the principle of legality provide for mechanisms allowing discretion where “prosecutors are not able to prosecute every minor offence in the adequate time”); A.M. DANNER, Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court, in «American Journal of International Law», Vol. 97, 2003, p. 512 (on the German system).
acts undertaken by the Prosecutor in the prosecution of a case.\textsuperscript{522} Exceptions exists for a number of less serious offences, where there exists only a limited public interest or where prosecution is only mandatory following a specific application (\textit{querela}) by the victim.\textsuperscript{523} As a corollary to the principle of compulsory prosecution, the Prosecutor is prevented from closing the investigation him or herself.\textsuperscript{524} The principle is equally familiar to the German criminal justice system, where the \textit{Strafprozeßordnung} obliges the public Prosecutor to prosecute all offences capable of being prosecuted, save those treated otherwise by the law, as soon as the facts are sufficiently established.\textsuperscript{525} The principle is rooted in the objective to ensure equality before the law and in the prevention of arbitrary prosecution.\textsuperscript{526} Generally speaking, the principle of mandatory prosecution helps ensuring the independence of the Prosecutor by preventing outside pressure. However, several provisions limit the application of this principle.\textsuperscript{527} Notably, for example, the dropping of less serious cases is possible, provided that the judge consents and provided that the culpability is minor and there is no public interest in prosecuting.\textsuperscript{528} Furthermore, Section 153a (1) StPO allows for a conditional dispensing with the prosecution of the case provided that the accused person agrees. Moreover, proceedings may be discontinued with regard to ‘insignificant secondary


\textsuperscript{523} Ibid., p. 371.

\textsuperscript{524} Ibid., p. 372.

\textsuperscript{525} Section 152 (2) StPO.


\textsuperscript{527} Therefore, some authors prefer to label the German system a combination of the principle of legality and the principle of opportunity and noted that a gradual move towards the principle of opportunity can be noticed. See A. PERRODET, The Public Prosecutor, in M. DELMAS-MARTY and J.R. SPENCER (eds.), European Criminal Procedure, Cambridge, Cambridge University Press, 2002, p. 449.

\textsuperscript{528} Section 153 (1) StPO. Besides the creation of exceptions to the principle of legality, other mechanisms to coop with the number of cases include increasing the personnel of the Prosecutor’s office and the decriminalisation of minor offences. See C.J.M. SAFFERLING, Towards an International Criminal Procedure, Oxford University Press, Oxford, 2001, p. 173.
penalties’, where a penalty would be insignificant in comparison with the punishment for another offence committed by the accused.529 Hence, the principle of legality is not as strict and leaves some discretion, albeit limited, with the Prosecutor.530

In turn, the principle of opportunity leaves discretion whether or not to investigate and/or prosecute a crime to the prosecuting authority (opportunité des poursuites). This principle is traditionally found in common law countries, leaving broad discretion to the Prosecutor whether or not to prosecute a case.531 For example, in England and Wales the decision to prosecute is left with the police in the first stage and discretion is subsequently left with the CPS to decide whether there exists sufficient evidence and whether or not the ‘public interest’ requires a prosecution.532 The exercise of this discretion is structured by the Code for Crown Prosecutors, issued by the Director of Public Prosecutions.533 These guidelines are intended to ensure the coherence and transparency of the penal policy of the prosecution service.534 They include criteria that limit the discretion with regard to the evidence available (by requiring an objective assessment of the presence of a ‘realistic prospect of conviction’, not only regarding the admissibility and reliability of the prosecution evidence, but also the implicit consideration of possible defences that might be raised) and of the public interest in the prosecution (based on criteria that denote proportionality and the weighing of arguments in favour and against prosecution).535 According to PERRODET, in practice the prosecution mostly leaves the decision to the police on the basis of their closer relationship with the local

529 Sections 154 and 154a StPO.
531 K. Ambos, The Status, Role and Accountability of the Prosecutor of the International Criminal Court: A Comparative Overview on the Basis of 33 National Reports, in «European Journal of Crime, Criminal Law and Criminal Justice», Vol. 8/2, 2000, p. 98. Similarly, the Prosecutor may decide to stop an investigation that has already been initiated, e.g. because of lack of public interest in prosecuting the case (ibid., p. 98).
532 Section 23 (III) PACE (1984). At the moment the CPS receives the case, the investigation will normally already have been closed. Similarly, the public Prosecutor in the United States enjoys nearly unfettered discretion whether or not to bring charges against a suspect. See L.F. Horton, Prosecutorial Discretion Before International Criminal Courts and Perceptions of Justice: How Expanded Prosecutorial Independence Can Increase the Accountability of International Actors, in «Eyes on the ICC», Vol. 7, 2010-2011, p. 8.
533 Section 10 of the Prosecution of Offences Act (POA) 1985.
community and probably also because of the close cooperation between the prosecution and the police. While in the ideal-type inquisitorial system, neither side has any right to drop the case, to bargain about the outcome or the way in which it will be tried, prosecutorial discretion is equally to be found in some ‘French-styled’ civil law countries; for example, in France, Belgium and The Netherlands. These systems have in common that the Prosecutor hierarchically resorts under the executive.

Several advantages have been associated with the principle of opportunity, including the greater fairness of this principle (by avoiding unworthy prosecutions), the greater efficiency (avoiding backlogs) as well as the greater transparency (in all criminal justice systems, choices have to be made, but only in systems adhering to the principle of legality, these choices are hidden).

The introductory comparative overview above illustrates that national criminal justice systems never apply the principle of legality in its purest form, and that varying levels of prosecutorial discretion exist. All countries to some extent allow for prosecutorial discretion. Nevertheless, the modalities and scope of such discretion varies widely. One scholar in this regard discerns six variables, to know (1) the actor in charge of pre-investigations, (2) the point when the pre-investigation is triggered, (3) the entity responsible for taking the decision in the start of the investigation, (4) the level of discretion involved in the initiation of a formal investigation, (5) the circumstances under which investigations can be dismissed and (6) the control of the decision by another body.

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levels of prosecutorial discretion can similarly be discerned at the various international criminal tribunals. This may be surprising where in practice all national criminal justice systems provide for a ‘principle of legality’, at least as far as the most serious crimes are concerned, since it would not be in the ‘public interest’ to leave these crimes without prosecution.  

Hence, the question arises whether and to what extent the concepts outlined above are applicable to prosecutions at the international echelon. As will be illustrated later, for various reasons, the necessity of at least some form of prosecutorial discretion in initiating investigations and prosecuting crimes holds all the more true at the international level. This diminishes the value of drawing comparisons with the prosecution of (serious) crimes at the national level. As ARBOUR convincingly points out, domestic criminal justice systems are never called upon to be selective in the prosecution of serious crime.  

STAHN takes issue with such justification for the necessity of prosecutorial discretion in international criminal proceedings. He discerns a paradox in the argument that the number of potential cases necessitates prosecutorial discretion and “should justify the absence or a lesser degree of objective scrutiny of prosecutorial discretion.” Nevertheless, this stretches the argument by ARBOUR too far. She only argues that whereas in domestic criminal justice, all ‘serious cases’ will normally be prosecuted, provided that sufficient evidence is available, the differing nature of international criminal prosecutions does not allow to do so, necessitating the Prosecutor to be selective and operate in a manner which complements national jurisdictions.  

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543 L. ARBOUR, Progress and Challenges in International Criminal Justice, in «Fordham International Law Journal», Vol. 21, 1997-1998, p. 534. For a similar argument, consider A.M. DANNER, Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court, in «American Journal of International Laws», Vol. 97, 2003, p. 521 (“Even in domestic systems that vest prosecutors with significant discretion, there is a clear assumption that the most serious crimes, like murder, will be prosecuted”).


The argumentation by ARBOUR can be agreed with. At the national level, prosecutors are expected to investigate and prosecute serious crimes. Irrespective of whether a principle of opportunity or of legality prevails in a national criminal justice system, only rarely will serious crimes not be prosecuted. However, at the international echelon, international criminal tribunals will only investigate and prosecute a few cases. Hence, any comparison is flawed from the outset.546

II.2. The ad hoc tribunals: broad discretion

Pursuant to Article 18 (1) ICTY Statute and Article 17 (1) ICTR Statute, it is for the Prosecutor to determine whether there is ‘sufficient basis to proceed’ with an investigation. Hence, as confirmed by the case law, the Prosecutor enjoys broad discretion in initiating investigations.547 No obligation to investigate all crimes can readily be discerned (opportunité des poursuites). However, at least one author holds the view that the ICTY and ICTR Statute express an obligation to assess every case and to assess the level of suspicion, in line with the principle of legality.548

In turn, the wording of Article 18 (4) ICTY Statute (and equivalent Article 17 (4) ICTR Statute) which deals with the decision to prosecute, seems to betray a duty to prosecute (‘shall’). This viewpoint is shared by the doctrine.549 This suggests that from the moment that

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546 For a similar argumentation, see M.M. DEGUZMAN, Choosing to Prosecute: Expressive Selection at the International Criminal Court, in «Michigan Journal of International Law», Vol. 33, 2012, p. 269 (“Prosecutors are expected to prosecute the vast majority of cases; and, on the rare occasions when a prosecutor’s decision whether or not to prosecute a case is controversial, such debates are generally limited to the particular case.” Further, she argues with regard to national prosecutions that “only very exceptionally will a selection decision spark challenges to the legitimacy of the entire criminal justice system”); ibid., p. 277 (“national courts usually enjoy much greater parity between available resources and the conduct the community wants to punish than does the ICC”); A.K.A. GREENAWALT, Justice Without Politics? Prosecutorial Discretion and the International Criminal Court, in «NYU Journal of International Law & Politics», Vol. 39, 2007, p. 610 (the author notes that “in many domestic systems […] the system can at least aspire toward something approximating universal prosecution, at least in the context of the most serious, violent crimes”).

547 ICTY, Judgement, Prosecutor v. Delalić, Case No. IT-96-21-A, A. Ch., 20 February 2001, par. 602 (“It is beyond question that the Prosecutor has a broad discretion in relation to the initiation of investigations and in the preparation of indictments”); ICTR, Decision on Ntabakuze Petition for a Writ of Mandamus and Related Defence Requests, Prosecutor v. Bagosora et al., T. Ch. I, 18 April 2007, par. 6 (the Trial Chamber states that “the Prosecutor has independence and unfettered discretion to decide which investigations and prosecutions to pursue”).


the Prosecutor has evidence which amounts to a *prima facie* case, he or she *should* prosecute. At that moment, he or she should prepare and submit an indictment to the Trial Chamber. In this regard, the Trial Chamber may be said to exercise a supervisory function, restricting the discretion of the Prosecutor. However, case law of the ICTY confirmed that no requirement exists to prosecute in all cases where sufficient evidence is available. Moreover, no judicial review is provided for if the Prosecutor decides not to present an indictment (*nolle prosequi*). Furthermore, the absence of a duty to prosecute in all such cases (principle of strict legality) clearly follows from the concept of concurring jurisdiction. It is for the Prosecutor, as *dominus litis*, to decide on the selection of cases and crimes for investigation and prosecution.

The existence of discretion should be understood in light of Article 16 (1) ICTY Statute which refers to ‘persons responsible for serious violations of international humanitarian law

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International Criminal Justice, Vol. 3, 2005, pp. 135 - 136 (noting that regarding the decision to prosecute, the Prosecutors only have limited discretion).


Where the Prosecutor is solely responsible for prosecutions, he or she may withdraw the indictment without prior judicial leave, until the indictment has been confirmed. After an indictment has been confirmed, the indictment may only be withdrawn with leave from the Judge who confirmed the indictment, a Judge assigned by the President or by motion before the Trial chamber to which the case has been assigned (Rule 51 (A) ICTY and ICTR RPE).


committed in the territory of the former Yugoslavia since 1991. This broad formulation of the task of the tribunal includes thousands of potential cases.

While a selection is thus necessary, the statutory frameworks of the ad hoc tribunals do not contain criteria for the selection/prioritisation of cases. This implies that a decision of what criteria to consider is left to the Prosecutor. The Prosecutor’s selection of cases is not subject to judicial scrutiny since the Trial Chamber cannot decline to confirm an indictment when it disagrees with the Prosecutor’s decision to bring a case.

§ Limitations to prosecutorial discretion

Several factors limit the prosecutorial discretion in investigating and prosecuting cases. These limitations on prosecutorial discretion can be categorised as follows. In the first category, limitations can be grouped which derive from the conception and understanding of the role of the Prosecutor at the ad hoc tribunals. A second class of limitations follows from the implementation of the completion strategy.

As far as the first group of limitations is concerned, it should firstly be noted that the concepts of prosecutorial independence and prosecutorial discretion are closely related. The Prosecutor’s independence prevents him or her from (actively) seeking or (passively) receiving instructions from any government or any other source on how to exercise his or her discretion. Secondly, the Appeals Chamber in Delalić et al. clarified that the prosecutorial

554 Emphasis added.


556 ICTY, Judgment, Prosecutor v. Jelisić, Case No. IT-95-10-A, A. Ch., 5 July 2001, Partial Dissenting Opinion of Judge Wald, par. 4 (“Nowhere in the Statute is any Chamber of the ICTY given authority to dismiss an indictment or any count therein because it disagrees with the wisdom of the Prosecutor’s decision to bring the case”); C. ANGERMAIER, Case Selection and Prioritization Criteria in the Work of the International Criminal Tribunal for the Former Yugoslavia, in M. BERGSMO (ed.), Criteria for Prioritizing and Selecting Core International Crimes Cases, Oslo, Torkel Opsahl Academic EPublisher, 2010, p. 29 (clarifying that Article 19 ICTY Statute “does not allow the judges to review the application of extra-evidentiary criteria for the selection of cases”).

discretion is further circumscribed by his or her position as an “official vested with specific
duties imposed by the Statute or the Tribunal.” This entails that the Prosecutor should
exercise his functions “with full respect of the law”, including with full respect of the
recognised principles of human rights. Two of these principles which constitute an
important limiting factor are the principle of non-discrimination and the principle of
equality. They require that all persons are treated equal by the tribunal. These principles
can be found in international human rights law, and in Additional Protocol I to the Geneva
Conventions. These principles address the tension that may exist “between individual
prosecutorial decisions and protection from arbitrary state action.”

An accused may claim that his or her prosecution was selective. The importance of such a
defence lies where no control mechanism exists for the review of a decision not to
prosecute. Indeed, originally, judicial control over prosecutorial discretion was limited to
this issue of selective charging. The ICTY Appeals Chamber qualified the principle that all
persons are equal before the tribunal as “central to the principle of due process of law” and a
“firmly established principle of international law.” The principle requires the Prosecutor
not to discriminate in the selection of cases for investigation and prohibits indictment on
impermissible motives such as race, religion, opinion, national or ethnic origin. Proof is

559 Ibid., par. 604.
560 Article 21 (1) and (4) ICTY Statute; Article 20 (1) and (4) ICTR Statute and Article 17 (1) and (4) SCSL
Statute.
561 Article 14 (1) ICCPR and 26 ICCPR; Article 7 UDHR; Article 8 (2) ACHR; Article 14 ECHR (in relation to
other rights and freedoms in the ECHR); Article 75 (1) Additional Protocol I GC.
562 A.M. DANNER, Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the
563 L. WALDORF, “A mere Pretense of Justice”: Complementarity, Sham Trials, and Victor’s Justice at the
564 C. STAHN, Judicial Review of Prosecutorial Discretion: on Experiments and Imperfections, in G. SLUITER
566 Ibid., par. 605. Where an accused alleges that the principle of equality has been violated by the decision to
investigate and prosecute his or her case, he or she bears the burden of proof. Given the breadth of the
prosecutorial discretion and the prosecutor’s independence, a presumption exists that the principle of equality
has been respected. To rebut the presumption, the accused should bring evidence to establish that the discretion
has in fact not been executed in accordance with the Statute. According to the Appeals Chamber, this “require[s]
evidence from which a clear inference can be drawn that the Prosecutor was motivated in that case by a factor
inconsistent with that principle [principle of equality].” It necessarily involves a comparison with other similarly
situated persons (ibid., par. 611 – 619). For the ICTR, consider ICTR, Judgement, Prosecutor v. Akayesu, Case
No. ICTR-96-4, A. Ch., A. Ch., 1 June 2001, par. 94 - 96; ICTR, Decision on Urgent Oral Motion for a Stay of
required, rather than a mere assertion, that (1) the Prosecutor has exercised his or her discretion unlawful or improper (including discriminatory) and (2) that in prosecuting the persons he or she did prosecute, the Prosecutor left out persons similarly situated.\textsuperscript{567} It does not suffice to show that only one group is selectively targeted while another is not.\textsuperscript{568} In \textit{Delalić\textit{ et al. (Čelebići case)}}, the Appeals Chamber required a ‘clear inference that the Prosecutor was motivated in that case by a factor inconsistent with principles such as equality before the law’, given the \textit{presumption of regularity}.\textsuperscript{569} A high burden is thus set to establish abuse of prosecutorial discretion.\textsuperscript{570} For the Defence, such threshold may even prove insurmountable in practice, since it may lack access to necessary prosecutorial information.\textsuperscript{571} Further, it remains unclear what the proper remedy would be if the Chamber would conclude to a violation of the principle of equality. In \textit{Delalić}, the Appeals Chamber only indicated that the reversing of the conviction of the accused “would be an entirely disproportionate response.”\textsuperscript{572}

Thirdly, a gravity threshold has been read in the Statutes of the ad hoc tribunals where their jurisdiction is limited to ‘serious violations of international humanitarian law’. However, such a formulation falls short of a threshold, comparable to the limitation of the IMT’s jurisdiction to ‘major’ war criminals. Rather, “the drafting process arguably suggests that there was a deliberate choice not to limit the jurisdictional mandate to senior persons.”

More recently, as will be discussed further on, a threshold has effectively been introduced into the framework of the ad hoc tribunals as part of their respective completion strategies.

Finally, limitations to prosecutorial discretion follow from the Prosecutor’s duty to be impartial.

Further limitations on prosecutorial discretion follow from the growing exercise of judicial review over prosecutorial discretion; the mechanisms for such judicial review being expanded over the lifespan of the ad hoc tribunals. Whereas in the beginning judicial review over prosecutorial discretion was characterised by an “abstentionist” approach and such discretion considered to be closely linked to prosecutorial independence, the focus on the completion strategy led prosecutorial discretion to be considered an “impediment to the expeditiousness of proceedings.”

Rule amendments ensured the division of labour between the tribunals and the domestic criminal justice systems. Consequently, as previously noted, the non-permanent

573 Article 1 ICTY and ICTR Statute. Consider also the reference to ‘serious violations’ in Article 16 (1) ICTY Statute and Article 15 (1) ICTR Statute. It was argued by CASSESE that these provisions include a gravity threshold. Consider A. CASSESE, The ICTY, a Living and Vital Reality, in «Journal of International Criminal Justice», Vol. 2, 2004, p. 587 (“True, the Nuremberg Charter explicitly entrusted the International Military Tribunal (IMT) with the task of trying the ‘major’ war criminals. However, the ICTY Statute was also substantially based on the same assumption, for it insisted on the need to prosecute persons responsible for ‘serious’ violations.”); L.D. JOHNSON, Ten Years Later: Reflections on the Drafting, in «Journal of International Criminal Justice», Vol. 2, 2004, p. 369 (“[T]he Security Council did not follow the Nuremberg example, which referred to the trial of ‘major’ war criminals, with ‘minor’ ones being left to other courts [...]. Domestic courts were to have concurrent jurisdiction but be subject to the ‘primacy’ of the Tribunal, which could require domestic courts to defer to its competence. The Security Council did, however, introduce a qualitative phrase in that persons to be prosecuted were those who were responsible for ‘serious’ violations of international humanitarian law” (emphasis added)); H.B. JALLOW, Prosecutorial Discretion and International Criminal Justice, in «Journal of International Criminal Justice», Vol. 3, 2005, p. 151 (noting that the reference to ‘serious’ violations of international humanitarian law indicates that the tribunal was not intended to prosecute every violation”).


575 Article 13 juncto Article 21 (1) ICTY Statute; Article 12 juncto Article 20 (1) ICTR Statute and Article 13 (1) juncto Article 17 (4) SCSL Statute.

character of the ad hoc tribunals may be considered to have heavily impacted upon the exercise of prosecutorial discretion.577

Rule amendments were the direct result of mounting pressure from the UN Security Council. Notably, in June 2002, then ICTY President Claude Jorda presented a report to the Secretary-General, signed by the three tribunal organs and suggesting that the ICTY should focus on the highest-ranking political and military leaders (‘completion strategy’).578 Other cases involving perpetrators at intermediary-level positions should be referred to national courts.579 The report proposed the adoption of an amended Rule 11bis. The possibility for referral of cases should be broadened and criteria adopted for the referral of cases. Rule 11bis was eventually amended in September 2002.580

Consequently, on 28 August 2003, Security Council Resolution 1503 was adopted which reaffirmed that the ICTY should focus on the most senior leaders suspected of being most responsible for crimes within the ICTY’s jurisdiction and urged the ICTR to also adopt a completion strategy.581 In response, a completion strategy was adopted by the ICTR, including several factors to be considered in the exercise of prosecutorial discretion, such as the alleged status and extent of participation of the individual, the alleged connection of the accused with other cases, the need to cover the major geographical areas where crimes were allegedly committed, the availability of evidence, the concrete possibility of arresting the

579 Ibid., par. 32.
581 Security Council Resolution 1503, U.N. Doc S/RES/1503, 28 August 2003, preambular paragraphs 7 and 8. The Security Council further reaffirmed that other cases should be referred to national courts and that the capacity of the national courts to deal with such cases should be strengthened. The Prosecutors and Presidents of the ad hoc tribunals were further requested to focus on the completion strategy in their national reports (ibid., preambular paragraph 7 and operative paragraph). In turn, this Resolution was followed by SC Resolution 1534, in which the Security Council reaffirmed the importance of the full implementation of SC Resolution 1503. See Security Council Resolution 1534, U.N. Doc. S/RES/1534, 26 March 2004.
individual or the availability of investigative material for transmission to a state for national prosecution.582

The ICTY saw the amendment of the RPE, introducing a pre-indictment review process under Rule 28 (A) ICTY RPE. It entails that prior to the sending of the indictment to the reviewing Judge, the President sends the indictment to the Bureau, which should determine ‘whether the indictment, *prima facie*, concentrates on one or more of the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the Tribunal’.583 A similar rule amendment was not adopted by the ICTR.584 This consideration of the gravity of the crimes charged and the level of responsibility of the accused is also required in cases where the Referral Bench considers the referral of a case pursuant to Rule 11bis ICTY RPE.585

Following the confirmation of the indictment, prosecutorial discretion is reduced.586 The powers of the ICTY Trial Chamber under Rule 73bis (D) and (E) should be noted.587 They equip the Judges with significant supervisory powers over the work of the Prosecutor, allowing them to direct the Prosecutor to reduce the number of counts charged or the number of incidents or crime sites comprised in one or more of the charges. In this regard, the


584. See D. A. MUNDIS, The Judicial Effects of the “Completion Strategies” on the Ad Hoc International Criminal Tribunals, in «American journal of International Law», Vol. 99, 2005, p. 148 (noting that the ICTR Judges refused to adopt the amendment because they considered it to be a violation of the ICTR Statute where it limits the independence of the Prosecutor).

585. Rule 11bis (C) ICTY RPE. A similar provision is absent from Rule 11bis ICTR RPE.


587. Rule 73bis (D) and (E) ICTY RPE as amended on the extraordinary plenary session of 30 May 2006 (IT/32/Rev. 38); Compare with the powers of the SCSL Trial Chamber pursuant to Rule 73bis (G) SCSL RPE: Rule 73bis (G) SCSL RPE as amended on 13 May 2006 at the occasion of the seventh Plenary Meeting of the Judges.
provisions introduce an additional *filter*. In the past, the Prosecution has strongly objected to such amendment, holding that it infringes upon its prosecutorial discretion.588

These amendments have resulted in the extension of judicial control over prosecutorial discretion. To some extent, these changes remain in tension with the prosecutorial independence and encroach upon the prosecutorial discretion of whom to indict, which is firmly embedded in the jurisprudence of the *ad hoc* tribunals.589 Nevertheless, overall, the Prosecutor remains solely responsible for the decision to investigate or not and to prosecute or not.590 In line with national criminal justice systems, judicial review of the exercise of prosecutorial discretion remains very limited.591

§ Criteria for the selection and prioritisation of cases

An in-depth discussion of the strategy of the Prosecutor of the ICTY and the ICTR in selecting cases for investigation and prosecution certainly surpasses the aims of the present analysis. However, a brief outline of the *criteria* relied upon by the Prosecutors in the exercise of their discretion may be useful to get a better understanding of the manner in which discretion has been exercised in practice. Generally speaking, the first ICTY Prosecutor (Goldstone) adopted a strategy to focus on the lower level perpetrators and from there, to build the cases against persons bearing the greatest responsibility (the so-called ‘bottom-up approach’).592 The Judges objected to such prosecutorial strategy, and issued a public

588 Consider *e.g.* ICTY, Tribunal’s Prosecutor Addresses Security Council on Completion Strategy Progress, Press Release, AN/MOW/1085e, 7 June 2006.


592 Consider the prosecution of Tadić (ICTY) and Akayesu (ICTR) respectively. Regarding the prosecution of Tadić, SCHLAG recalls that “[i]n the fall of 1994, mindful of the importance of our being able to present
statement saying so, which Goldstone felt encroached on his prosecutorial independence.\textsuperscript{593}

With hindsight, it is clear that the decision to indict lower level perpetrators was not solely based on the availability of evidence but equally on “legitimate political considerations.”\textsuperscript{594}

Ultimately, a shift in focus could be noted.

Neither of the \textit{ad hoc} tribunals has published the criteria for the selection of cases;\textsuperscript{595} a decision which can be criticised on transparency grounds.\textsuperscript{596} Throughout the lifespan of the ICTY, no single focused investigation and prosecution strategy or criteria for the selection of cases can be discerned.\textsuperscript{597} However, the ICTY adopted internal selection criteria as early as 1995.\textsuperscript{598}
These internal criteria were non-binding and comprised a set of factors, including the seriousness of the offence, policy considerations including the advancement of international jurisprudence, the symbolic value of prosecution as well as public perceptions concerning impartiality and balance.\footnote{M. BERGSMO, K. HELVIG, I. UTMELIDZE and G. ŽAGOVEC, The Backlog of Core International Crimes Cases in Bosnia and Herzegovina (2nd ed.), Torkel Opshaal Academic EPublisher, Oslo, 2010, p. 108; C. ANGERMAIER, Case Selection and Prioritization Criteria in the Work of the International Criminal Tribunal for the Former Yugoslavia, in M. BERGSMO (ed.), Criteria for Prioritizing and Selecting Core International Crimes Cases, Oslo, Torkel Opshaal Academic EPublisher, 2010, pp. 31 – 34.} In 1998, the ICTY indictments were re-assessed following an internal memorandum. As a consequence, charges against 14 accused were withdrawn.\footnote{Press statement by the Prosecution of 8 May 1998, CC/PIU/314-E, to be found at http://www.icty.org/sid/7671, last visited 10 February 2014; ICTY, Judgement, Prosecutor v. Delalić, Case No. IT-96-21-A, A. Ch., 20 February 2001, par. 614.} The aim of the revision was to put additional emphasis on persons in leadership positions and on persons who had been personally responsible for exceptionally brutal or otherwise extremely serious offences.\footnote{H.B. JALLOW, Prosecutorial Discretion and International Criminal Justice, in «Journal of International Criminal Justice», Vol. 3, 2005, p. 152.}

At the ICTR, the primary focus has been on the prosecution of the governmental, political and military leadership which planned and oversaw the execution of the genocide.\footnote{Ibid., p. 152 et seq.} Other criteria considered include (i) the extent of participation of the accused or suspect, (ii) the nature and gravity of the offences (including a focus on sexual violence, destruction of pregnant women and the killing of infants and on the role of the media), (iii) the need for geographic spread with regard to targets and incidents and (iv) the prospects for dealing with the suspect or accused otherwise than by prosecution at the ICTR.\footnote{Ibid., p. 154.} Additionally, according to Chief Prosecutor Jallow, reconciliation is considered to be a relevant consideration.\footnote{Ibid., p. 154.}

The selection criteria of the ICTR thus focus on the leaders who planned the Rwandan genocide. In this manner, it appears that the crimes allegedly committed by the RPF are not...
considered serious enough to justify prosecution. This internal decision not to prosecute any crimes allegedly committed by the RPF has been criticised by many authors.605 However, allegations of crimes committed by the RPF were investigated by Del Ponte.606 At one point, she indicated that indictments against RPF officers should be issued by the end of 2001.607 This resulted in travel restrictions being imposed, preventing witnesses from travelling to Arusha to testify, causing ongoing trials to be stalled.608 No indictments would be issued by the time she left the tribunal.609

In June 2008, Del Ponte’s successor, ICTR Prosecutor Jallow announced that RPF case files would be transferred to Rwanda.610 The domestic trial that followed was monitored by the OTP and the Prosecutor concluded that fair trial standards had been upheld.611 However, strong criticisms were voiced regarding the OTP’s monitoring of the trial and its conclusion

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606 See ICTR, Press Release: Prosecutor Outlines Future Plans, ICTR/INFO-9-2-254, 13 December 2000. These investigations are often referred to as the ‘Special Investigations’.


610 Statement by Justice Hassan B. Jallow, Prosecutor of the ICTR, to the U.N. Security Council, 4 June 2008. The Prosecutor communicated that it had been able to establish a prima facie case that on the 5th of June 1994 RPF soldiers killed some thirteen clergymen, including five bishops and two other civilians at the Kabguyi Parish in Gitarama.

on the fairness of the trial. After concluding that fair trial standards had been upheld, ICTR Prosecutor Jallow announced that no RPF would be prosecuted.

II.3. The Special Court for Sierra Leone (SCSL): ‘guided’ discretion

In line with the ad hoc tribunals, the Prosecutor is solely responsible for investigations and prosecutions and acts independently as a separate organ of the Court. In further similarity with the ad hoc tribunals, it follows from Article 15 (1) SCSL Statute that it is for the Prosecutor to determine whether there is ‘sufficient basis to proceed’ with an investigation. This provision betrays broad discretion. Nevertheless, unlike the ad hoc tribunals, the SCSL Statute and the SCSL Agreement explicitly limit the Special Court’s competence to serious violations of international humanitarian law or Sierra Leonean Law committed by persons bearing ‘the greatest responsibility’. Such wording resembles that of the ECCC, limiting jurisdiction to ‘senior leaders’ and ‘those most responsible for the crimes’.

In the CDF (Norman et al.) case, Fofana’s Defence argued (1) that Article 1 (1) SCSL Statute should be understood as a limitation (the interpretation of which is unclear) of the Court’s personal jurisdiction and (2) that the Court did not have jurisdiction over Fofana insofar that he did not belong to the category of persons bearing the greatest responsibility. The Trial Chamber considered that the different formulation of the Special Court’s competence,
compared to the jurisdiction of the *ad hoc* tribunals, should have some bearing on the scope of its respective competence. According to Trial Chamber I, firstly, the *travaux préparatoires* reveal that Article 1 (1) SCSL Statute should be understood in a broad manner, not only including the political or military leadership. Others down the chain of command may also be included judging on the severity of the crime or its massive scale.\(^{618}\) Furthermore, the phrase ‘persons who bear the greatest responsibility’ in Article 1 (1) SCSL Statute is a *jurisdictional* requirement and does not solely articulate prosecutorial discretion.\(^{619}\) The Trial Chamber further held that the drafters intended the category of persons that the Court would have personal jurisdiction over to be limited. By limiting its personal jurisdiction to “persons who bear the greatest responsibility” rather than “persons most responsible”, the Security-Council intended that “the fact that an individual held a leadership role should be the primary consideration; the severity of a crime or the massive scale of a particular crime should not be

\(^{618}\) U.N., Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, U.N. Doc. S/2000/915, 4 October 2000, par. 30: “Most responsible’ […] denotes both a leadership or authority position of the accused, and a sense of the gravity, seriousness or massive scale of the crime. It must be seen, however, not as a test criterion or a distinct jurisdictional threshold, but as a guidance to the Prosecutor in the adoption of a prosecution strategy and in making decisions to prosecute in individual cases.”

\(^{619}\) SCSL, Decision on the Preliminary Defence Motion on the Lack of Personal Jurisdiction filed on Behalf of Accused Fofana, *Prosecutor v. Norman et al.*, Case No. SCSL-04-14-PT, T. Ch., 3 March 2004, par. 27; SCSL, Judgement, *Prosecutor v. Fofana and Kondewa*, Case No. SCSL-04-14-T, T. Ch. I, 2 August 2007, par. 91. Several U.N. Documents support this conclusion. First, the Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone (U.N. Doc. S/2000/915) shows that the Secretary-General initially disagreed with the term ‘greatest responsibility’ which originates from Security Council Resolution 1315 (Security Council Resolution 1315, U.N. Doc. S/RES/1315, 14 August 2000). As an alternative, the formulation ‘persons most responsible’ was proposed, which was clearly intended “not as a test criterion or a distinct jurisdictional threshold, but as a guidance to the Prosecutor in the adoption of a prosecution strategy and in making decisions to prosecute in individual cases.” However, the Security Council held the view that the personal jurisdiction of the Court should be restricted and that the ‘most responsible’ formulation should be changed by the concept of ‘greatest responsibility’. See Letter Dated 22 December 2000 from the President of the Security-Council addressed to the Secretary-General, U.N. Doc. S/2000/1234, 22 December 2000, par. 1 (where it is argued that the Special Court “should have personal jurisdiction over persons who bear the greatest responsibility for the commission of crimes, including crimes against humanity, war crimes and other serious violations of international humanitarian law, as well as crimes under relevant Sierra Leonean law committed within the territory of Sierra Leone”); Letter Dated 12 January 2001 from the President of the Security Council Addressed to the Security-Council, U.N. Doc. S/2001/40, 12 January 2001, par. 2-3 (stating that the members of the Security-Council preferred the view of “extending the personal jurisdiction of the Court to “persons who bear the greatest responsibility”; thus limiting the focus of the Special Court to those who played a leadership role.” “However, the wording of subparagraph (a) of article 1 of the draft Statute, as proposed by the Security Council, does not mean that the personal jurisdiction is limited to the political and military leaders only. Therefore, the determination of the meaning of the term “persons who bear the greatest responsibility” in any given case falls initially to the Prosecutor and ultimately to the Special Court itself.” Besides, the view is expressed that the reference in Article 1 (1) SCSL Statute to “those leaders who […] threaten the establishment of and implementation of the peace process” should be understood as offering guidance to the Prosecutor); Letter Dated 31 January 2001 from the President of the Security-Council Addressed to the Secretary-General, U.N. Doc. S/2001/95, 31 January 2001, par. 1 (endorsing the interpretation provided by the Security-General in its letter of 12 January 2001).
the primary consideration." The criterion should be considered by the Confirming Judge in reviewing the indictment and the accompanying material but it is not a material element that the Prosecutor needs to prove beyond reasonable doubt.

Based on the drafting history of the Statute, Trial Chamber II arrived at a different conclusion in the AFRC case. On the basis of a wrong interpretation of a letter by the UN Secretary General, it concluded that the drafters of the SCSL Statute never intended to create an additional jurisdictional threshold through the insertion of the ‘greatest responsibility’ concept in Article 1 (1) SCSL Statute. The Prosecution disputed the jurisdictional character of the ‘greatest responsibility’ requirement and argued that such a determination is part of its prosecutorial discretion; this discretion only being reviewable in extreme cases such as abuse of process. This discretion could not be exercised by the Chamber insofar that it would not have all the evidence gathered by the Prosecution before it. In turn, the Kanu Defence argued, in line with the argumentation of Trial Chamber I in the CDF case, that the ‘greatest responsibility’ concept should be understood as imposing a jurisdictional limitation. The Trial Chamber held that the ‘greatest responsibility’ requirement “solely purports to

620 SCSL, Decision on the Preliminary Defence Motion on the Lack of Personal Jurisdiction filed on Behalf of Accused Fofana, Prosecutor v. Norman et al., Case No. SCSL-04-14-PT, T. Ch., 3 March 2004, par. 40.
621 Ibid., par. 38; SCSL, Judgement, Prosecutor v. Fofana and Kondeva, Case No. SCSL-04-14-T, T. Ch. I, 2 August 2007, par. 91 – 92. At the same time, Trial chamber I held that “[w]hether or not in actuality the Accused could be said to bear the greatest responsibility can only be determined by the Chamber after considering all the evidence presented during trial” (ibid., par. 92).
622 SCSL, Judgment, Prosecutor v. Brima et al. (AFRC), Case No. SCSL-2004-16-T, T. Ch. II, 20 June 2007, par. 653. The argumentation by the Trial Chamber is based on a wrong interpretation of the ‘Letter Dated 12 July 2001 from the Secretary-General to the President of the Security Council, U.N. Doc. S/2001/693, 12 July 2001’, which confirms that the members of the Security Council are in agreement with the Secretary-General that “the words beginning with ‘those leaders who […]’ are intended as guidance to the Prosecutor in determining his or her prosecutorial strategy” (emphasis added). This sentence cannot be interpreted as implying that the ‘those bearing the greatest responsibility’ criterion should be interpreted as guidance to the Prosecution. It only refers to the latter part of the sentence which clarifies that ‘those bearing the greatest responsibility’ includes ‘those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone’. For a confirming view, consider e.g. S. MORRISON, Extraordinary Language in the Courts of Cambodia: Interpreting the Limiting Language and Personal Jurisdiction of the Cambodian Tribunal, in «Capital University Law Review», Vol. 37, 2009, pp. 595 – 597 (“The United Nations establishing documents show an intent that the “greatest responsibility” language was to act as a jurisdictional requirement. However, for practical reasons, the Appeals Chamber [where it endorsed Trial Chamber II’s interpretation of Article 1 (1) SCSL Statute] ruled that the phrase is to be understood solely as a guide to the Prosecutor in exercising discretion”). Consider additionally C.C. JALLOH, Prosecuting those Bearing “Greatest Responsibility”: The Lessons of the Special Court for Sierra Leone, in «Marquette Law Review» Vol. 96, 2013, pp. 891 - 892 (“it would seem that the judges of Trial Chamber II did not read in their entirety either the drafting history of Article 1(1) and the subsequent correspondence between Secretary-General Annan and the Council”).
624 Ibid., par. 644 – 646.
streamline the focus of prosecutorial strategy.” However, it added that it “does not exclusively articulate prosecutorial discretion,” as the Prosecutor submitted. Trial Chamber II also emphasised that it follows from Article 15 SCSL Statute that the Prosecutor is solely responsible for the investigation and prosecution of persons bearing the greatest responsibility for serious violations of international humanitarian law. The Prosecutor should act independently as a separate organ of the Court. Hence, the Chamber “is [...] not called upon to review the prosecutorial discretion in bringing a case against the Accused, nor would it be in a position to do so.”

This latter interpretation was later confirmed by the Appeals Chamber. Unlike both of the Trial Chambers, the Appeals Chamber did not rely on the travaux préparatoires as its starting point for interpreting the ‘greatest responsibility’ term but, rather, considered the Special Court’s structure. It stated that it follows from Article 15 (1) that the Prosecutor is responsible for and has the competence to determine who should be investigated and prosecuted. Therefore, the:

“only workable interpretation of Article 1 (1) is that it guides the Prosecutor in the exercise of prosecutorial discretion. That discretion must be exercised by the Prosecution in good faith, based on sound professional judgment [...] that it would also be unreasonable and unworkable to suggest that the discretion is one that should be exercised by the Trial Chamber or the Appeals Chamber at the end of the trial.”

The Appeals Chamber added that “it is inconceivable that after a long and expensive trial the Trial Chamber could conclude that although the commission of serious crimes has been established beyond reasonable doubt against the accused, the indictment ought to be struck

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625 Ibid., par. 653.
626 Ibid., par. 653.
627 Ibid., par. 653; SCSL, Judgement, Prosecutor v. Brima et al., A. Ch., Case No. SCSL-2004-16-A, 22 February 2008, par. 280.
629 SCSL, Judgement, Prosecutor v. Brima et al., A. Ch., Case No. SCSL-2004-16-A, 14 October 2011, par. 280; SCSL, Judgement, Prosecutor v. Taylor, Case No. SCSL-03-01-T, T. Ch. II, 18 May 2012, par. 78.
630 Ibid., par. 280-281.
631 Ibid., par. 280-281.
out on the ground that it has not been proved that the accused was not one of those who bore the greatest responsibility.  

This reasoning neglects the fact that at the time the Confirming Judge reviews the indictment, he or she must have already determined whether he or she is satisfied that the crime(s) charged fall(s) within the Court’s jurisdiction (subject matter, personal, territorial or temporal).  

It does not seem problematic to consider the ‘greatest responsibility’ threshold during the confirmation of the indictment process.  

To some extent, such an assessment can be compared to the Bureau’s review of the indictment at the ICTY to determine whether it, prima facie, concentrates on one or more of the most senior leaders suspected of being most responsible for crimes within the tribunal’s jurisdiction.  

However, the low threshold for the confirmation of the indictment at the Special Court, coupled with the limited material that should be made available by the SCSL Prosecutor, may hamper the Confirming Judge’s assessment.  

This problem led one author to suggest that any determination of whether a particular accused appears to bear the greatest responsibility should be postponed until the evidentiary phase of the trial process has been completed.  

However, such a solution does not resolve the Appeals Chamber’s concern that such a determination at the end of the trial process may waste money on a trial that the Special Court was not competent to handle.

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632 Ibid., par. 283.
633 Rule 47 (E) (i) SCSL RPE. In fact, through the confirmation of the indictment, the Confirming Judge reviews the prosecutorial discretion in bringing a case, where the Judge will assess whether the crimes charged fall within the jurisdiction of the Court and where jurisdictional requirements limit prosecutorial discretion. Therefore, this author disagrees with the statement by Trial chamber II that “[t]he trial chamber is therefore not called upon to review the prosecutorial discretion in bringing a case against the Accused, nor would it be in a position to do so.” At least, such statement should be nuanced. See SCSL, Judgment, Prosecutor v. Brima et al. (AFRC), Case No. SCSL-2004-16-T, T. Ch. II, 20 June 2007, par. 654.
635 Rule 28 (A) ICTY RPE.
636 Under present Rule 47 (C) SCSL RPE, the Prosecutor should provide the Confirming Judge with: (1) the name and particulars of the suspect; (2) a statement of each specific offence of which the named suspect is charged; (3) a short description of the particulars of the offence and (4) a Prosecutor’s case summary briefly setting out the allegations he proposes to prove in making his case. Rule 47 (D) formulates the threshold for the confirmation of the indictment and requires that the Confirming Judge is satisfied that (i) the indictment charges the suspect with a crime or crimes within the jurisdiction of the Special Court; and (ii) that the allegations in the Prosecutor’s case summary would, if proven, amount to the crime or crimes as particularised in the indictment.
that regard, it is clearly preferable to have a solution that settles the jurisdiction at the initial stages of the proceedings.638

It is this author’s conviction that the Appeals Chamber erred in finding Article 1 (1) of the SCSL Statute to merely offer guidance to the Prosecutor in exercising his or her discretion.639 First and foremost, a literal interpretation of Article 1 (1) SCSL indicates that the Prosecutor has the power to prosecute those persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996. Where ‘power’ denotes an ‘ability to act’, it follows that the Prosecutor would not have the ability to act in relation to those persons that do not fall within the category of the persons bearing the greatest responsibility.640 Besides, a contextual interpretation shows that the ‘greatest responsibility’ criterion is to be found in Article 1, which deals with the ‘competence’ of the Special Court. Competence refers to ‘the quality or position of being legally competent; legal capacity or admissibility’. From there, it is argued that the Special Court lacks competence to prosecute persons that do not satisfy the ‘greatest responsibility’ criterion. First and foremost, it is clear that the jurisprudence gives too much weight to the drafting history of the Statute of the Special Court. It is recalled that the travaux préparatoires constitute a ‘supplementary means of interpretation’ under the VCLT, which may only be consulted in precisely delineated situations. While it is this author’s conviction that the meaning of Article 1 (1) is sufficiently clear, it is noted arguendo that the interpretation given to the drafting history of the Statute by the AFRC Trial Chamber is erroneous since the drafting history confirms that the criterion was intended to limit the Court’s personal jurisdiction.641 Overall, if the consideration of whether a person falls within the category of those bearing the greatest responsibility is left entirely to the Prosecutor and such a criterion is not subjected to judicial review, the possibilities for external control over

638 For a similar view (with regard to the ECCC), consider S. MORRISON, Extraordinary Language in the Courts of Cambodia: Interpreting the Limiting Language and Personal Jurisdiction of the Cambodian Tribunal, in «Capital University Law Review», Vol. 37, 2009, p. 600.
641 For a criticism of the interpretation by Trial Chamber II in the AFRC case, see supra, fn. 622 and accompanying text.
Prosecutorial choices are greatly diminished. Other authors equally consider the ‘greatest responsibility’ criterion to delineate personal jurisdiction.\(^\text{642}\)

As in other international criminal tribunals, SCSL Prosecutors did not make their prosecution strategy public.\(^\text{643}\) Besides, the decision of Trial Chamber I mentioned previously, which determined that the ‘greatest responsibility’ concept entails a jurisdictional threshold, did not clarify how such a threshold was to be interpreted.\(^\text{644}\) However, in one decision, some hints were given. In its judgment on a motion for acquittal, Trial Chamber II stated that the expression ‘greatest responsibility’ includes “at a minimum, political and military leaders and implies an even broader range of individuals.”\(^\text{645}\) “This category may even include children between the ages of 15 and 18.”\(^\text{646}\)

Nevertheless, some general trends in the Prosecutor’s selection of cases may be noted. The Court’s first Prosecutor’s decision to not prosecute any children was notable, notwithstanding the Court’s jurisdiction \textit{ratione personae} over children 15 years and older.\(^\text{647}\) Furthermore, the Prosecutor purportedly narrowed the “greatest responsibility” concept out of financial and political considerations, including the stability of the region and the viability of the Special Court.\(^\text{648}\) The Prosecution relied upon some high level participants in the Sierra Leonan


\(^{643}\) T. PERRIELLO and M. WIERDA, the Special Court for Sierra Leone under Scrutiny, ICTJ, March 2006, p. 27.


\(^{646}\) Ibid., par. 36.

\(^{647}\) Article 7 SCSL Statute.

conflict as insider witnesses, rather than prosecuting them. The Prosecutor only targeted those “at the very top”, “rather than targeting individuals who may bear the greatest responsibility for some of the conflict’s most brutal atrocities below the top-level commanders.”

The Special Court has been lauded for its even-handed approach in the investigation and for prosecuting crimes allegedly committed by all sides of the conflict. However, at least one author criticises the consideration of ‘open-ended terms’ such as peace and justice by the SCSL Prosecutor. This blurs the line between politics and law.

§ Limitations to prosecutorial discretion

In line with what was said regarding the ad hoc tribunals, the Prosecutor’s discretion is both guaranteed and limited by his or her independence. In the Taylor case, in applying the same test set forward by the ICTY Appeals Chamber in Delalić et al. (Čelebići case), Trial Chamber II concluded that the defendant had not been singled out for selective prosecution. Besides, the Appeals Chamber of the SCSL clarified that “discretion must be exercised by the Prosecution in good faith, based on sound professional judgment.”

II.4. The ICC: tempered legality

II.4.1. General

From the first sentence of Article 53 ICC Statute (‘Initiation of Investigation’), it follows that a principle of legality is incumbent on the ICC Prosecutor (‘shall […] initiate an investigation’). This formulation seems to rule out any arbitrary decision making by the

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650 Ibid., p. 7.
652 N.J. JURDI, The International Criminal Court and National Courts, Farnham, Ashgate Publishing Limited, 2011, p. 95 (calling the decision to prosecute Charles Taylor an example where it is unclear whether the political aspect influenced the Prosecutor’s decision or not).
653 Article 15 (1) SCSL Statute.
654 SCSL, Judgement, Prosecutor v. Taylor, Case No. SCSL-03-01-T, T. Ch. II, 18 May 2012, par. 84. See supra, Chapter 3, II.2.
Prosecutor regarding the appropriateness of an investigation.\textsuperscript{656} In a similar vein, Article 15 (3) ICC Statute (on the more limited question of the Prosecutor’s \textit{proprio motu} power to initiate an investigation) is drafted in mandatory terms.\textsuperscript{657} Contrary to other international criminal tribunals, any explicit requirement (jurisdictional, admissibility or otherwise) requiring the ICC Prosecutor to focus on a specific category of persons (e.g. ‘those most responsible’) is absent from the ICC Statute. Such a limitation was explicitly rejected during the negotiations on the ICC Statute.\textsuperscript{658} The Statute’s Preamble offers further support for the existence of a principle of obligatory prosecution.\textsuperscript{659}

Nevertheless, as will be shown, the ICC’s procedural design does not offer a straightforward, conclusive answer to the question of whether the Prosecutor is to be guided by a principle of legality or by a principle of opportunity. Rather, as some of the literature acknowledges, it is clear that the principle that guides the Prosecutor depends on the factors the Prosecutor should consider in deciding whether or not to initiate investigations into a certain situation or in deciding whether or not to prosecute a certain case.\textsuperscript{660} At least some discretion is built in and


\textsuperscript{657} Article 15 (3) ICC Statute (“If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation” (emphasis added)). Consider I. STEGMILLER, The Pre-Investigation Stage of the ICC, Berlin, Duncker & Humblot GmbH, 2011, p. 251 (noting that this provision, together with Article 53, suggests “\textit{prima facie} mandatory investigations”). SCHABAS notes that the term ‘shall’ is confusing as far as the \textit{proprio motu} powers of the Prosecutor are concerned. The Prosecutor ‘shall’ proceed after having decided to exercise of discretion under Article 15 ICC Statute. W.A. SCHABAS, An Introduction to the International Criminal Court (3d ed.), Cambridge, Cambridge University Press, 2007, p. 242.


\textsuperscript{659} Consider in particular preambular paragraph 4 of the ICC Statute: “Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished.” Importantly, this duty is coupled with the duty of national states “to exercise criminal jurisdiction” (preambular paragraph 6), which, however, falls short of a ‘duty to prosecute’. See D. ROBINSON, The Mysterious Mysteriousness of Complementarity, in «Criminal Law Forum», Vol. 21, 2010, p. 94. \textit{Contra}, consider e.g. W.A. SCHABAS, Complementarity in Practice: Some Uncomplimentary Thoughts, in «Criminal Law Forum», Vol. 19, 2007, pp. 5, 8, 22-23.

\textsuperscript{660} H. OLÁSOLO, The Prosecutor of the ICC before the Initiation of Investigations: a Quasi-Judicial or Political Body?, in «International Criminal Law Review», Vol. 3, 2003, p. 132; G.-J.A. KNOOPS, Challenging the Legitimacy of Initiating Contemporary International Criminal Proceedings: Rethinking Prosecutorial Discretionary Powers from a Legal, Ethical and Political Perspective, in «Criminal Law Forum», Vol. 15, 2005, p. 577 (holding that “the discretion to prosecute under the ICC Statute amounts to a departure from [the] principle of legality”). Contrary, consider Razesberger, who argues that it follows from the joint reading of Article 15 (1) ICC Statute (“The Prosecutor \textit{may} start investigations \textit{proprio motu}” (emphasis added)) and Article 53 (1) ICC Statute (“The Prosecutor \textit{shall}, […] initiate investigations” (emphasis added)) that the Prosecutor enjoys a margin of discretion with regard to \textit{proprio motu} investigations whereas he or she is under an obligation to investigate with regard to Security Council or state referrals (though still enjoying a margin of appreciation under Article 53 (1) (c) ICC Statute). However, the author does not further clarify the relationship between Article 15 (1) (‘may’) and 15 (3) ICC Statute (‘shall submit to the Pre-Trial Chamber a request for authorization’). See F. RAZESBERGER, The International Criminal Court: The Principle of Complementarity,
the Prosecutor is not under an obligation to investigate and prosecute all crimes within the Court’s jurisdiction. Hence, it is necessary to identify the instances where the ICC Prosecutor possesses some discretion to investigate and/or prosecute the crimes within the Court’s jurisdiction. This requires a closer consideration of the substantive requirements of Article 53 (1) and (2) ICC Statute. Nevertheless, falling short of giving a comprehensive overview of each and every one of these requirements, our focus will be on the question of whether these conditions leave or do not leave discretion to the Prosecutor.

II.4.2. Variables to be considered

§ Receipt of the notitia criminis / start of the preliminary investigation

It is recalled that the wording of Article 15 (2) ICC Statute, on the receipt of the notitia criminis by the Prosecutor, points toward an underlying principle of legality. It was concluded that the Prosecutor does not have the discretion to not conduct a preliminary investigation. If additional information is required to properly assess the notitia criminis, the Prosecutor has no discretion and must conduct a preliminary investigation.

§ Decision whether or not to proceed with an investigation

As previously discussed, it follows from Article 53 (1) ICC Statute that different variables should be considered in assessing whether there is ‘reasonable basis’ to proceed with an investigation into a situation. It was equally pointed out that the same variables have to be
considered in case the Prosecutor decides to make use of his or her *proprio motu* powers.\(^\text{664}\) The first two variables respectively require (1) the Prosecutor to proceed when a ‘reasonable basis to believe’ exists that a crime has been committed and that (2) such a crime falls within the Court’s jurisdiction.\(^\text{665}\) The third variable requires the Prosecutor to consider, prior to the initiation of the investigation, (3) whether the ‘case’ would be *prima facie* admissible.\(^\text{666}\) Below, it will be shown how these variables are based on an objective assessment of the *notitia criminis*.\(^\text{667}\) Contrastly, the last variable to be considered, to know (4) whether 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, leaves broad discretion with the Prosecutor.\(^\text{668}\) Remarkably, in this scheme, the issue of the gravity of the crime should be considered twice, as part of the admissibility consideration (3) and in the assessment of the interests of justice (4). Such a list of variables is exhaustive in nature (‘shall’).\(^\text{669}\) Most of the variables indicated lack a clear definition in the Statute or the RPE. Nevertheless, the precise definition of these terms is a precondition for any meaningful assessment of the discretionary (or non) nature of any of these elements.

As a caveat, it should be noted that prosecutorial discretion not only depends on the particular variable under consideration but equally on the triggering mechanism. Prosecutorial discretion may be more limited in case of referrals.\(^\text{670}\) Unlike communications, in cases where a situation is referred, there is a *presumption* in favour of opening an investigation. This follows from Article 53 (1), which states that the Prosecutor ‘shall […] initiate an investigation unless he or she determines that there is no reasonable basis to proceed’.\(^\text{671}\) Only the review by the PTC of a determination not to proceed is provided for under the Statute, not of an affirmative decision to proceed (as with *proprio motu* investigations).

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\(^\text{664}\) See *supra*, Chapter 3, I.1.

\(^\text{665}\) Article 53 (1) (a) ICC Statute.

\(^\text{666}\) Article 53 (1) (b) ICC Statute.


\(^\text{668}\) Article 53 (1) (c) ICC Statute.


\(^\text{671}\) Article 53 (1) ICC Statute *chapêu and in fine.*
§ Whether 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

The first two variables led the ICC Prosecutor not to proceed with an investigation in the Venezuela situation and the Palestine situation. According to PTC II, any definition on the ‘reasonable basis to believe’ threshold should reflect “the specific purpose underlying this procedure.” Bearing in mind that this threshold is the lowest to be found in the ICC Statute, the information available to the Prosecutor does not have to be ‘comprehensive’ or ‘conclusive’. Rather, (like the reasonable basis to proceed threshold in the chapeau of Article 53 (1)), it serves to prevent unwarranted, frivolous, or politically motivated investigations. Hence, information “need not point towards only one conclusion.” Consequently, PTC II considered the threshold to imply that the Chamber must be satisfied that there is a sensible or reasonable justification for believing that a crime that falls within the Court’s jurisdiction has been or is being committed. However, it remains unclear what the difference between a reasonable basis to proceed in the chapeau of Article 53 (1) and a reasonable basis to believe in Article 53 (1) (a) actually is.

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672 ICC, Annex to Update on Communications Received by the Office of the Prosecutor: Venezuela Response, 9 February 2006, p. 4 (“The available information did not provide a reasonable basis to believe that the requirement of a widespread and systematic attack against any civilian population had been satisfied”); OTP: Situation in Palestine, 3 April 2012 (the Prosecutor concludes that he lacks authority to determine whether Palestine qualifies as a ‘state’, which is a prerequisite for the lodging of an ad hoc declaration accepting the Court’s jurisdiction).


674 Ibid., par. 27. Notably, the Pre-Trial Chamber considered that the ECtHR’s ‘reasonable suspicion’ threshold, upon which the Court’s case law relies for the interpretation of the ‘reasonable grounds to believe’ test under Article 58 ICC Statute, is not suitable for the interpretation of Article 53 (1) (a) ICC Statute, where “[t]he latter was not designed to determine whether a particular person was involved in the commission of a crime within the jurisdiction of the Court, which may justify his arrest” (ibid., par. 32).


676 ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Situation in the Republic of Kenya, Case No. ICC-01/09-19, PTC II, 31 March 2010, par. 34. It should be noted that the PTC interprets this threshold in light of the underlying purpose of the procedure of Article 15 (4) ICC Statute (authorisation by the PTC of proprio motu investigation by the ICC Prosecutor) (ibid., par. 32).

677 Nevertheless, the two concepts do no conflict because the “reasonable basis to believe” test under Article 53 (1) (a) is only one of the elements to be considered under the “reasonable basis to proceed” test in the chapeau of Article 53 (1). M. BERGSMO and P. KRUGER, Article 53, in O. TRIFTERER (ed.), Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article, München, Verlag C.H. Beck, 2008, p. 1069.
Several attempts have been undertaken to further define this parameter. The OTP Draft Regulations suggested the following interpretation: “if there is a realistic prospect that the investigation will produce evidence that will lead to a prima facie case against the potential accused” or “if there is a clear indication that a person has participated in a crime within the jurisdiction of the Court”. However, this suggestion did not make it to the final version of the Regulations of the OTP. Also scholarly writings have proposed different formulas. For example, STEGMILLER argues that a reasonable basis implies that “[i]f there is initial evidence that the event in question occurred and the Prosecutor deems the event to be within the jurisdiction of the Court, the Prosecutor should not decline further proceedings.” In any case, it is clear that the reasonable basis test should objectively be construed and be evidentiary in nature. It should not include a check on the appropriateness of the request to initiate an investigation.

The rest of the parameter’s wording, specifically ‘crimes within the jurisdiction of the court’ does not cause a great deal of difficulty. It is clear that such wording is devoid of any discretionary traits and implies an examination of all necessary jurisdictional requirements (subject-matter, temporal, personal and territorial).

§ Whether the case is or would be admissible under Article 17

The second parameter refers to admissibility. A brief incursion on the content of this criterion is necessary in order to assess whether it leaves room for prosecutorial discretion or not. According to Pre-Trial Chamber II, this admissibility criterion refers mainly to “the scenarios or conditions on the basis of which the court shall refrain from exercising its recognized
jurisdiction over a given situation or case.\textsuperscript{683} It encompasses both complementarity and gravity,\textsuperscript{684} which led TURONE to label it as “fluctuating”. He argues that this criterion may be discretionary or non-discretionary, depending on the case. Where gravity is concerned, the criterion would be “fully discretionary” in nature.\textsuperscript{685} Other authors argue that gravity under Article 53 (1) (b) ICC Statute should be objectively construed. Yet other authors hold that not only the gravity criterion, but also the complementarity criterion, leaves considerable room for discretion.\textsuperscript{686}

Admissibility attaches to different stages, starting with a ‘situation’ up to a concrete ‘case’.\textsuperscript{687} The text of Article 53 (1) (b) suggests that the admissibility at this stage relates to ‘cases’. Nevertheless, a contextual reading of Article 53 (1) ICC Statute affirms that, notwithstanding its wording, the admissibility test at this stage, in principle, relates to a ‘situation’ rather than a specific case.\textsuperscript{688} Indeed, the wording of Article 53 (1) (b) ICC Statute points to an assessment at a more general level than that of a particular ‘case’ (“or would be admissible”).\textsuperscript{689} An interpretation whereby admissibility would be assessed on the basis of a concrete case at the stage when individuals may not yet have been identified would be illogical.\textsuperscript{690} Pre-Trial Chamber II offered different explanations for the peculiar wording of Article 53 (1) (b) ICC Statute. Firstly, based on the travaux préparatoires of the ICC Statute, it appears that ‘case’

\begin{footnotesize}
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  \item\textsuperscript{683} Ibid., par. 40.
  \item\textsuperscript{684} Consider e.g. \textit{ibid.}, par. 52; ICC, Corrigendum to “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation in the Situation in the Republic of Côte d’Ivoire”, \textit{Situation in the Republic of Côte d’Ivoire}, Case No. ICC-02/11-14-Corr, PTC III, 15 November 2011, par. 192 – 206.
  \item\textsuperscript{686} A. MCDONALD and R. HAVEMAN, Prosecutorial Discretion – Some Thoughts on ‘Objectifying’ the Exercise of Prosecutorial Discretion by the Prosecutor of the ICC, \textit{Expert Consultation Process on General Issues Relevant to the ICC Office of the Prosecutor}, 15 April 2003, p. 4.
  \item\textsuperscript{687} ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, \textit{Situation in the Republic of Kenya}, Case No. ICC-01/09-19, PTC II, 31 March 2010, par. 41. Consider also ICC, Decisions on the Applications for Participation in the Proceedings of VPRS1, VPRS2, VPRS3, VPRS4, VPRS5 and VPRS6, \textit{Situation in the DRC}, Case No. ICC 01/04-01-101-tEN-Corr, PTC I, 17 January 2006, par. 65 (situations are generally defined in terms of temporal, territorial and in some cases personal parameters whereas cases comprise specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects. They entail proceedings that take place after the issuance of a warrant of arrest or a summons to appear).
  \item\textsuperscript{688} ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, \textit{Situation in the Republic of Kenya}, Case No. ICC-01/09-19, PTC II, 31 March 2010, par. 44–46. Such reading is supported by a plain reading of Article 13 (a), 14 (1), 15 (5) and (6) and 18 (1) ICC Statute.
  \item\textsuperscript{689} See also J. KLEFFNER, Complementarity in the Rome Statute and National Criminal Jurisdictions, Oxford, Oxford University Press, 2008, p. 197 (“This wording suggests that the provision extends to situations in which the facts can only be determined with such a degree of generality that the question of whether a case is admissible cannot be answered” (emphasis in original)).
  \item\textsuperscript{690} Ibid., p. 197.
\end{itemize}
\end{footnotesize}
was used in all drafts of Article 17 at the Prepcom. It has been argued that, at the Rome conference, there was a ‘prevailing trend’ to not reopen the ‘substance’ of the admissibility provisions drafted by the PrepCom. Therefore, changing the terminology in Article 53 would have required revisiting the terminology of Article 17; hence, it was left unaltered.\(^{691}\)

However, Pre-Trial Chamber II preferred a different explanation and held that the reference to ‘case’ was advertently left in all provisions on admissibility, leaving it up to the Court “to harmonize the meaning according to the different stages of the proceedings.”\(^{692}\) Thus, the Chamber is called upon to construe the meaning of a ‘case’ within the context where it is applied. It continued by explaining that since “it is not possible to have a concrete case involving an identified suspect for the purpose of prosecution, prior to the commencement of the investigation, the admissibility assessment at this stage actually refers to the admissibility of one or more potential cases within the context of a situation.”\(^{693}\) As such “admissibility at the situation phase should be assessed against certain criteria defining a “potential case” such as (i) the groups of persons involved that are likely to be the focus of an investigation for the purpose of shaping the future case(s); and (ii) the crimes within the jurisdiction of the Court allegedly committed during the incidents that are likely to be the focus of an investigation for the purpose of shaping the future case(s).”\(^{694}\)

Logically, such a “selection […] is preliminary in nature and is not binding for future admissibility assessments.”\(^{695}\) “[T]he Prosecutor’s selection on the basis of these elements for the purposes of defining a potential “case” for this particular phase may change at a later


\(^{692}\) Ibid., par. 47.


stage, depending on the development of the investigation." In this sense, one may argue that the complementarity is assessed at this stage "in a general manner." Such an admissibility assessment is of a *prima facie* nature. Nevertheless, at least one scholar argues that a *prima facie* determination of admissibility may sometimes be impossible because of insufficient factual and legal bases on which to decide.

The admissibility assessment encompasses the three grounds of inadmissibility under Article 17 (1) (complementarity, gravity and *ne bis in idem*), which are exhaustive in nature. As held by Pre-Trial Chamber II, the admissibility assessment at this stage first encompasses "an examination as to whether the relevant State(s) is/are conducting or has/have conducted national proceedings in relation to the groups of persons and the crimes allegedly committed during those incidents, which together would likely form the object of the Court’s investigation." Secondly, it includes an assessment of whether the gravity threshold is met or not.

The first admissibility test is that of complementarity, a concept at the core of the ICC’s procedural framework. However, the notion has not been defined in the Statute or the RPE anywhere. Rather, Article 17 ICC Statute outlines the requirements pursuant to which the Court exercises its complimentary jurisdiction. These requirements entail that a case will be inadmissible and that the Prosecutor has to defer to the national authorities in the event that a case is or has been the subject of genuine national proceedings. This assessment is on-going.

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698 G. TURONE, Powers and Duties of the Prosecutor, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court*, Oxford, Oxford University Press, 2002, p. 1151. It may be noted that it follows from Article 15 (4) that in case the Pre-Trial Chamber grants authorisation to the Prosecutor to start an investigation, this assessment is without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.
702 ICC Statute, preambular paragraph 10.
and made on the basis of the underlying facts as they exist at the time but, nevertheless, subject to revision based on any change in those facts. At first, it seems that the principle of complementarity is devoid of any discretional traits.

However, it is to be recalled that the ICC’s practice shows that an ‘inaction’ requirement is to be read into Article 17 (1) ICC Statute. This requirement follows from an a contrario reading of Article 17 (1) (a) – (c) ICC Statute. It results in a ‘two-step’ complementarity test, entailing that a situation (i) will be prima facie admissible only insofar as states having jurisdiction over it have remained inactive in relation to individuals and crimes that are likely to constitute the Court’s future case(s) or (ii) where states are unwilling or unable in the sense

703 ICC, Decision on the Admissibility of the Case under Article 19 (1), Prosecutor v. Kony et al., Situation in Uganda, Case No. ICC-02/04-01/05-377, PTC II, 10 March 2009, par. 28 (“Considered as a whole, the corpus of these provisions delineates a system whereby the determination of admissibility is meant to be an ongoing process throughout the pre-trial phase, the outcome of which is subject to review depending on the evolution of the relevant factual scenario. Otherwise stated, the Statute as a whole enshrines the idea that a change in circumstances allows (or even, in some scenarios compels) the Court to determine admissibility anew”); ICC, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01-1497, PTC II, 25 September 2009, par. 56.

704 Ibid., par. 56.

705 ICC, Corrigendum to “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation in the Situation in the Republic of Côte d’Ivoire”, Situation in the Republic of Côte d’Ivoire, Case No. ICC-02-11-14-Corr, PTC III, 3 November 2011, par. 193-200; ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Situation in the Republic of Kenya, Case No. ICC-01/09-19, PTC II, 31 March 2010, par. 53-54; ICC, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Situation in the DRC, Case No. ICC-01-04-01-07-1497, A. Ch., 25 September 2009, par. 56; ICC, Judgment on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of 30 May 2011 Entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(2)(b) of the Statute”, Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Situation in the Republic of Kenya, Case No. ICC-01-09-01-11-307, A. Ch., 30 August 2011, par. 41 (“It should be underlined, however, that determining the existence of an investigation must be distinguished from assessing whether the State is "unwilling or unable genuinely to carry out the investigation or prosecution", which is the second question to consider when determining the admissibility of a case. For assessing whether the State is indeed investigating, the genuineness of the investigation is not at issue; what is at issue is whether there are investigative steps” (footnote omitted)). Similarly: ICC, Judgment on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of 30 May 2011 Entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(2)(b) of the Statute”, Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Situation in the Republic of Kenya, Case No ICC-01-09-02-11-274, A. Ch., 30 August 2011, par. 40; ICC, Decision on the Admissibility of the Case against Saif Al-Islam Gadaffi, Prosecutor v. Saif Al-Islam Gadaffi and Abdullah Al-Senussi, Situation in Libya, Case No. ICC-01-11-01-11-344-Red, PTC I, 31 May 2013, par. 58.

706 ICC, Decision on the Prosecutor’s Application for a Warrant of Arrest, Article 58, Prosecutor v. Lubanga, Situation in the DRC, Case No. ICC-01-04-01-06, PTC I, 10 February 2006, par. 29, fn. 19 (annexed to ICC, Decision Concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, Prosecutor v. Lubanga, Situation in the DRC, Case No. ICC-01-04-01-06-8, PTC I, 24 February 2006).

of Article 17 (1) (a) – (c), (2) and (3) ICC Statute. This issue of inactivity should be addressed prior to the unwillingness or inability test.

In the Katanga and Ngudjolo Chui case, the Appeals Chamber held that the inaction requirement clearly follows from the wording of Article 17 (1) (a) and (b) and 17 (2) (a), where these provisions refer to a situation in which an investigation or prosecution is being or has been conducted in a state that has jurisdiction. The Appeals Chamber overturned the holding of Trial Chamber II, which seemingly treated inaction as a form of unwillingness. The Appeals Chamber held that an interpretation whereby unwillingness and inability are also considered in case of inaction conflicts with a purposive interpretation of the Statute, which aim is "to put an end to impunity" and to ensure that "the most serious crimes of concern to the international community as a whole do not go unpunished." Such an interpretation can be reconciled with the notion of complementarity, a notion which "strikes a balance between safeguarding the primacy of domestic proceedings vis-à-vis the International Criminal Court on the one hand, and the goal of the Rome Statute to “put an end to impunity” on the other.

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708 ICC, Decision on the Prosecutor’s Application for a Warrant of Arrest, Article 58, Situation in the DRC, Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, PTC I, 10 February 2006, par. 29 annexed to ICC, Decision Concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, Prosecutor v. Lubanga, Situation in the DRC, Case No. ICC-01/04-01/06-8, PTC I, 24 February 2006.

709 Ibid., par. 29; ICC, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, Prosecutor v. Katanga and Chui, Situation in the DRC, Case No. ICC-01/04-01/07-1497, A. Ch., 25 September 2009, par. 78. Consider also ICC, Policy Paper on Preliminary Examinations, 2013, par. 47 (“As confirmed by the Appeals Chamber, the first question in assessing complementarity is an empirical question: whether there are or have been any relevant national investigations or prosecutions”).

710 ICC, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, Prosecutor v. Katanga and Chui, Situation in the DRC, Case No. ICC-01/04-01/07-1497, A. Ch., 25 September 2009, par. 74 – 79 (for example, the Appeals Chamber refers to the wording of Article 17 (1) (a) “is being investigated or prosecuted”; Article 17 (1) (b) “has been investigated […] has decided not to prosecute” (emphasis added). According to the Appeals Chamber “the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. It is only when the answers to these questions are in the affirmative that one has to look to the second halves of sub-paragraphs (a) and (b) and to examine the questions of unwillingness and inability. To do otherwise would be to put the cart before the horse.” (Ibid., par. 78).

711 ICC, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC, Case No. ICC-01/04-01/07-1213, T. Ch. II, 16 June 2009, par. 74-75, 77.

712 Ibid., par. 79 (such interpretation would entail that “[t]he Court would be unable to exercise its jurisdiction over a case as long as the State is theoretically willing and able to investigate and to prosecute the case, even though that State has no intention of doing so. Thus a potentially large number of cases would not be prosecuted by domestic jurisdictions or by the International Criminal court”).
hand.” “If States do not or cannot investigate and, where necessary, prosecute, the International Criminal Court must be able to step in.”

The Appeals Chamber’s stance is convincing. It is in line with the Prosecutor’s understanding of complementarity. ROBINSON, who was responsible for drafting the text that later became Article 17, also shares this understanding. In this regard, he distinguishes a “proceedings requirement”, and argues that in the absence of such proceedings, inadmissibility under the complementarity regime is impossible. However, it should be noted that other commentators reject reading an inaction requirement into Article 17 ICC Statute.

It should be underlined that the admissibility determination at the start of the investigation (‘situation stage’) differs from the admissibility assessment at the ‘case stage’. The latter stage starts with an application by the Prosecutor under Article 58 of the Statute for the issuance of a warrant of arrest or summons to appear, where one or more suspects has or have been identified. At the case stage, the Court’s jurisprudence has held that national proceedings must encompass both the same person and the same conduct (specificity test). Contrastly,

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713 Ibid., par. 85 (the Appeals Chamber added that “there may be merit in the argument that the sovereign decisions of a State to relinquish its jurisdiction in favour of the court may well be seen as complying with the “duty to exercise [its] criminal jurisdiction”, as envisaged in the sixth paragraph of the Preamble.”); ICC, Decision on Application by the government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19 (2) (b) of the Statute, Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Situation in the Republic of Kenya, Case No. ICC-01/09-01-11-101, PTC II, 30 May 2011, par. 44.


715 D. ROBINSON, The Mysterious Mysteriousness of Complementarity, in «Criminal Law Forum», Vol. 21, 2010, p. 68 (“the requirement of national proceedings is not a gloss or innovation; it is expressly stated in 55 words of unambiguous, black and white text in Article 17”). Consider also the detailed textual and teleological interpretation of Article 17: ibid., pp. 82 – 91.


718 “[I]t is a condition sine qua non for a case arising from the investigation of a situation to be inadmissible that national proceedings encompass both the person and the conduct which is subject of the case before the Court.” See ICC, Decision on the Prosecutor’s Application for a Warrant of Arrest, Article 58, Prosecutor v. Lubanga,
at the situation stage, “the contours of the likely case will often be relatively vague because the investigations of the Prosecutor are at their initial stages.” It follows that the admissibility check is more general in nature insofar that it relates to the overall conduct.

While a definition of complementarity is lacking, the factors to be considered are outlined in Article 17 ICC Statute. For example, it is clear from Article 17 (2) (a) – (c) ICC Statute which factors should be considered in assessing unwillingness and that these factors are exhaustive in nature (‘shall consider […] whether one or more of the following exist’). The

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*721* T.O. HANSEN, A Critical Review of the ICC’s Recent Practice Concerning Admissibility Challenges and Complementarity, in «Melbourne Journal of International Law», Vol. 13, 2012, p. 224. In its decision authorising a *proprio motu* investigation in Kenya, Pre-Trial Chamber II concluded that there were no national investigations regarding senior business and political leaders on the serious criminal incidents which are likely to be the focus of the Prosecutor’s investigation. See ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Situation in the Republic of Kenya, Case No. ICC-01/09-19, PTC II, 31 March 2010, par. 187. In a similar vein, in authorising a *proprio motu* investigation in the Republic of Côte d’Ivoire, Pre-Trial Chamber III found that Côte d’Ivoire nor any other state having jurisdiction is conducting or has conducted national proceedings against individuals or crimes that are going to be the likely to constitute the Court’s future case(s). See ICC, Corrigendum to “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation in the Situation in the Republic of Côte d’Ivoire”, Situation in the Republic of Côte d’Ivoire, Case No. ICC-02/11-14-Corr, PTC III, 3 November 2011, par. 206. Hence “there are potential cases that would be admissible in the situation in the Republic of Côte d’Ivoire, if the investigation is authorised.”

*722* Confirming, see M.M. EL ZEIDY, The Principle of Complementarity in International Criminal Law: Origin, Development and Practice, Martinus Nijhoff Publishers, Leiden – Boston, 2008, p. 168 (since unwillingness is the exception to the rule (admissibility), the term should be given a narrow interpretation). *Contra*, consider e.g. D. ROBINSON, Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal
inability assessment is deemed to be exhaustive and linked to the ‘national judicial system’.\textsuperscript{723}
From this, one is tempted to conclude that the complementarity component of Article 53 (1) (b) ICC Statute reflects a principle of legality.\textsuperscript{724}

However, some commentators disagree and have argued that, notwithstanding the fact that the parameters on complementarity are indicated in Article 17 ICC Statute (except for the implicit inaction requirement), the vagueness of many of these parameters, such as ‘an unjustified delay’ or ‘to bring the person concerned to justice’, leave ample discretion with the Prosecutor.\textsuperscript{725} It has been argued that such ‘subjective potential’ is particularly present in the unwillingness criterion, unlike the more objective inability criterion.\textsuperscript{726} While one can agree with this argument, it is important in light of our assessment, that these parameters lend themselves to objective qualification, either through the Court’s jurisprudence, or through the definition in prosecutorial guidelines. Here, one could refer to the distinction between ‘inherent’ and ‘political’ discretion. Underlying this distinction is the understanding that there are some inherent forms of discretion (or a ‘margin of appreciation’) in all systems that adhere to the principle of legality.\textsuperscript{727} In turn, political discretion allows for the consideration of purely political factors.\textsuperscript{728} The limited nature of prosecutorial discretion does not deny the political sensitivity surrounding admissibility considerations, insofar that it may involve a critical assessment of the domestic system of criminal justice.\textsuperscript{729}

\textsuperscript{724} Ibid., p. 294 (noting that “the legal avenue of admissibility does not leave room for the exercise of prosecutorial discretion based on policy grounds”); J. KLEFFNER, Complementarity in the Rome Statute and National Criminal Jurisdictions, Oxford, Oxford University Press, 2008, p. 288.
\textsuperscript{725} See e.g. A. MCDONALD and R. HAVEMAN, Prosecutorial Discretion – Some Thoughts on ‘Objectifying’ the Exercise of Prosecutorial Discretion by the Prosecutor of the ICC, Expert Consultation Process on General Issues Relevant to the ICC Office of the Prosecutor, 15 April 2003, p. 4; I. STEGMILLER, The Pre-Investigation Stage of the ICC, Berlin, Duncker & Humblot GmbH, 2011, p. 295. DELMAS-MARTY even argues that the concept of unwillingness cannot be tested with regard to a situation as a whole. A more specific assessment is necessary: unwillingness to investigate and prosecute persons really responsible. See M. DELMAS-MARTY, Interactions between National and International Criminal Law in the Preliminary Phase of Trial at the ICC, in «Journal of International Criminal Justice», Vol. 4, 2006, p. 5.
\textsuperscript{726} I. STEGMILLER, The Pre-Investigation Stage of the ICC, Berlin, Duncker & Humblot GmbH, 2011, p. 303. On the inability criterion, Stegmiller argues that it is a more fact-driven, objective notion than unwillingness (ibid., p. 309).
\textsuperscript{728} Ibid., p. 90, 109.
\textsuperscript{729} A.M. DANNER, Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court, in «American Journal of International Law», Vol. 97, 2003, p. 517 (quoting Justice Arbour).
The gravity-criterion is another criterion that lacks clarity. Notably, the Prosecutor relied on this gravity concept so as to not proceed with an investigation into the situation in Iraq. It was also the criterion on the basis of which the LRA, and not the UPDF, was selected for investigation in the situation in Uganda. According to Pre-Trial Chamber II, the gravity criterion (Article 17 (1) (d) ICC Statute) “prevents the court from investigating, prosecuting and trying peripheral cases.” At the Article 53 (1) stage, gravity, like admissibility, will be assessed in a general sense, on the basis of ‘potential cases’. Such assessment should be general in nature and compatible with the pre-investigative stage. It entails a generic assessment of whether the individuals or groups of persons that are likely to be the object of an investigation capture those who may bear the greatest responsibility for the alleged crimes committed. With regard to the crimes committed during the incidents that are likely to be the focus of an investigation for the purpose of future cases, Pre-Trial Chambers II and III referred to the interplay between crimes and their context, entailing that the gravity of the crimes will be assessed in the context of the incidents that are likely to be the object of the investigation. It may include quantitative and qualitative parameters, including factors such as (i) the scale of the alleged crimes (including geographic and temporal intensity), (ii) the nature of the unlawful behaviour or of the crimes allegedly committed, (iii) the means employed for executing the crimes (manner of their commission) and (iv) the impact of the crimes and the harm caused to victims and their families. Also, any aggravating

730 ICC, Annex to Update on Communications Received by the Office of the Prosecutor: Iraq Response, 9 February 2006, p. 9 (“The number of potential victims of crimes within the jurisdiction of the Court in this situation […] was of a different order than the number of victims found in other situations under investigation or analysis by the Office”).

731 OTP, Statement by Luis Moreno-Ocampo, 14 October 2005, p. 3 (“The criteria for selection of the first case was gravity. We analyzed the gravity of all crimes in Northern Uganda committed by the LRA and Ugandan forces. Crimes committed by the LRA were much more numerous and of much higher gravity than alleged crimes committed by the UPDF. We therefore started with an investigation of the LRA”).


735 Ibid., par. 60; ICC, Corrigendum to “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation in the Situation in the Republic of Côte d’Ivoire”, Situation in the Republic of Côte d’Ivoire, Case No. ICC-02/11-14-Corr, PTC III, 15 November 2011, par. 204.


737 Ibid., par. 62.
circumstances should be considered.\textsuperscript{738} However, it is evident that this definition of gravity is vague. Hence, it may open the door for discretional traits.

The ordinary meaning of the word gravity refers to “extreme importance”, or “seriousness.”\textsuperscript{739} No indications are to be found in the ICC Statute on the application of this gravity threshold. Furthermore, the drafting history does little to enlighten us. It seems that the concept is vague “by design.”\textsuperscript{740} Its function remains unclear.\textsuperscript{741} It may be read in light of the preambular reference that “the serious crimes of concern to the international community as a whole must not go unpunished.” Besides, Article 1 ICC Statute clarifies that the Court will have “the power to exercise its jurisdiction over persons for the most serious crimes of international concern” and Article 5 (1) limits jurisdiction to “the most serious crimes of concern to the international community as a whole.” Both provisions convey the clear message that not all crimes committed within a situation will be investigated and/or prosecuted.\textsuperscript{742}

Originally, the Prosecution paid little attention to the gravity concept. It arose for the first time in the OTP Policy Paper and in the annex thereof.\textsuperscript{743} The OTP Policy Paper clarified that “[t]he concept of gravity should not be exclusively attached to the act that constituted the crime but also to the degree of participation in its commission.”\textsuperscript{744} In turn, the Regulations of the OTP refer to ‘various factors’, including (i) the scale of the crimes, (ii) the nature of the crimes, (iii) the manner of commission of the crimes as well as (iv) the impact of the crimes.\textsuperscript{745} These factors are further detailed in the ‘Policy Paper on Preliminary


\textsuperscript{740} M.M. DEGUZMAN, Choosing to Prosecute: Expressive Selection at the International Criminal Court, in \textit{«Michigan Journal of International Law»}, Vol. 33, 2012, p. 284 (arguing that “[t]he gravity threshold for admissibility was also aimed at eliding differences of opinion about when jurisdiction is appropriate”).

\textsuperscript{741} I. STEGMILLER, The Pre-Investigation Stage of the ICC, Berlin, Duncker & Humblot GmbH, 2011, p. 319 (“Is it a procedural, legal filter or a policy decision by the Prosecutor?”).


\textsuperscript{743} ICC, Paper on Some Policy Issues before the Office of the Prosecutor (“Policy Paper”), September 2003, p. 7 and ‘Annex to the “Paper on Some Policy Issues before the Office of the Prosecutor”: Referrals and Communications’, p. 3. Consider W.A. SCHABAS, Prosecutorial Discretion and Gravity, in C. STAHN and G. SLUITER (eds.), The Emerging Practice of the International Criminal Court, Leiden, Koninklijke Brill, 2009, pp. 230 -231 (noting that the limited attention to gravity in these two documents “indicate[s] that gravity was not viewed as an issue of significance in the selection of cases and an assessment of their admissibility”).


\textsuperscript{745} Regulation 29 (2) of the Regulations of the OTP.
The Prosecution assesses gravity in light of ‘the gravity of each potential case that would likely arise from an investigation of the situation’. The Prosecution rejects an “overly restrictive” interpretation of the criterion. Firstly, the ‘scale of the crimes’ may be interpreted in light of factors including the number of direct and indirect victims, the damage (bodily or psychological damage in particular) caused to the victims and their families or the geographical or temporal spread. Far from being rigid, the weight to be attributed to each of these factors depends on the facts and circumstances of each case. The last of these criteria (‘impact of the crimes’) seems especially subjective in nature. One author questions the inclusion of this criterion, given that within the context of Article 53 (1) (b) and 17 (1) (d) “primarily quantitative factors” should be applied. Since the latter impact criterion is discretionary in nature, it does not fit in well.

As is well documented, the first substantive discussion of the gravity criterion in the Court’s case law is to be found in the Lubanga case. The gravity of the ‘case’ was assessed by the Pre-Trial Chamber at the Article 58 stage. On the basis of a literal, contextual and teleological interpretation, taking into consideration the existing principles and rules of international law, Pre-Trial Chamber I advanced a number of parameters that should be considered in assessing gravity. According to Pre-Trial Chamber I, the parameters included in this test were not discretionary in nature. This test was later quashed by the Appeals Chamber, insofar that they found the Pre-Trial Chamber’s interpretation of gravity to be flawed. For example, the Appeals Chamber found the ‘social alarm’ criterion that was introduced by Pre-Trial Chamber

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747 Ibid., par. 59.
748 Ibid., par. 62.
750 I. STEGMILLER, The Pre-Investigation Stage of the ICC, Berlin, Duncker & Humblot GmbH, 2011, p. 351 (noting that any attempt to include qualitative factors in the assessment will be controversial).
751 Ibid., pp. 340, 350.
752 ICC, Decision on the Prosecutor’s Application for a Warrant of Arrest, Article 58, Prosecutor v. Lubanga, Situation in the DRC, Case No. ICC-01/04-01/06, PTC I, 10 February 2006, par. 42-63 (annexed to ICC, Decision Concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, Prosecutor v. Lubanga, Situation in the DRC, Case No. ICC-01/04-01/06-8, PTC I, 24 February 2006).
753 Ibid., par. 62.
754 ICC, Judgment on the Prosecutor’s Appeal against the Decision of Pre-Trial Chamber I Entitled: “Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58, Situation in the DRC, Case No. ICC-01/04-169, A. Ch., 13 July 2006, par. 68-84.
to be subjective in nature and not suitable for an objective assessment of the gravity of a crime. Hence, the Appeals Chamber holds the view that gravity, as part of the admissibility requirement of Article 17 (1) (d) (and Article 53 (1) (b)), is to be construed objectively.

While the Appeals Chamber’s reasons for turning down the gravity test proposed by Pre-Trial Chamber I are convincing, the Appeals Chamber failed to subsequently shed light on the exact meaning of the term. An attempt to define the concept was undertaken by Judge Pikis, but his thoughts are enigmatic and fall short of a useful test that can be readily applied. Judge Pikis argues that the term should be interpreted and applied in the context of Article 17. He argues that gravity denotes “weightiness” and that the qualifier “sufficient” in this context implies “a case of sufficient weightiness to merit consideration by the Court.” It refers to cases “unworthy of consideration by the Court.” Judge Pikis understands such cases to include “cases insignificant in themselves; where the criminality on the part of the culprit is wholly marginal; borderline cases.” It refers to crimes that “notwithstanding the fact that [they] satisfy the formalities of the law, i.e. the insignia of the crime, bound up with the mens rea and the actus reus, the acts constituting the crime are wholly peripheral to the objects of the law in criminalising the conduct.” As discussed, Pre-Trial Chambers II and III

755 Ibid., par. 72.
756 The Appeals Chamber found the requirement that the conduct must be systematic or large-scale to be at tension with the express intent of the drafters of the ICC Statute, who chose not to include such jurisdictional requirement in Article 8 (1) ICC Statute on war crimes (‘in particular’). Besides, only with regard to crimes against humanity, a requirement of the ‘systematic’ commission of such crimes is provided for under the ICC Statute. As to the second and third prong of the test, the Appeals Chamber found it difficult to understand why the deterrent effect is highest if all other categories but the “most senior leaders suspected of being the most responsible” cannot be brought before the Court. The Appeals Chamber considered that it would seem more logical to assume that the deterrent effect is highest if no category of perpetrators is per se excluded from potentially being brought before the Court. Rather would an exclusion of many perpetrators severely hamper the preventive or deterrent role of the Court. More generally, the Appeals Chamber concluded that the criterion was based on a flawed interpretation.
757 ICC, Decision on the Prosecutor’s Application for a Warrant of Arrest, Article 58, Situation in the DRC, Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, PTC I, 10 February 2006, Separate and Partly Dissenting Opinion of Judge Georgios M. Pikis, par. 42-63 (annexed to ICC, Decision Concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, Prosecutor v. Lubanga, Situation in the DRC, Case No. ICC-01/04-01/06-8, PTC I, 24 February 2006).
758 Ibid., par. 26.
759 Ibid., par. 39.
760 Ibid., par. 39.
761 Ibid., par. 40.
further clarified the notion of gravity at the situation stage, but failed to remove all of its uncertainties.\footnote{762}

A great deal of the confusion surrounding the gravity concept is due to the fact that the concept appears in several places within the ICC Statute. At the ‘situation stage’, the gravity threshold appears two times: (1) the reference in Article 53 (1) (b) to Article 17 and (2) in Article 53 (1) (c), as part of the interests of justice criterion. It seems logical to assume that these two gravity thresholds at the situation stage should have different meanings.\footnote{763} The wording ‘gravity of the case’ vs. ‘gravity of the crime’ supports the idea of two different interpretations. So far, however, the jurisprudence has not addressed the distinction between these two notions.\footnote{764}

Several scholars favour a ‘two-notions’ approach to the gravity of situations. They argue that because Article 53 (1) (b) refers to the notion of gravity as embedded in Article 17, the notion should be strictly legally construed (‘legal dimension of the gravity concept’).\footnote{765} This concept of gravity is linked to admissibility.\footnote{766} It encompasses a minimum threshold, below which the Prosecutor cannot initiate an investigation into a situation.\footnote{767} In contrast, ‘relative gravity’ or the ‘policy dimension of gravity’ provides the Prosecutor with the discretion to select situations and cases.

\footnote{762} See \textit{supra}, fn. 736, 737 and accompanying text.  
\footnote{763} See e.g. I. STEGMILLER, The Pre-Investigation Stage of the ICC, Berlin, Duncker & Humblot GmbH, 2011, p. 332.  
\footnote{764} In case the Prosecutor requests authorisation from the Pre-Trial Chamber to \textit{ proprio motu} start with an investigation, he or she does not have to present information or supporting materials why proceeding with an investigation would be in the interests of justice.  
\footnote{765} M.M. DEGUZMAN, Gravity and the Legitimacy of the International Criminal Court, in \textit{Fordham International Law Journals}, Vol. 32, 2009, p. 1403 (“gravity plays two essential and distinct roles for the ICC.” The author correctly notes that this legal dimension of gravity is also linked to the jurisdiction of the Court, as evident from e.g. Article 1 or Article 5 ICC Statute); I. STEGMILLER, The Pre-Investigation Stage of the ICC, Berlin, Duncker & Humblot GmbH, 2011, p. 332; WCRO, The Gravity Threshold of the International Criminal Court, March 2008, pp. 51 - 52, 53. \textit{Contra}, consider e.g. J. WOUTERS, S. VERHOEVEN and B. DEMEIYERE, The International Criminal Court’s Office of the Prosecutor: Navigating between Independence and Accountability?, in \textit{International Criminal Law Review}, Vol. 8, 2008, p. 296 (the authors argue that the gravity concept provides the Prosecutor with some discretion (without distinguishing between two notions of gravity)).  
\footnote{766} M.M. DEGUZMAN, Gravity and the Legitimacy of the International Criminal Court, in \textit{Fordham International Law Journal}, Vol. 32, 2009, pp. 1405 – 1406 (this notion of gravity is also to be found in provisions of the ICC Statute on jurisdiction, including Article 1 and 5 ICC Statute).  
\footnote{767} \textit{Ibid.}, p. 1412.
In regards to this second notion of gravity, scholars disagree. STEGMILLER links relative gravity to Article 53 (1) (c) ICC Statute.\textsuperscript{768} DEGUZMAN takes another approach. According to her, Article 53 (1) (c) ICC Statute does not allow for a reconsideration of gravity at the situation stage, since it is only mentioned as one of the factors against which the interests of justice are to be balanced ("Taking into account the gravity of the crime").\textsuperscript{769} In turn, at the ‘case stage’, Article 53 (2) (c) allows for the consideration of relative gravity, since gravity is mentioned as one of the circumstances to be taken into the equation by the Prosecutor.\textsuperscript{770}

Rather, DEGUZMAN argues that relative gravity at the situation stage only attaches to the Prosecutor’s use of his or her own \textit{proprio motu} powers. In other words, unlike for \textit{proprio motu} investigations, relative gravity plays no role in the determination of a reasonable basis to investigate in case of a referral.\textsuperscript{771} However, this distinction, based on the triggering mechanism, is to be rejected, if one agrees that Article 53 (1) ICC Statute applies to all triggering mechanisms.

Scholars are in agreement that only the latter notion allows for discretionary evaluation. In general, it appears that the framework of Article 53 favours discretion as only part of Article 53 (1) (c) (and Article 53 (2) (c)) since the review mechanism of Article 53 (3) would otherwise be undermined.\textsuperscript{772} Hence, STEGMILLER suggests using ‘legal gravity’ with regard to Article 53 (1) (b) and 17 (1) (d) ICC Statute and ‘relative gravity’ with regard to Article 53 (1) (c) ICC Statute.\textsuperscript{773}

\textsuperscript{770}Ibid., p. 1415 ("here the language of the “interests of justice” provision, unlike the similar provision discussed above, does seem to envision a relative gravity analysis. Rather than pitting gravity against the interests of justice, here gravity is one of the circumstances the Prosecutor should consider in determining the interests of justice").
\textsuperscript{771}Ibid., p. 1410 ("As such, the Prosecutor does not appear to have discretion to reject a referred situation at this preliminary stage based on a relative gravity determination"). The author holds the view that Article 53 (1) does not apply to \textit{proprio motu} investigations by the Prosecutor. Otherwise, the Prosecutor would have to start an investigation in all cases where information provided demonstrates a reasonable basis for an investigation (an “absurd result” according to the author). Rather, the author proposes an interpretation of Article 15 ICC Statute whereby an intermediate step is read into it, between the receipt of information and the determination of a reasonable basis. During this step, the Prosecutor will, pursuant to Rule 48 ICC RPE, consider the factors of Article 53 (1), not yet the existence of a reasonable basis. According to the author, such interpretation is not precluded by the wording of Article 15 ICC Statute. Article 15 (1) reads “may initiate investigations \textit{proprio motu}”, whereas Article 15 (3) (“of the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit...”) refers to the stage where an assessment of the reasonable basis to proceed has been made (after the intermediate step).
\textsuperscript{772}Ibid., p. 335.
Conversely, TURONE argues that if the Prosecutor decides to not initiate investigations because the case is inadmissible due to insufficient gravity, his or her decisions have to be considered as falling under Article 53 (1) (c), including all of the relevant consequences. This includes the duty to notify the Pre-Trial Chamber in case the Prosecutor’s determination is solely based on the ‘interests of justice’ criterion.\(^7\) This view takes the risk of side-lining the Pre-Trial Chamber into consideration. TURONE holds that the reference to gravity in Article 53 (1) (c) should be \textit{lex specialis} to the reference in Article 53 (1) (b) since the latter reference is stated in a generic manner and the former in a very specific manner.\(^8\) Under Article 53 (1) (c), gravity should be considered together with, \textit{inter alia}, the interests of victims.\(^9\) However, as argued above, provided that the two notions of gravity under Article 53 (1) do have different meanings, the better view seems to clearly distinguish between a strictly legal and a relative conception of gravity. In order to preserve the Pre-Trial Chamber’s function, it is necessary to clearly define and distinguish both notions.

As to the nature of the gravity test under Article 53 (1) (b), STEGMILLER argues that such a threshold should be low, in contrast to relative gravity, which should encompass a high threshold considering the number of potential cases.\(^7\) Judge PIKIS also favours a low threshold, throwing out cases “unworthy of consideration by the International Criminal Court.” Setting a high threshold would detract from the deterrent effect of the ICC and other objectives, including the preambular order to ensure that the most serious crimes do not go unpunished.\(^7\) STEGMILLER further argues that the assessment pursuant to Article 53 (1) (b) (situations) and Article 53 (2) (b) (cases) should basically be the same. Such an interpretation deviates from the view expressed by Pre-Trial Chambers II and III that at the

\(^7\) G. TURONE, Powers and Duties of the Prosecutor, in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), The Rome Statute of the International Criminal Court. Oxford, Oxford University Press, 2002, pp. 1154-1156. According to Turone, such duty to notify the Pre-Trial Chamber thus also applies to cases of ‘insufficient gravity of the case’, since Article 53 (1) (c) is \textit{lex specialis}.


‘situation stage’, gravity should be assessed in a more general manner. One commentator holds the view that the gravity of the crime should be measured quantitatively, in order to remove any prosecutorial discretion. It was discussed how the Pre-Trial Chambers have, so far, interpreted the gravity of the crimes at the situation stage to encompass both qualitative and quantitative parameters.

When looking at the application of situational gravity in practice, it seems that the ICC Prosecutor also applies two notions of gravity. Nevertheless, the Prosecutor fails to clearly distinguish between these different dimensions of gravity. For example, the Prosecution interpreted the gravity consideration in Article 53 (1) (b) as allowing it to compare different situations and in casu, not to proprio motu initiate an investigation into the situation of British war crimes in Iraq. However, gravity considerations under Article 53 (1) (b) ICC Statute should be limited to the question of whether the gravity threshold is met, according to clear and pre-set criteria, rather than allowing the Prosecutor to select between different situations.

Similarly, in deciding to pursue crimes committed by the LRA and not those allegedly committed by government forces in the situation in Uganda, the ICC Prosecutor compared the gravity of the crimes committed.

In sum, gravity under Article 53 (1) (b) should be distinguished from relative gravity under Article 53 (1) (c) ICC Statute. Although the ICC Judges have started to interpret the notion of gravity in Articles 17 and 53 (1) (b) ICC Statute, its precise meaning remains rather unclear. The Court’s case law should further elucidate its meaning. In turn, as far as relative gravity is

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781 See supra, fn. 737 and accompanying text.
785 OTP, Statement by Luis Moreno-Ocampo, 14 October 2005, p. 3 (“The criteria for selection of the first case was gravity. We analyzed the gravity of all crimes in Northern Uganda committed by the LRA and Ugandan forces. Crimes committed by the LRA were much more numerous and of much higher gravity than alleged crimes committed by the UPDF. We therefore started with an investigation of the LRA”).
concerned, jurisprudence has yet to start interpreting this term. In the absence of a further elaboration of this proposed interpretation, the gravity criterion is not devoid of subjective traits (e.g. how should the Prosecutor or the Court determine which ‘potential cases’ are ‘peripheral’). Thus, in practice, gravity under Article 53 (1) (b) still leaves some room for the Prosecutor to manoeuvre.

§ The ‘interests of justice’

As with the other language used in Article 53, the term ‘interests of justice’ has been left undefined, leaving it open to various interpretations. For example, it is unclear as to whether the drafters envisaged a narrower conception of justice (as referring only to ‘criminal justice’) or a broader one (including ‘restorative justice’ interests). As one author puts it, the ‘interests of justice’ parameter offers full discretion to the Prosecutor and “moves along a principle of largely discretionary criminal action”, characteristic of common law jurisdictions. Another author points out that the factor is “quite elastic”. Hence, it is clear that the undefined nature of the concept leaves considerable discretion to the Prosecutor.

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787 No definition can be found in the Statute or the RPE. See F. RAZESBERGER, The International Criminal Court: The Principle of Complementarity, Frankfurt am Main, Peter Lang, 2006, p. 103; R. J. GOLDSTONE and N. FRITZ, ‘In the Interests of Justice’ and Independent Referral: The ICC Prosecutor’s Unprecedented Powers, in «Leiden Journal of International Law», Vol. 13, 2000, p. 662 (noting that the word ‘justice’ means different things to different persons).
788 Consider e.g. J. WOUTERS, S. VERHOEVEN and B. DEMEYERE, The International Criminal Court’s Office of the Prosecutor: Navigating between Independence and Accountability?, in «International Criminal Law Review», Vol. 8, 2008, p. 292 (the authors argue that the lack of such definition may prove to be one of the fundamental flaws in the Statute, “fatally leading the Prosecutor to be forced to take position in a politically sensitive areas without clear legal guidelines”); I. STEGMILLER, The Pre-Investigation Stage of the ICC, Berlin, Duncker & Humblot GmbH, 2011, pp. 357-358 (who focuses on two opposing views on the interests of justice, namely justice in the narrow sense (criminal or retributive justice) and justice in the broader sense (transitional or restorative justice)); H. OLÁSOLÓ, The Prosecutor of the ICC before the Initiation of Investigations, in «International Criminal Law Review», Vol. 3, 2003, p. 140 (arguing that, on the basis of the Preamble of the ICC Statute, there can be no doubt that criminal prosecutions were preferred over amnesties).
Some scholars even hold that this discretion is ‘unlimited’.\textsuperscript{792} However, this is not entirely accurate given that the discretion inherent in the ‘interests of justice’ criterion is checked by the prosecutorial duty to inform the Pre-Trial Chamber if a decision to not initiate investigations or prosecutions was solely gauged on the ‘interests of justice’.\textsuperscript{793}

It has been argued that the concept was included at the Rome conference to accommodate concerns that criminal prosecution may not always be the most appropriate course of action.\textsuperscript{794} Admittedly, the interpretation of this concept is “one of the most complex aspects of the Treaty.”\textsuperscript{795} It raises difficult issues, such as whether the reliance on alternative justice mechanisms qualifies as ‘unwillingness’ in the sense of Article 17 ICC Statute.

The Prosecution’s understanding of the ‘interests of justice’ concept is to be found in its ‘Policy Paper on the Interests of Justice’.\textsuperscript{796} The Prosecution considers the interests of justice to be a “course of last resort”.\textsuperscript{797} The paper stresses the exceptional nature of the ‘interests of justice’ criterion but does not engage in a detailed discussion of the factors that underlie it. Nevertheless, it sets out the four main considerations underlying the OTP’s interpretation. Firstly, (i) the paper stresses the exceptional nature of the ‘interests of justice’ criterion and sets out a general presumption in favour of investigations and prosecutions. This implies that there is no precondition that an investigation is in the interests of justice. Besides, (ii) criteria are to be guided by the object and purposes of the ICC Statute (prevention of serious crimes of concern to the international community through ending impunity) and (iii) a distinction should be drawn between ‘interests of justice’ and ‘interests of peace’. Lastly, (iv) the OTP is under a duty to notify the Pre-Trial Chamber of any decision not to investigate or prosecute in

\textsuperscript{793} If the decision not to proceed is based solely on article 53, paragraph 1 (c) or 2 (c), the Prosecutor shall promptly inform the Pre-Trial Chamber in accordance with Rules 105 (4) and (5), and 106 respectively. See more in detail, \textit{infra}, Chapter 3, II.4.3.
\textsuperscript{796} \textit{Ibid}. Note that the policy paper expressly states on page 1 that it does not give right to any rights in litigation.
\textsuperscript{797} \textit{Ibid}. p. 9.
the interests of justice. The OTP paper deliberately does not detail all of the factors to be considered when a situation arises, provided that “each situation is different”. The Policy paper goes some way in clarifying the meaning of the factors explicitly named in Article 53 (1) (c) ICC Statute. With regard to the ‘gravity of the crime’ factor, the paper refers (with regard to the situations stage) to the same considerations as with regard to Article 53 (1) (b) and 17 (1) (d) ICC Statute (to know the scale of the crimes, the nature of the crimes, the manner of their commission and their impact). Such overlap is understandable, insofar that the reference was seemingly only inserted to satisfy the concern of delegations “that the interests underlying the complementarity principle sufficiently permeate the Statute.” Nevertheless, it was previously concluded that the inclusion of gravity considerations into Article 53 (1) (c) would not make any sense if the criterion would be identical to the gravity requirement found in Article 53 (1) (b) ICC Statute. Hence, a two-notions approach was favoured.

As far as the ‘interests of victims’ consideration is concerned (Article 53 (1) (c) and Article 53 (2) (c) ICC Statute), the paper notes that victims have the interest ‘to see justice done’ but acknowledges also that other considerations, such as the safety of witnesses, should be measured in. Hence, while this factor will normally weigh in favour of investigation or prosecution, this will not always be the case. With regard to the ‘particular interests of the accused’ (Article 53 (2) (c) ICC Statute), the OTP’s strategy is to focus on those bearing the greatest degree of responsibility, and to consider factors including the alleged status or hierarchical level of the accused or his or her alleged implication in particularly serious or notorious crimes (‘significance of the role of the accused in the overall commission of the crimes and the degree of the accused’s involvement’). In some instances however, these

800 Ibid., p. 5.
802 OTP Policy paper on the interests of justice, September 2007, p. 5.
803 Ibid., p. 5. Compare P. WEBB, who notes that it follows from national practice, that the interests of victims can also be a factor not to prosecute a case: See P. WEBB, The ICC Prosecutor’s Discretion not to Proceed in the “Interests of Justice”, in «Criminal Law Quarterly», Vol. 50, 2005, p. 330.

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‘particular interests of the accused’ will prevent the accused from being prosecuted; for example, if the accused were to be terminally ill or is the victim of serious human rights abuses. The factor is not mentioned in Article 53 (1) (c), given that, at that stage, the accused will often not be known yet. Furthermore, depending on the facts of the case or the situation under consideration, the Prosecutor may consider (i) other justice mechanisms and (ii) peace processes.

In the literature, disagreement persists as to how to interpret the ‘interests of justice’; interpretations of the term point in different directions. Again, disagreement boils down to the question of whether the notion should be strictly or broadly construed. While a narrow conception is victim-oriented and ignores reconciliation and alternative justice mechanisms, in a broad conception, the Prosecutor considers the implications that an investigation or prosecution will have on peace and security, including reconciliatory processes. For the purposes of this section, it suffices to emphasize that most scholars subscribe to a broader approach to the ‘interests of justice’. So construed, the ‘interests of justice’ concept allows

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805 Ibid., pp. 7-9. However, the paper equally stresses that the ‘interests of justice’ concept should not be construed too broadly as to encompass all peace and security related issues where the broader matter of international peace and security clearly falls within the mandate of institutions other than the Prosecutor (ibid., p. 9).
807 M.R. BRUBACHER, Prosecutorial Discretion in the International Criminal Court, in «Journal of International Criminal Justice», Vol. 2, 2004, p. 83 (noting that “[s]triking the balance between concerns of international peace and security and material factors, including the gravity of the offence and the interests of victims, will be a persistent dilemma for the ICC”).
808 Consider e.g. R.J. GOLDSSTONE and N. FRITZ, ‘In the Interests of Justice’ and Independent Referral: The ICC Prosecutor’s Unprecedented Powers, in «Leiden Journal of International Law», Vol. 13, 2000, pp. 655-567; D. ROBINSON, Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court”, in «European Journal of International Law», Vol. 14, 2003, p. 488 (arguing that this “appears to be the only supportable solution”); I. STEGMILLER, The Pre-Investigation Stage of the ICC, Berlin, Duncker & Humblot GmbH, 2011, p. 367 and following (arguing that the concept should encompass alternative forms of justice); F. RAZESBERGER, The International Criminal Court: The Principle of Complementarity, Frankfurt am Main, Peter Lang, 2006, p. 105 (holding that “the notion is not only confined to interests of retributive criminal justice but a broader concept that includes alternative means has to be taken into account”); P. WEBB, The ICC Prosecutor’s Discretion not to Proceed in the “Interests of Justice”, in «Criminal Law Quarterly», Vol. 50, 2005, pp. 338 – 340; B.D. LEPARD, How Should the ICC Prosecutor Exercise his or her discretion? The Role of Fundamental Ethical Principles, in «John Marshall Law Reviews», Vol. 43, 2010, p. 565 (the author argues that fundamental ethical principles show a close connection between peace and human rights, which justifies a broader interpretation of the ‘interests of justice’ concept than the ICC Prosecutor has adopted); A. MCDONALD and R. HAVEMAN, Prosecutorial Discretion – Some Thoughts on ‘Objectifying’ the Exercise of Prosecutorial Discretion by the Prosecutor of the ICC, Expert Consultation Process on General Issues Relevant to the ICC Office of the Prosecutor, 15 April 2003, p. 5 (“It could well be decided in a particular case that justice is served not by prosecuting before the ICC or even by stimulating prosecution in a particular case but by the encouragement of alternative disputes mechanisms”); A.K.A. GREENAWALT, Justice Without Politics? Prosecutorial Discretion and the International Criminal Court, in «NYU Journal of International Law &
public policy considerations and the broader interests of the international community to be taken into account. It obliges the Prosecutor to consider the political ramifications of investigations and/or prosecutions.

When starting an investigation, the Prosecutor does not need to show that the investigation is in the interests of justice. Only in case of a decision that continuing with an investigation is not in the interests of justice, the Prosecution should inform the Chamber of the reasons thereof. Even though this criterion leaves the Prosecutor considerable discretion, it avoids arbitrariness by requiring ‘substantial reasons’. This implies that the Prosecutor produce convincing reasons not to open an investigation. Besides, further supervision is guaranteed since the Pre-Trial chamber may ex officio review a determination not to proceed with an investigation, solely based on the interests of justice.

It is important to realise that the ‘interests of justice’ criterion allows the Prosecutor to refuse to investigate a situation where a State remains inactive. Indeed, based on the ‘two step’ approach to admissibility, it was concluded that Article 17 ICC Statute implies that a case is admissible where a State has remained inactive. The interests of justice criterion offers the Prosecutor the necessary leeway not to investigate or prosecute. This equips him or her with an indispensable instrument for preventing States from ‘dumping’ cases onto the Prosecutor’s desk. Hence, the ‘interests of justice’ leaves the discretion of whether or not to investigate (or prosecute) a case to the Prosecutor and offers leeway for different approaches, including

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810 Ibid., p. 81.
811 ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation not the Situation in the Republic of Kenya, Situation in the Republic of Kenya, Case No. ICC-01/09-19, PTC II, 31 March 2010, par. 63 (“the Prosecutor does not have to present reasons or supporting material in this respect”); OTP Policy paper on the interests of justice, September 2007, pp. 2-3 (“While the other two tests (jurisdiction and admissibility) are positive requirements that must be satisfied, the “interests of justice” is not. The interests of justice test is a potential countervailing consideration that might produce a reason not to proceed even where the first two are satisfied. This difference is important: the Prosecutor is not required to establish that an investigation or prosecution is in the interests of justice” (emphasis in original)).
812 Article 53 (1) in fine ICC Statute; Rule 105 (4) – (5) ICC RPE.
813 Article 53 (3) (b) ICC Statute. See infra, Chapter 3, II.4.3.
815 Ibid., pp. 92-93.
burden-sharing between the international and national levels. Absent strict rules on when, in case of inaction, national action is preferred (a certain preference for national prosecutions emerges from the ICC Statute’s Preamble), it is for the Prosecutor to adopt guidelines in that regard.

In conclusion, it appears that the ‘interests of justice’ criterion leaves considerable discretion to the Prosecutor. However, it also appears that further clarification is necessary regarding the precise elements that are included in the ‘interests of justice’ and how they should be balanced against each other.

§ Criteria for the selection of cases under Article 53 (2) ICC Statute

In general, the criteria which are to be found in Article 53 (2) ICC Statute (which has ‘cases’ as its subject) refer to similar considerations as Article 53 (1) ICC Statute. Nevertheless, the parameters are stricter than those for the commencement of an investigation. At this stage, the contours of the likely cases will have been shaped further. For example, rather than a ‘reasonable basis’, Article 53 (2) ICC Statute refers to a stricter ‘sufficient basis to seek a warrant of summons under Article 58’ as the threshold for proceeding with a prosecution.

In a similar vein, the consideration of admissibility under Article 53 (2) is more specific in nature. Indeed, Pre-Trial Chamber II confirmed that while the admissibility check at the situation stage encompasses ‘potential cases’, “the test is more specific when it comes to an admissibility determination at the ‘case’ stage, which starts with an application by the Prosecutor under article 58 of the Statute for the issuance of a warrant of arrest or summons to appear, where one or more suspects has or have been identified.” At this stage, the Appeals

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816 Consider e.g. the proposal by C. STAHN on a positive form of complementarity, allowing flexibility and a managerial division of labour between the Court and domestic jurisdictions. See C. STAHN, Complementarity: A Tale of Two Notions, in «Criminal Law Forum», Vol. 19, 2008, p. 88.
817 D. ROBINSON, The Mysterious Mysteriousness of Complementarity, in «Criminal Law Forum», Vol. 21, 2010, p. 98 (admitting that several answers are possible to this question).
819 Ibid., p. 418. It follows from Regulation 29 (5) and 33 of the Regulations of the OTP that in selecting potential cases within a situation, the Prosecution will mutatis mutandis apply the same steps as for the selection of situations and will analyse issues of jurisdiction, admissibility (including gravity) and the interests of justice.
821 ICC, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19 (2) (b) of the Statute, Prosecutor v. William Samoei Ruto, Henry Kiprono Kooge and
Chamber determined that a case ‘being investigated’ must cover the same individual and substantially the same conduct as alleged in the proceedings before the Court.\footnote{ICC, Judgment on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of 30 May 2011 Entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(2)(b) of the Statute”, Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Situation in the Republic of Kenya, Case No ICC-01/09-02/11-274, A. Ch., 30 August 2011, par. 40. As previously noted, the test was first adopted by Pre-Trial Chamber I in the Lubanga case. See ICC, Prosecutor v. Lubanga, Situation in the DRC, Case No. ICC-01/04-01/06, PTC I, 10 February 2006, par. 37; see also ICC, Decision on the Prosecution Application under Article 58 (7) of the Statute, Prosecutor v. Harun and Kushayb, Situation in Darfur, Sudan, Case No. ICC-02-05-01-07-e, PTC I, 27 April 2007, par. 24 – 25. In the Katanga and Ngudjolo Chui case, the Appeals Chamber declined to rule on the correctness of the test where this was not determinative for the appeal. See ICC, Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, Case No. ICC-01/04-01/07-1497, A. Ch., 25 September 2009, par. 81.} With regard to gravity under Article 53 (2) (b) ICC Statute (legal gravity), the same considerations apply but where the test here refers to specific cases, the test is narrower.\footnote{I. STEGMILLER, The Pre-Investigation Stage of the ICC, Berlin, Duncker & Humblot GmbH, 2011, p. 424.} Hence, gravity in the sense of Article 17 (1) (d) is relevant to two parts of the proceedings: (i) the initiation of the investigation of a situation and (ii) cases arising out of that situation.\footnote{I. STEGMILLER, The Pre-Investigation Stage of the ICC, Berlin, Duncker & Humblot GmbH, 2011, p. 425.}

In line with Article 53 (1), discretion regarding what cases to prosecute mainly enters through the consideration of the ‘interests of justice’. The criterion, which is to be found in Article 53 (2) (c), is broader than Article 53 (1) (c). The formulation ‘taking into consideration all circumstances’ clearly evidences the non-exhaustive nature of the enumeration of factors to be considered.\footnote{Ibid., p. 425.} Besides, insofar that Article 53 (2) deals with cases and not situations, the assessment occurs at a more advanced stage of individualisation.\footnote{Ibid., p. 425.} Criteria expressly listed are: (1) the gravity of the crime, (2) the interests of victims, (3) the age of the alleged perpetrator or the infirmity of the alleged perpetrator and (4) his or her role in the alleged crime. Similar to the interests of justice criterion under Article 53 (1) (c) ICC Statute, this
criterion is fully discretionary in nature.\textsuperscript{827} For example, with regard to the role of the accused person in the crime, “[i]t is possible that the role of a suspect, while satisfying all elements of the crime, was so insignificant as to make it counter to the interests of justice to proceed with a prosecution.”\textsuperscript{828}

II.4.3. Review of and control over prosecutorial discretion

From the foregoing, it can be concluded that some of the factors that the Prosecutor must consider when proceeding with an investigation or a prosecution are discretionary in nature. In this regard, at the Rome conference, review of prosecutorial discretion was considered essential. The need for accountability structures was mainly driven by the fear of an overactive Prosecutor.\textsuperscript{829} Besides, some forms of accountability have been built in to prevent political interference and to counter criticisms of political influences.\textsuperscript{830} Below, a distinction will be drawn between institutional and judicial forms of accountability.

As for \textit{judicial forms of accountability} are concerned, an important check on prosecutorial discretion is provided through the vehicle of Article 53 (3) ICC Statute. In case of a referral, it allows the Pre-Trial Chamber to review the Prosecutor’s decision to not proceed with an investigation or prosecution, upon request by the referring state or the Security Council within 90 days following notification of the decision.\textsuperscript{831} If a decision is solely based on the interests of justice, the Pre-Trial Chamber may itself review a decision to not proceed within 180 days following notification.\textsuperscript{832} It is clear that this review mechanism requires that the Pre-Trial Chamber, referring state or Security Council be informed of any prosecutorial decision taken


\textsuperscript{828} M. BERGSMO and P. KRUGER, Article 53, in O. TRIFTERER (ed.), Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article, München, Verlag C.H. Beck, 2008, p. 1073 (for example a case against the abettor while the main perpetrator is still at large where this could put witnesses important to the case at risk).

\textsuperscript{829} C. STAHN, Judicial Review of Prosecutorial Discretion: Five Years on, in C. STAHN and G. SLUITER (eds.), The Emerging Practice of the International Criminal Court, Leiden, Koninklijke Brill, 2009, p. 265 (“It was essentially the idea of Pre-Trial Chamber control which managed to overcome objections by those delegations which were hesitant to accept”).

\textsuperscript{830} \textit{Ibid}. , p. 253.

\textsuperscript{831} Rule 107 ICC RPE.

\textsuperscript{832} Article 53 (3) (b) and Rule 109 ICC RPE.
It is in the discretionary nature of this review obligation (‘may review’) that potentially lays its most important limitation. No obligation is incumbent on the Pre-Trial Chamber to act upon a request. On such an occasion, the Pre-Trial Chamber may request the Prosecutor to transmit the necessary information or documents in his possession or the summaries thereof and should take measures to protect the documents and the safety of the victims, witnesses and family members.\(^{834}\) The Pre-Trial Chamber may also seek further observations from States or the Security Council.\(^{835}\)

In case of a request by a State or by the Security Council, the Pre-Trial Chamber may either confirm the decision by the Prosecutor or request the reconsideration of that determination, an obligation which the Prosecutor should fulfil as soon as possible. Nothing prevents the Prosecutor from reaching the same conclusion upon reconsideration. While Article 53 (3) (a) only speaks of referrals, nothing seems to prevent the information provider (other than a State Party or the Security Council) from filing a motion to the Chamber prospecting the reasons for which a judicial review on its own initiative could be desirable and practicable.\(^ {836}\)

If a negative decision is solely based on Article 53 (1) (c), the Prosecution’s decision may only become effective if the Pre-Trial Chamber confirms it.\(^{837}\) Consequently, the Pre-Trial Chamber’s revision may lead to a judicial order to investigate (‘shall’).\(^ {838}\) Such a possibility is known to some civil law jurisdictions. Admittedly, the term ‘investigation on judicial command’ only makes sense in case of a notitia criminis referred by another source. Besides, the possibility of an investigation on judicial command may be problematic insofar that nothing prevents the Prosecutor from conducting a “perfunctory and superficial” investigation.\(^ {839}\)

\(^{833}\) As provided for under Article 105 and 106 ICC RPE respectively. Consider also C. STAHN, Judicial Review of Prosecutorial Discretion: Five Years on, in C. STAHN and G. SLUITER (eds.), The Emerging Practice of the International Criminal Court, Leiden, Koninklijke Brill, 2009, pp. 271 – 272 (noting that the review mechanism is at risk of “remain[ing] largely academic in the absence of prosecutorial notification”).

\(^{834}\) With regard to Article 53 (3) (a), consider Rule 107 (2) and (3) ICC RPE; with regard to Article 53 (3) (b), consider Regulation 48 (1) of the Court Regulations.

\(^{835}\) Rule 107 (4) ICC RPE.


\(^{837}\) Article 53 (3) (b) ICC Statute. Again, in such case, the Pre-Trial Chamber has to be informed of a decision not to investigate, based solely on Article 53 (1) (c) ICC Statute. See Rule 105 (4) ICC RPE and Article 53 (1) in fine ICC Statute.

\(^{838}\) Rule 110 (2) ICC RPE.

Some commentators have argued that there is a duty to review the Prosecutor’s decision (“In order to be valid such decisions must be confirmed by the PTC”). Others have interpreted this provision as implying that the decision not to proceed with an investigation or prosecution only becomes effective if the Pre-Trial Chamber reviews the Prosecutor’s decision. However, a textual interpretation suggests that judicial review is not a prerequisite for the Prosecutor’s decision to be effective (in case a decision not to proceed is solely based on the ‘interests of justice’). Logically, the second sentence of paragraph (b) of Article 53 (3) ICC Statute (“[i]n such a case”) refers to the situation outlined in the previous sentence, and leaves discretion to the Pre-Trial Chamber whether or not to review such a decision. Overall, however, the structure of Article 53 (3) suggests that closer scrutiny is provided for in case of a decision not to investigate or prosecute, solely based on the interests of justice.

Furthermore, it has been argued that the reference to Article 53 (1) (c) and Article 53 (2) (c) in Article 53 (3) (b) ICC Statute should be interpreted in a broad manner, so as to also include ‘gravity’ as included in Article 53 (1) (b) and 53 (2) (b) ICC Statute. It was previously stated that such an interpretation may be preferable to prevent side-lining the Article 53 (3) review mechanism. However, strictly distinguishing between legal and relative gravity may achieve a similar result.

It has been argued that the different treatment of situations when the Prosecutor’s decision not to proceed is based solely on the interests of justice is necessary given that such a decision may involve political or other reasons. Thus, this decision requires a check by the Pre-Trial Chamber. It is necessary to control the Prosecutor’s actions, otherwise, the Prosecutor’s role

843 Consider e.g. J. WOUTERS, S. VERHOEVEN and B. DEMEYERE, The International Criminal Court’s Office of the Prosecutor: Navigating between Independence and Accountability?, in «International Criminal Law Review», Vol. 8, 2008, p. 301 (referring to the substantial overlap between gravity under Article 17 (1) (d) and considerations regarding the ‘interests of justice’).
844 See supra, Chapter 3, II.4.2.
may become unduly politicised.845 As one scholar rightly points out, the difficulty of the Pre-Trial Chamber’s and/or the Appeals Chamber’s review task consists of the inherently political nature of the decision not to investigate or prosecute.846 This is particularly true when a decision not to investigate or prosecute was solely gauged on the ‘interests of justice’ criterion—which was found to be fully discretionary in nature—, making it difficult for the Pre-Trial Chamber to meaningfully exercise its review task. Moreover, the lack of clear definitions for many other criteria in Article 53 will also hamper the Pre-Trial Chamber. Since the Pre-Trial Chamber lacks an independent investigative function, it has to rely on the Prosecutor’s information in order to review the Prosecutor’s decision.847 Considering that the Article 53 (3) review mechanism has not yet been applied in practice, it will be important for the Pre-Trial Chamber to put forward its own understanding of the criteria considered, including the ‘interests of justice’.

To meaningfully exercise its task, Regulation 48 of the Regulations of the Court encompasses the Pre-Trial Chamber’s power to ‘request the Prosecutor to provide specific or additional information or documents in his or her possession […] that the Pre-Trial Chamber considers necessary in order to exercise the functions and responsibilities set forth in Article 53 (3) (b)’. However, the existence of such a power, in the absence of any express decision not to proceed, has occasionally been contested by the Prosecutor.848 For example, in the Uganda situation, Pre-Trial Chamber II convened a status conference in order to seek further information from the Prosecutor confirming that the Prosecution did not intend to further

846 H. OLÁSOLO, The Prosecutor of the ICC before the Initiation of Investigations, in «International Criminal Law Reviews», Vol. 3, 2003, pp. 142 – 143 (Olásolo points out that this judicial review mechanism has turned both the Pre-Trial Chamber and the Appeals Chamber into policy makers. Hence, while providing a guarantee against prosecutorial abuse, it generates additional problems by turning the judges into legislators).
848 Consider e.g. ICC, OTP Submission Providing Information on the Status of the Investigation in Anticipation of the Status Conference to be Held on 13 January 2006, Situation in Uganda, PTC II, Case No. ICC-02/04-01/05-76, 11 January 2006, par. 8.
investigate past crimes and that the investigation was nearing completion. The Prosecution subsequently denied that a decision not to prosecute further crimes had been taken.

Apart from Article 53 (3), Article 15 (4) ICC Statute provides for an independent review of the Prosecutor’s decision to investigate with regard to *proprio motu* investigations. Such a review is evidentiary in nature. It provides for some checks and balances by ensuring judicial supervision when the Prosecutor wants to initiate an investigation in the absence of a referral. Its underlying purpose is to prevent “unwarranted, frivolous, or politically motivated investigations”. In order to allow the Pre-Trial Chamber to exercise its supervisory functions, the Prosecutor is required to submit a request for authorisation in writing. Consequently, the Pre-Trial Chamber should authorise the investigation with respect to all or parts of the request. This supervisory function of the Pre-Trial Chamber does not affect the investigative or prosecutorial functions of the Prosecutor. It entails a two-fold assessment of whether there is a reasonable basis to proceed and whether the case appears to fall within the jurisdiction of the Court. Again, at this stage, ‘the case’ refers to potential cases within

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853 Rule 50 (2) ICC RPE and Regulation 49 of the Court Regulations. A request shall contain: (a) A reference to the crimes which the Prosecutor believes have been or are being committed and a statement of the facts being alleged to provide the reasonable basis to believe that those crimes have been or are being committed; (b) A declaration of the Prosecutor with reasons that the listed crimes fall within the jurisdiction of the Court. The statement of the facts shall indicate, as a minimum: (a) The places of the alleged commission of the crimes, e.g. country, town, as precisely as possible; (b) The time or time period of the alleged commission of the crimes; and (c) The persons involved, if identified, or a description of the persons or groups of persons involved. An appendix should be included which includes ‘if possible’: (a) The chronology of relevant events; (b) Maps showing relevant information, including the location of the alleged crimes; and (c) An explanatory glossary of relevant names of persons, locations and institutions.
855 Article 15 (4) ICC Statute.
the situation under consideration. Such a form of judicial review is not traditionally provided for in national criminal justice systems. In those inquisitorial criminal justice systems where the investigation is headed by an investigating judge or examining judge, the power to initiate investigations remains the prerogative of the Prosecutor (or the victim).

In regards to the first prong of the assessment (existence of a ‘reasonable basis to proceed’), Judge de Gurmendi considered that insofar that such an assessment encompasses the consideration of the same factors previously considered by the Prosecutor in submitting a request for authorisation, it “should not become a duplication of the preliminary examination conducted by the Prosecutor.” Rather, the examination should be limited by “the underlying purpose of providing a judicial safeguard against frivolous or politically-motivated charges.” As such, Judge de Gurmendi disagreed with the majority’s assessment. On the basis of supporting materials provided by the Prosecutor and the victims’ representatives, the majority made a number of conclusions regarding crimes that were not presented by the Prosecutor. According to Judge de Gurmendi, “the Chamber should not attempt to duplicate the preliminary analysis conducted by the Prosecutor for the purpose of initiating an investigation, in particular by seeking to identify additional alleged crimes and suspects on its own.” The Chamber has not been endowed with investigative or fact-finding powers. Hence, it “has no independent way to assess the reliability, credibility or completeness of the


857 P. HAUCK, Judicial Decisions in the Pre-Trial Phase of Criminal Proceedings in France, Germany and England: a Comparative Analysis Responding to the Law of the International Criminal Court, Baden-Baden, Nomos Verlagsgesellschaft, 2008, p. 33 (the author notes several exceptions, including the referral of a case to an investigating judge by another investigating judge, who declared him or herself incompetent, but these exceptions do not confer the power to the investigating judge to initiate the investigation).


859 Ibid., par. 16.


Moreover, information that is gathered by the Prosecutor during the pre-investigation stage is non-exhaustive. Any facts or incidents that are mentioned in the Prosecutor’s request only serve to provide concrete examples of the gravest types of criminality that were allegedly committed in the situation. They are, by no means, any indication of the cases that will later be selected for prosecution.863 One commentator describes the undertaking by the Pre-Trial Chamber as superfluous.864 It is evident that the broad interpretation given by Pre-Trial Chamber II to its functions regarding the authorisation of *proprio motu* investigations by the Prosecutor neglects the supervisory nature of this procedural step.

A second category of restraints on prosecutorial discretion consists of institutional forms of accountability. These checks on prosecutorial discretion are of an indirect nature. Political accountability is ensured since the Prosecutor operates under the scrutiny of the Assembly of States Parties (‘ASP’). The ASP exercises supervision over the ICC Prosecutor through election865, professional responsibility866 or through its control over the ICC’s budget.867 The professional accountability mechanism is weak given the high threshold (“serious misconduct and serious breach of duty”) and the requirement of an absolute majority vote in the ASP.868

DANNER (who speaks in this respect of “formal accountability”), argues that this form of institutional accountability may be useful in cases of manifest abuses “but likely will have

862 Ibid., par. 35 - 39.
863 Ibid., par. 31 - 34.
864 R. RASTAN, The Jurisdictional Scope of Situations before the International Criminal Court, in «Criminal Law Forum», Vol. 23, 2012, pp. 26 – 27 (“The specification by the Chamber of further examples is merely illustrative of a threshold that has already been met. The task of the Chamber is to identify the outer parameters of the situation, not to fill in the individual pieces thereof”).
865 Article 42 (4) ICC Statute.
866 Article 46 (1) (a) ICC Statute and Rule 24 ICC RPE.
867 Article 112 (2) (d) ICC Statute. Some authors have noted that the use by the ASP of budgetary allocations to exercise pressure on the Prosecutor would be in violation of Article 42 ICC Statute which establishes the Prosecutor’s full authority over the administration and management of the office (Article 42 (2) ICC Statute). See e.g. H. OLÁSOLO, The Prosecutor of the ICC before the Initiation of Investigations, in «International Criminal Law Reviews», Vol. 3, 2003, p. 108.
868 Rule 24 ICC RPE and Article 46 (2) (b) ICC Statute respectively. Note that the requirement of an absolute majority is lower than the two-third majority needed for the removal of Judges (Article 46 (2) (a) ICC Statute). A.M. DANNER, Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court, in «American Journal of International Law», Vol. 97, 2003, p. 523 (noting, more generally, that “in many significant cases, member states have proven ineffective at constraining or overriding decisions made by international institutions.” On the ICC Prosecutor, DANNER notes that “[i]t is doubtful […] whether the ASP will in fact act as a strong check on the Prosecutor” (ibid., p. 524)). OLÁSOLO takes another view, calling the requirement of an absolute majority “a source of major concern”, when compared to the position of judges, who can be removed by only a two-third majority of the members of the ASP. See H. OLÁSOLO, The Prosecutor of the ICC before the Initiation of Investigations, in «International Criminal Law Reviews», Vol. 3, 2003, p. 107.
little impact on a Prosecutor who is simply ineffective or demonstrates poor judgment.”

STAHN also refers to process-based checks and balances that follow from prosecutorial obligations towards several actors. These actors include states and victims. They may restrain the Prosecutor, even if he or she is not directly accountable to these actors. Consider, for example, the existence of notification duties (e.g. the right of information providers to be informed of the result of the prosecutorial information analysis), the possibility for states to challenge the admissibility of a case, the possibility to challenge a decision not to proceed with an investigation and prosecution, etc. In addition, DANNER (who speaks in this regard of ‘pragmatic accountability’) refers to the choice that actors have as to how to react to prosecutorial decisions, namely, to cooperate or not. He refers to “enforcement weaknesses” in the state cooperation regime. The need of cooperation by states forces the Prosecutor to apply rules uniformly. A more powerful tool allowing for external political pressure is Article 16 ICC Statute which allows the Security Council to prevent or stop an investigation or prosecution for a renewable period of 12 months under Chapter VII.

Lastly, forms of institutional accountability may be found in forms of (self) regulation. In line with many national jurisdictions, prosecutorial guidelines may be adopted defining the exercise of prosecutorial discretion. ‘Incentives’ for the ICC Prosecutor to adopt guidelines can be found in the statutory framework. In practice, various policy documents have

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871 A.M. DANNER, Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court, in «American Journal of International Law», Vol. 97, 2003, p. 525 (these forms of accountability are informal (implied rather than explicit), dynamic (as they may change over time) and hence diachronic in nature. Aside from the decision of a state to cooperate or not with the ICC, DANNER notes that pragmatic forms of accountability towards states are to be found in the various control mechanisms built-in into the ICC Statute as well as in forms of financial accountability).

872 Ibid., p. 530.


876 First, Article 42 (2) ICC Statute seems to authorise the Prosecutor to adopt certain office policies. Secondly, Rule 105 (5) and 106 (2) require the Prosecutor to provide reasons for a decision, pursuant to Article 53 ICC Statute, not to investigate a situation or not to prosecute a case.
already been adopted by the Prosecution, including a policy paper on the ‘interests of justice’. 877

II.4.4. Organisational safeguards and constraints of prosecutorial discretion

Firstly, it is clear that an independent Prosecutor is important for safeguarding prosecutorial discretion. In this regard, it is important to underline that the OTP is set up as a separate organ of the ICC. It operates independently and is responsible for receiving referrals and any substantiated information on crimes within the Court’s jurisdiction, for examining referrals and information and for conducting investigations and prosecutions before the Court. 878 The Prosecution cannot seek or act on instructions from any external source. 879 As one author notes, this provision also implies that “the selection process is not influenced by the presumed wishes of any external source, the importance of the cooperation of any particular party, or the quality of cooperation provided” and that the selection process “is conducted exclusively on the available information and evidence and in accordance with the Statute criteria and the policies of the Office.” 880 In that regard, the ICC Prosecutor is in a worse position than his counterparts at the ad hoc tribunals insofar that he or she finds himself in a weaker position vis-à-vis states. Besides, while the Prosecutor exercises “full authority over the management and administration of the Office” he or she does not enjoy similar institutional protections as his or her national counterparts. 881 The Prosecutor has labelled independence to be one of the guiding principles in the course of preliminary investigations. Additionally, the Prosecutor also interpreted the principle to imply that decisions ‘shall not be influenced or altered by the

877 OTP Policy Paper on the Interests of Justice, September 2007. Consider also e.g. ICC, Paper on Some Policy Issues before the Office of the Prosecutor (“Policy Paper”), September 2003. It is noted that many of these prosecutorial guidelines include a disclaimer, stating that these guidelines “[d]o not give rise to rights in litigation and [are] subject to revision based on experience and in the light of legal determinations by the Chambers of the Court.” See OTP Policy paper on the interests of justice, September 2007, p. 1; OTP Policy Paper on Victims’ Participation, April 2010, p. 2.
878 Article 34 (c) ICC statute; Article 42 (1) ICC Statute (emphasis added) and Regulation 13 of the Regulations of the OTP.
879 Article 34 (c) ICC statute; Article 42 (1) ICC Statute (emphasis added) and Regulation 13 of the Regulations of the OTP.
presumed or known wishes of any party, or in connection with efforts to secure cooperation’. 882

Secondly, linked to this, is the principle of impartiality. 883 It has been interpreted by the Prosecutor to imply that (i) the OTP will not draw any adverse distinction based on a ground prohibited under the Statute and (ii) will consistently apply methods and criteria irrespective of the states or parties involved or the person(s) or group(s) concerned. 884 Besides, geopolitical implications as well as geographical spread between situations are not considered to be relevant criteria. 885 As such, this understanding of impartiality seeks to guarantee the two linked principles of non-discrimination and equality before the law; both of which derive from human rights law and can be traced in the ICC Statute. 886

Thirdly, a principle guiding the preliminary examination and the selection of cases (situations) is that of objectivity. 887 It implies that information received is analysed in an objective manner. According to DEGUZMAN, where situations and cases are selected on the basis of vague criteria such as ‘gravity’ or the ‘interests’ of justice’, it may well be impossible to uphold a principle of objectivity in practice. 888

II.4.5. Prosecutorial practice

While an in-depth analysis of the Prosecutor’s selection of cases surpasses the aims of the present undertaking, the most important features of it will shortly be outlined. 889 Notably, the Prosecutor has faced criticism on the selection of cases. 890 The Office of the Prosecutor consistently stated that it would focus its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility, such as the leaders of the state or organisation

883 Article 42 (7) and 21 (3) ICC Statute.
886 Article 67 (1) ICC Statute and Article 21 (3) ICC Statute. See supra, Chapter 3, II.2, fn. 560.
887 ICC, Policy Paper on Preliminary Examinations, 2013, par. 30 - 33. This principle of objectivity is to be distinguished from the principle of objectivity that can be found in Article 54 (1) (a) ICC Statute.
889 The selection of cases is to be distinguished from the selection of situations, a feature which is only found at the ICC.
890 Generally on this issue: ibid., pp. 265 – 320.
allegedly responsible for those crimes (‘focused investigations’ approach).\textsuperscript{891} Such a focus derives from the Prosecutor’s own convictions, rather than from the ICC Statute itself.\textsuperscript{892} Unlike other international(ised) criminal tribunals, no clear focus on those bearing the greatest responsibility can be discerned in the ICC Statute. Nevertheless, even though the ICC Appeals Chamber rejected the idea of such a criterion as a legal requirement (as part of the gravity requirement), it is a legitimate criterion in the exercise of prosecutorial discretion.\textsuperscript{893} Such an approach is coupled with encouraging national prosecutions. Notwithstanding the Prosecutor’s proclaimed focus on those bearing the greatest responsibility, it may be feared that the Prosecutor occasionally made use of the inactivity of the state to pick up minor cases.\textsuperscript{894}

Besides, the Prosecutor clarified that, within a situation, a number of incidents are selected, allowing short investigations in order to limit the number of persons put at risk because of their interactions with the OTP.\textsuperscript{895} In deciding what incidents to select for trial, the OTP undertakes “to provide a sample that reflects the gravest incidents and the main types of victimization.”\textsuperscript{896} Besides, a ‘sequenced approach’ was adopted by the OTP in 2006, implying that cases within a situation are selected according to their gravity.\textsuperscript{897}
Finally, it is recalled that at the beginning, the OTP adopted a policy of inviting and encouraging voluntary referrals. While commentators agree that such a policy made sense in the early stages of the Court’s lifetime, they argue that such a policy should be re-evaluated. Besides, it is important for the Prosecution to underline the fact that it will investigate all sides of the conflict in case of a self-referral, in order to prevent the mechanisms from being hijacked for domestic political (or military) reasons.

II.5. The Extraordinary Chambers in the Courts of Cambodia (ECCC): moderate legality

Articles 1 and 2 of the ECCC Agreement and Article 1 and 2 new ECCC Law expressly limit the jurisdiction of the Extraordinary Chambers *ratione personae* to ‘senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979’. The formulation indicates that ‘senior leaders’ and ‘those who were most responsible’ are two distinct categories. This seems to imply that senior leaders and those who were most responsible for the crimes and serious violations will be subject to trial. The formulation is consistent with the article’s attempt to draft a clear and comprehensive list of crimes and criminals that will be subject to prosecution. The formulation is also consistent with the OTP’s policy of involving territorial states in the referral process and the referral of cases to the Court. The formulation is consistent with the OTP’s policy of involving territorial states in the referral process and the referral of cases to the Court.

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898 See OTP, Report on the Activities Performed During the first three Years (June 2003 – June 2006), 12 September 2006, p. 7 ("the Prosecutor adopted the policy of inviting and welcoming voluntary referrals by territorial states as a first step in triggering the jurisdiction of the Court. This policy resulted in referrals for what would become the Court’s first two situations: Northern Uganda and the DRC. The method of initiating investigations by voluntary referral has increased the likelihood of important cooperation and on-the-ground support"); A. CASSESE, Is the ICC Still Having Teething Problems?, in «Journal of International Criminal Justice», Vol. 4, 2006, p. 436 (the author highlights that the biggest advantage lies in the “likelihood of cooperation from the national authorities”); P. GAETA, Is the Practice of ‘Self-Referrals’ a Sound Start for the ICC?, in «Journal of International Criminal Justice», Vol. 2, 2004, pp. 950 - 951 (noting that the same level of cooperation cannot always be expected from where the Prosecutor relies on his or her proprio motu powers or even compared to the other two remaining triggering mechanisms, especially where the Court determined, contrary to the will of that state, that it is not willing or able to conduct genuine national proceedings. Such makes on-site investigation an arduous undertaking and may lead the Prosecutor to principally investigate sources outside the territorial state).

899 In this regard, GAETA notes that this practice may have assisted in reassuring opponents of the Court which fear the design of the Prosecutor’s role and function. See P. GAETA, Is the Practice of ‘Self-Referrals’ a Sound Start for the ICC?, in «Journal of International Criminal Justice», Vol. 2, 2004, p. 950. For a similar view, see J. WOUTERS, S. VERHOEVEN and B. DEMEYERE, The International Criminal Court’s Office of the Prosecutor: Navigating between Independence and Accountability?, in «International Criminal Law Review», Vol. 8, 2008, p. 289 (arguing that “[i]n the long term […] the Prosecutor should not rely primarily on state referrals but use his proprio motu power, even if this entails entering into conflict with the States concerned: it is in the use of the proprio motu powers that his real force resides.” At the same time, the authors acknowledge that “this is a long-term process, requiring the Prosecutor to increase his Office’s legitimacy before actually resorting to using these powers”). Consider also: I. STEGMILLER, The Pre-Investigation Stage of the ICC, Berlin, Duncker & Humblot GmbH, 2011, p. 143.


901 Emphasis added.
leaders may be prosecuted solely on the basis of their status. In this regard, the formulation differs from the “most senior leaders suspected of being most responsible” criterion that was proposed by ICC Pre-Trial Chamber I.

From the legislative history of the ECCC, it follows that the Group of Experts, whose advice had been sought by the UN General Assembly, had suggested a focus on “those persons most responsible for the most serious violations of human rights during the reign of Democratic Kampuchea.” Such a formulation would be broad enough not only to include the senior leaders who had responsibility over the abuses but also “those at lower levels who are directly implicated in the most serious atrocities.” This was also the understanding during the discussion of the ECCC Agreement and changes to the ECCC Law in the Cambodian parliament. As one former negotiator explained, “at no point did negotiators state to each other that any suspect must be both a senior leader of Democratic Kampuchea and an individual most responsible for the serious violations.” Hence, both the clear wording of the ECCC texts as well as the drafting history confirm that there are two categories of suspects that the ECCC has jurisdiction over. In Duch, the Supreme Court Chamber confirmed, on the basis of the drafting history, that the term “senior leaders of Democratic Kampuchea and those who were most responsible” refer to two categories but added that these categories overlap. It further specified these two categories as, on one hand, the “senior leaders of the

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902 Critical, see X.A. ARANBURU, Gravity of Crimes and Responsibility of the Suspect, in M. BERGSMO (ed.), Criteria for Prioritizing and Selecting Core International Crimes Cases, Oslo, Torkel Opsahl Academic EPublisher, 2010, p. 222 (“It is excessive to cast suspicion on leaders just because of their formal status without qualifying clearly what circumstances justify a presumption of individual responsibility”).

903 See ICC, Decision on the Prosecutor’s Application for a Warrant of Arrest, Article 58, Prosecutor v. Lubanga, Situation in the DRC, Case No. ICC-01/04-01/06, PTC I, 10 February 2006, par. 42-63 (annexed to ICC, Decision Concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the case against Mr. Thomas Lubanga Dyilo, Prosecutor v. Lubanga, Situation in the DRC, Case No. ICC-01/04-01/06-8, PTC I, 24 February 2006).


905 ECCC, Appeal Judgement, KAING Guek Eav (Duch), Case No. 001/18-07-2007/ECCC/SC, Supreme Court Chamber, 3 February 2012, par. 53.


908 ECCC, Appeal Judgement, KAING Guek Eav (Duch), Case No. 001/18-07-2007/ECCC/SC, Supreme Court Chamber, 3 February 2012, par. 57 (referred to “two categories of Khmer Rouge officials that are not dichotomous”); ECCC, Decision on Personal Jurisdiction and Investigative Policy Regarding Suspect, Case No. 003/07-09-2009-ECCC-OCIJ, OCIJ, 2 May 2012, par. 13.
Khmer Rouge who are among the most responsible” and “non-senior leaders of the Khmer Rouge who are also among the most responsible” on the other. However, contrary to the Supreme Court Chamber’s argumentation, it is unclear how this latter distinction is supported by the travaux préparatoires.

The Expert Group preferred any such limitation to offer guidance to the Co-Prosecutors, and opposed an express limitation of the ECCC’s personal jurisdiction in that regard. From the same report, it follows that the Group of Experts advised to focus on Khmer Rouge officials. However, from a combined literal and contextual interpretation, it clearly follows that these limitations encompass jurisdictional hurdles for the Co-Prosecutors in bringing cases. Most clearly, Article 2 of the ECCC Agreement stipulates that the Extraordinary Chambers “have personal jurisdiction over senior leaders of Democratic Kampuchea and those who were most responsible.” Besides, these limitations can be found in the Chapter of the ECCC Law that concerns the ‘competence’ of the Extraordinary Chambers. In line with the argument made regarding the personal jurisdiction of the Special Court, it is argued here that this is a clear indication of the jurisdictional nature of the limitations.

Such an interpretation was initially confirmed by the ECCC’s case law. However, in Duch, the Supreme Court Chamber somewhat confusingly arrived at another conclusion. It

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912 Ibid., par. 219 (1).
913 Emphasis added.
914 Article 2 new ECCC Law.
distinguished between three elements of the phrase “senior leaders of Democratic Kampuchea and those who were most responsible” in dealing with the question as to whether this phrase is jurisdictional in nature. Firstly, (i) there is the requirement of being a Khmer Rouge official; a requirement for the two categories of persons discussed above. Secondly (ii), there is the requirement of being ‘most responsible’, which, according to the Supreme Court Chamber, applies to the two categories of persons. Lastly, (iii) there is the requirement of being a ‘senior leader’, which only applies to one of the two categories. As to the first term, the Appeals Chamber concluded that it is precise and leaves little room for discretion. Hence, it is justiciable before the Trial Chamber and establishes a jurisdictional threshold.917 As far as the second term ‘most responsible’ is concerned, the Supreme Court Chamber concluded that it cannot be jurisdictional in nature.918 However, the reasons provided by the Chamber are not convincing. The Chamber pointed out that the term is not defined anywhere, leaving a great deal of room for discretion. Consequently, it is not justiciable.919 Of course, there is some truth in such a statement. However, one can ask whether it is not for the jurisprudence to further clarify and detail this notion. For example, with mixed success, the ICC jurisprudence undertook steps to carve out its understanding of ‘gravity’ as found within the ICC Statute.920 Moreover, it is unclear how the vague nature of the term alone would suffice to cast aside the express and unambiguous wording of the provision (labelling it a jurisdictional threshold).921

the category of those ‘most responsible’ through their participation in the implementation of the CPK’s common purpose). Also the national Co-Prosecutor has understood these limitations to be jurisdictional in nature. See the argumentation in ECCC, Annex I: Public Redacted Version - Considerations of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71, Disagreement No. 001/18-11-2008-ECCC/PTC, 18 August 2009, par. 32. 917 ECCC, Appeal Judgement, KAING Guek Eav (Duch), Case No. 001/18-07-2007/ECCC/SC, Supreme Court Chamber, 3 February 2012, par. 61.
918 Ibid., par. 62 – 74; ECCC, Decision on Personal Jurisdiction and Investigative Policy Regarding Suspect, Case No. 003/07-09-2009-ECCC-OCIJ, OCIJ, 2 May 2012, par. 12.
919 ECCC, Appeal Judgement, KAING Guek Eav (Duch), Case No. 001/18-07-2007/ECCC/SC, Supreme Court Chamber, 3 February 2012, par. 62. Even less convincing, the Supreme Court Chamber argues that such jurisdictional requirement would be in violation of the prohibition of a defence of superior orders under the ECCC Law, an argumentation which confuses jurisdictional thresholds with criminal defences. 920 See supra, Chapter 3, II.4.2.
921 The Supreme Court Chamber lists some counter-indications to argue that the term is only a policy consideration. First, the Chamber refers to the independence of the Co-Prosecutors and the Co-Investigating Judges. However, while it is uncontested that the Co-Prosecutors and Co-Investigating Judges should exercise their functions independently, it is unclear how such principle of independence can tell us anything on the jurisdictional nature or not of the ‘most responsible’ term. Where these actors should act independently, they should do so within certain predetermined jurisdictional boundaries. Secondly, the Supreme Court Chamber refers to the drafting history, more particular the recommendation by the Group of Experts that the term should not be understood to be a jurisdictional threshold (as highlighted in the main text). Here, it is to be recalled that the travaux préparatoires are a supplementary means of interpretation. Hence, where the wording is clear and unambiguous, there is no need to refer to it. The argument the Experts’ Report “is consistent with the terms of [the UN-RGC Agreement and the ECCC Law]” is plainly wrong: it clearly contradicts the texts of the two documents (“that the Extraordinary Chambers have personal jurisdiction...”). Lastly, the Supreme Court
Lastly, as far as the term ‘senior leaders’ is concerned, the Supreme Court Chamber similarly concluded that the term exclusively operates as “investigatorial and prosecutorial policy”.\textsuperscript{922} The Supreme Court Chamber relied on the vague nature of the term and on the drafting history.\textsuperscript{923} Again, the Supreme Court failed to explain how the drafting history, a supplementary means of interpretation, can brush aside the clear wording of the provision concerned, labelling it a jurisdictional threshold. Overall, rather than clarify, the Supreme Court Chambers’ findings seem to further obfuscate the matter.\textsuperscript{924}

As to the exact meaning of ‘senior leaders of Democratic Kampuchea’, the legislative history indicates that the term was intended to target a “small number” of people from the leadership of the Democratic Kampuchea, the selection of individuals being left to the Co-Prosecutors.\textsuperscript{925} Such a limitation is in keeping with the recommendations from the Group of Experts for Cambodia.\textsuperscript{926} The second category of persons ‘most responsible’ was intended to encompass those who were not ‘senior leaders’ but who committed crimes as serious as the crimes that were committed by the senior leaders.\textsuperscript{927}

\textsuperscript{922} Ibid., par. 77.
\textsuperscript{923} Ibid., par. 75 – 78.
\textsuperscript{924} For a similar view, consider e.g. OSJI, Recent Developments in the Extraordinary Chambers in the Courts of Cambodia, February 2012, p. 9 (to be found at http://www.opensocietyfoundations.org/sites/default/files/cambodia-eccc-20120223.pdf, last visited 10 February 2014) (“The SCC’s determination of this matter is alarming, not least because it potentially narrows the scope for review of the decision(s) of the co-investigating judges in relation to a highly controversial issue: the selection of individuals for investigation and prosecution.”); Amnesty International, Cambodia: Khmer Rouge Judgment Welcome, but Raises Human rights Concerns, 3 February 2012 (to be found at http://www.amnesty.org/en/news/cambodia-khmer-rouge-judgment-welcome-raises-human-rights-concerns-2012-02-03, last visited 4 July 2012) (warning that “confusing findings relating to the Tribunal’s personal jurisdiction over former Khmer Rouge may have implications for other cases”).
\textsuperscript{926} See the Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135, 18 February 1999, par. 110 (“Therefore, fourth, the Group recommends that any tribunal focus upon those persons most responsible for the most serious violations of human rights during the reign of Democratic Kampuchea. This would include senior leaders with responsibility over the abuses as well as those at lower levels who are directly implicated in the most serious atrocities. We do not wish to offer a numerical limit on the number of such persons who could be targets of investigation. It is, nonetheless, the sense of the Group from its consultations and research that the number of persons to be tried might well be in the range of some 20 to 30. While the decisions on whom and when to indict would be solely within the discretion of a prosecutor, the Group believes that the strategy undertaken by the Prosecutor of any tribunal should fully take into account the twin goals of individual accountability and national reconciliation”).
\textsuperscript{927} Ibid., par. 109.
In interpreting the ‘senior leaders’ and ‘most responsible’ requirements, a parallel can be drawn with the ‘most senior leaders suspected of being most responsible’ requirement that can be found at the ICTY and which was previously discussed. However, while Rule 28 (A) ICTY RPE combines the two terms, the ECCC documents clearly intended those two concepts to refer to separate categories. Besides, while Article 28 (A) refers to the ‘most senior leaders’, the ECCC documents refer to ‘senior leaders’. However, some further guidance as to the interpretation can be found in the consideration of the level of responsibility by the ICTY Referral Bench in Rule 11bis proceedings. In general, in this assessment, factors considered include the position or function of the accused in the civil, political or military hierarchy de jure and de facto, the role and level of their participation in the crimes committed as well as the permanence of their position. The seniority of the leaders will depend on the organisational structure, including not only the de jure but also the de facto position of the person. They should have exercised such a degree of authority that it would be appropriate to describe them as being among the ‘most senior’, rather than ‘intermediate’ leaders.

Furthermore, based on a literal interpretation of the term ‘most responsible’, commentators have concluded that this term could be understood as including “those individuals who bear

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928 Consider in particular Rule 28 (A) ICTY RPE. Consider also UN, Security Council Resolution 1503, U.N. Doc S/RES/1503, 28 August 2003, preamble paragraph 7 and other documents referred to, see supra, Chapter 3, II.2. Consider e.g. the references to Rule 28 (A) ICTY RPE in ECCC, Decision on Personal Jurisdiction and Investigative Policy Regarding Suspect, Case No. 003/07-09-2009-ECCC-OCJJ, OCIJ, 2 May 2012, par. 16 – 25.

929 Consider the interpretation by the Trial Chamber in ECCC, Judgement, KAING Guek Eav (Duch), Case No. 001/18-07-2007/ECCC/TC, T. Ch., 26 July 2010, par. 17 et seq.; S. MORRISON, Extraordinary Language in the Courts of Cambodia: Interpreting the Limiting Language and Personal Jurisdiction of the Cambodian Tribunal, in «Capital University Law Reviews», Vol. 37, 2009, p. 617 (referring to the fact that the two categories were inserted to ensure that KAING “Duch” Guek Eav and other high-ranking commanders of S-21 could be prosecuted).

930 Pursuant to Rule 11bis (C) ICTY RPE.


933 ICTY, Decision on Savo Todović’s Appeal against Decisions on Referral under Article 11bis, Prosecutor v. Ratcević and Todović, Case No. IT-97-25/1-AR11bis.1, A. Ch., 4 September 2006, par. 20.
the greatest responsibility for causing the crimes that occurred during the temporal jurisdiction of the court." The term ‘most responsible’ seems broader than the equivalent formulation in the Special court’s procedural framework, namely, the “greatest responsibility” requirement. The ECCC Supreme Court Chamber clarified that “it denotes a degree of criminal responsibility in comparison to all Khmer Rouge officials responsible for crimes within the ECCC’s jurisdiction.” Notably, the Co-Investigating Judges alleged that Duch fell within this category of persons. It was the scope of these two categories of persons (‘senior leaders’ and ‘most responsible’) that led to a split between international and national Judges and Prosecutors of the ECCC and to the endless controversy as to whether the Extraordinary Chamber had jurisdiction over Cases 003 and 004.

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936 ECCC, Appeal Judgement, KAING Guek Eav (Duch), Case No. 001/18-07-2007/ECCC/SC, Supreme Court Chamber, 3 February 2012, par. 62.
937 ECCC, Judgement, KAING Guek Eav (Duch), Case No. 001/18-07-2007/ECCC/TC, T. Ch., 26 July 2010, par. 18. In fact, as revealed by one negotiator, it appears that Duch “was a constant reference point for the negotiators as a likely defendant”, as he had been detained for six months when negotiations on the ECCC took place. D. SCHEFFER, The Negotiating history of the ECCC’s Personal Jurisdiction, 26 May 2011 (to be found at http://ki-media.blogspot.be/2011/05/negotiating-history-of-ecccs-personal.html, last visited, 10 February 2014).
938 Consider e.g. the press release by the national Co-Prosecutor, holding that on the basis of the preliminary investigation he concluded that Case 003 did not fall within either of these two categories. See ECCC, Press Release, Statement by the National Co-Prosecutor Regarding Case File 003, 11 May 2011, to be found at http://www.eccc.gov.kh/en/articles/statement-national-co-prosecutor-regarding-case-file-003, last visited 10 February 2014; ECCC, Annex I: Public Redacted Version - Considerations of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71, Disagreement No. 001/18-11-2008-ECCC/PTC, 18 August 2009, par. 32-33 (The national Co-Prosecutor holds that the suspects indicated in the Introductory Submissions are not senior leaders or those most responsible but lower-ranking officials). It is recalled that this controversy, which started in 2008, still continues today. When former international Co-Prosecutor Petit failed to reach agreement with his national colleague on the forwarding of the initial submissions with regard to Cases 003 and 004 to the Co-Investigating Judges, he filed a notice of disagreement and forwarded the matter to the Pre-Trial Chamber. The Pre-Trial Chamber could not reach agreement with regard to the disagreement (a supermajority is needed). Hence, in accordance with the Internal Rules, the request for a judicial investigation was allowed to proceed by default. However, this did not end the disputes. The matter became much worse once the matter reached the Co-Investigating Judges. It lead to a division amongst national/international lines within the Office of the Co-Prosecutors, the Office of the Co-Investigating Judges as well as in the Pre-Trial Chamber. On this controversy, consider Open Society Justice Initiative, The Future of Cases 003/004 at the Extraordinary Chambers in the Courts of Cambodia, October 2012 (available at: http://www.opensociety foundations.org/sites/default/files/eccc-report-cases3and4-100112_0.pdf, last visited 10 February 2014); Open Society Justice Initiative, Briefing Paper: Recent Developments at the Extraordinary Chambers in the Courts of Cambodia, March 2013, p. 11 (to be found at: http://www.refworld.org/pdfid/5242b9084.pdf, last visited 10 February 2014); J.D. CIORCIARI and A. HEINDEL, Experiments in International Criminal Justice: Lessons from the Khmer Rouge Tribunal, June 2013, pp. 29 - 33 (available at: http://papers.ssrn.com/ so3/papers.cfm?abstract_id=2269925, last visited 10 February 2014). In February 2013, a statement was issued by the Co-Investigating Judges containing contradictory statements as to the status of Case No. 003. See ECCC, Statement by the Co-Investigating Judges Regarding Case 003, 28 February 2013.
Having these jurisdictional (or not) limitations in mind, the question remains as to whether the Extraordinary Chambers are characterised by a principle of legality or a principle of opportunity. The formulation of Articles 5 (3) and 6 (3) of the ECCC Agreement point towards a principle of opportunity.\textsuperscript{939} Besides, it follows from the ECCC IR that the Co-Prosecutors enjoy full discretion to initiate proceedings. More precisely, only the Co-Prosecutors can initiate a prosecution and they can do so either at their own discretion or on the basis of a complaint.\textsuperscript{940} A further indication follows from the fact that complaints do not automatically initiate the prosecution.\textsuperscript{941} On the other hand, Rule 53 (1) ECCC IR states that “[i]f the Co-Prosecutors have reason to believe that crimes within the jurisdiction of the ECCC have been committed, they shall open a judicial investigation by sending an Introductory Submission to the Co-Investigating Judges.”\textsuperscript{942} Consequently, while the Co-Prosecutors enjoy full discretion to decide whether or not to initiate preliminary investigations, they have no discretion at the end of the preliminary investigation and shall sanction the opening of a judicial investigation. Hence, it appears that the procedural system of the ECCC is closer to a principle of legality than the other tribunals under review.\textsuperscript{943} Similarly, the Co-Investigating Judges have the authority to dismiss a case only where (i) the acts in question do not amount to crimes within the jurisdiction of the ECCC, (ii) the perpetrators of the act have not been identified or (iii) there is not sufficient evidence against the charged person(s) of the charges.\textsuperscript{944}

However, since it is for the Co-Prosecutors to decide whether there are ‘reasons to believe’ that crimes within the jurisdiction of the ECCC have been committed—-which requires the

\textsuperscript{939} Article 5 (3) ECCC Agreement reads: ‘The co-investigating judges shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source. It is understood, however, that the scope of the investigation is limited to senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979’. Article 6 (3) ECCC Agreement states: ‘The co-prosecutors shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source. It is understood, however, that the scope of the prosecution is limited to senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979’.

\textsuperscript{940} Rule 49 (1) ECCC RPE.

\textsuperscript{941} Rule 49 (4) ECCC RPE.

\textsuperscript{942} (emphasis added).


\textsuperscript{944} Rule 67 (3) ECCC IR.
Co-Prosecutor to sanction the opening of a judicial investigation (Rule 53 (1) ECCC IR)---, and since such a notion is not further defined, some discretion is built into the system.\textsuperscript{945} Moreover, the absence of a definition of the two previously discussed jurisdictional categories may provide the Co-Prosecutors (and the Co-Investigating Judges) with a certain amount of discretion.

In turn, discretion is limited by certain principles. The first one is the principle of impartiality. However, while an obligation of impartiality is explicitly provided for and incumbent on the Co-Investigating Judges,\textsuperscript{946} no such obligation has been provided with regard to the Co-Prosecutors. Besides, the independence of the Co-Prosecutors prevents them from seeking or receiving instructions with regard to the exercise of their discretion. At the ECCC, the independence of the Co-Prosecutors is laid down in Article 6 (3) ECCC Agreement as well as Article 19 ECCC Law. Besides, the Office of the Co-Prosecutors is established as an independent office within the ECCC.\textsuperscript{947}

Furthermore, like the SCSL, the Supreme Court Chamber held that “the Trial Chamber has the power to review the discretion of the Co-Investigating Judges and the Co-Prosecutors on the ground that they allegedly exercised their discretion under Articles 5(3) and 6(3) of the UN-RGC Agreement in bad faith or according to unsound professional judgement.”\textsuperscript{948} However, the Supreme Court Chamber added that such a review is “extremely narrow” so that it does not infringe on the independence of the Co-Prosecutors or the Co-Investigating Judges.\textsuperscript{949} It does not suffice for the accused person to point out that a particular “senior leader” or “person most responsible” is not prosecuted.\textsuperscript{950} In this regard, this power of review by the Trial Chamber is related to claims of selective prosecution before the \textit{ad hoc} tribunals and the SCSL.\textsuperscript{951}

\textsuperscript{945} N. JAIN, Between the Scylla and Charybdis of Prosecution and Reconciliation: the Khmer Rouge Trials and the Promise of International Criminal Justice, in «Duke Journal of Comparative & International Law», Vol. 20, 2010, p. 258.
\textsuperscript{946} Article 5 (2) ECCC Agreement, Article 10 new and 25 ECCC Law ; Rule 55 (5) ECCC IR.
\textsuperscript{947} Rule 13 (1) ECCC IR.
\textsuperscript{948} ECCC, Appeal Judgement, KAING Guek Eav (Duch), Case No. 001/18-07-2007/ECCC/SC, Supreme Court Chamber, 3 February 2012, par. 80.
\textsuperscript{949} Ibid., par. 80.
\textsuperscript{950} Ibid., par. 80.
\textsuperscript{951} See supra, Chapter 3, II.2.
II.6. The Special Panels for Serious Crimes (SPSC)

The SPSC had exclusive jurisdiction over ‘serious criminal offences’, including genocide, war crimes, crimes against humanity, murder, sexual offences and torture.\(^{952}\) Where ‘serious criminal offences’ were found to have occurred in the respective jurisdictions of District Prosecutors, they had to inform the Deputy General Prosecutor for Serious Crimes and were not allowed to initiate investigations themselves.\(^{953}\)

The Public Prosecutor was expected to conduct the investigation impartially and independently, ‘without improper influence, direct and indirect, from any source, whether within or outside the civil administration of East Timor’.\(^{954}\) Additionally, all persons had to be considered ‘equal before the courts of law’.\(^{955}\) The TRCP equipped the Public Prosecutor with wide discretion for initiating the investigation of cases following the reporting of a crime.\(^{956}\) In contrast, where investigations had been initiated, there seemed to be no discretion regarding the decision as to whether or not the suspect should be indicted, given the TRCP’s stipulation that “[u]pon completion of the investigation, if the result so warrants, the Public Prosecutor shall present a written indictment of the suspect to the competent District Court.”\(^{957}\)

As far as the exercise of discretion by the Public Prosecutor is concerned, it should be noted that the SPSC faced criticism for focusing on lower-level perpetrators.\(^{958}\) Notably, the first prosecutions focused on lower-level suspects that were already in custody.\(^{959}\) The Special Panels failed to bring high-level indictees residing outside of the court’s jurisdiction to

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952 Section 9 UNTAET Regulation 2000/11 (as amended); Section 1.3 UNTAET Regulation 2000/15. Regarding the latter three categories of crimes, a temporal limitation applied and the exclusive jurisdiction was limited to crimes that occurred in the period between 1 January 1999 and 25 October 1999 (Section 9.2 UNTAET Regulation 2000/11 (as amended)).
953 Section 17.1 of UNTAET Regulation 2000/16.
954 Section 4 of UNTAET Regulation 2000/16.
955 Section 2.1 TRCP.
956 Section 13.3 TRCP (stating that “[f]ollowing the report, the Public Prosecutor may, as appropriate, initiate an investigation and may for that purpose order the police to carry out the necessary measures”).
957 Section 24.1 TRCP (emphasis added).
958 H. TAKEMURA, Big Fish and Small Fish Debate – An Examination of the Prosecutorial Discretion, in «International Criminal Law Reviews», Vol. 7, 2007, p. 683. These were often illiterate farmers who stated to have followed superior orders or to have acted under duress.
Justice. A commission of experts found in 2005 that the Serious Crimes Unit (SCU) lacked a "consistent prosecution strategy or focus." Events, rather than Prosecutors, were setting the Serious Crimes Unit (‘SCU’)’s priorities. The Commission of Experts noted that investigations were initiated in relation with too many complaints which were received, often targeted at alleged low-level perpetrators. It was not until 2002 that the Deputy General Prosecutor for serious crimes made a decision to focus on "those military and political leaders who were allegedly the architects of the serious crimes committed in 1999 and/or those who failed to take responsible measures to prevent the crimes or punish the perpetrators." The Commission noted that the ad hoc tribunals, the Special Court and the ECCC have focused on and prioritised mid-level and high-level perpetrators or ‘those bearing the greatest responsibility’. Furthermore, the Commission of Experts noted that the SPSC had not yet achieved full accountability for those who bore the greatest responsibility for the serious human rights violations in East Timor in 1999.

The lack of a clear prosecutorial strategy should be understood in light of the apparent silence of UNTAET Regulation 2000/15, establishing the SPSC, on this particular issue. Neither in this document nor in its preamble is it clarified whether the Special Panels should prosecute all perpetrators, including low-level ones, or if they should only focus on prosecuting high-level perpetrators.

The SPSC have been further criticised for focusing on crimes following the outburst of violence after the 1999 referendum, while their jurisdiction seemed to extend to crimes

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961 Ibid., par. 60.
962 Ibid., par. 60. Notwithstanding the order from the UN to focus on ten priority cases, the report noted that “there was little rationale underlying the selection of some of these ten priority cases, which also appeared to change from year to year” (ibid, par. 62).
964 Ibid., par. 64. Confirming, see S. LINTON, Cambodia, East Timor and Sierra Leone: Experiments in International Criminal Justice, in «Criminal Law Forum», Vol. 12, 2001 pp. 218 – 219 (adding that were the SPSC to deal with all perpetrators, including lower-level ones, such would swamp the system).
committed prior to that date.\textsuperscript{968} Early on, a decision was taken inside the SCU to focus on the 1999 events. However, some investigations were conducted into prior incidents.\textsuperscript{969} Lastly, criticism has been directed toward the SPSC’s apparent failure to address the systemic nature of the violence and the military’s role in it.\textsuperscript{970}

Peculiarities also follow from the limited number of estimated killings in East-Timor. While, as previously discussed, the Public Prosecutor enjoyed wide discretion in initiating investigations, there was an expectation that all of the crimes would be prosecuted, considering the low number of estimated killings, particularly when compared with other international(ised) criminal tribunals.\textsuperscript{971}

II.7. The Special Tribunal for Lebanon (STL)

The STL is difficult to compare to the other international(ised) tribunals discussed since the tribunal’s jurisdiction is very limited. In principle, the tribunal’s jurisdiction is limited to bringing to justice the persons responsible for the 14 February 2005 attack which resulted in the death of former Lebanese Prime Minister Rafiq Hariri.\textsuperscript{972} However, the tribunal’s jurisdiction may also cover two distinct categories of attacks. Firstly (1), it may cover attacks that occurred in Lebanon between 1 October 2004 and 12 December 2005 which are connected to the 14 February 2005 attack and are of a similar nature and gravity.\textsuperscript{973} Besides, (2) the tribunal has jurisdiction over similar attacks that occurred at a later date decided by the United Nations and Lebanon, with the consent of the UNSC and Lebanon.\textsuperscript{974}

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\textsuperscript{971} Ibid., p. 20 (referring to pressure from families).

\textsuperscript{972} Article 1 (1) STL Agreement; Article 1 STL Statute.

\textsuperscript{973} Article 1 STL Statute.

\textsuperscript{974} Article 1 STL Statute.
\end{flushright}
submitted by the Prosecutor for a ruling by the Pre-Trial Judge, either before or together with an application for the confirmation of the indictment.\textsuperscript{975} The Pre-Trial Judge should subsequently determine whether there is \textit{prima facie} evidence that the case is within the tribunal’s jurisdiction.\textsuperscript{976} Such a ruling may be appealed by the Prosecutor within seven days.\textsuperscript{977} In cases where the Prosecutor decides to \textit{not} bring a connected case submission, no judicial overview mechanism is provided for, leaving broad discretion to the Prosecutor.\textsuperscript{978} In this regard, the procedure differs from that of the ICC, which provides for some judicial scrutiny over a decision not to proceed. For the second category of attacks (2), a submission including reasoned conclusions to the STL President is required, who will request the Registrar to forward these to the UNSC and to Lebanon.\textsuperscript{979} It is for the UNSC and the Lebanese authorities to decide whether or not to grant the tribunal jurisdiction over these attacks.\textsuperscript{980} The Prosecutor should be convinced that it is appropriate for the tribunal to exercise jurisdiction over the persons allegedly responsible for that attack.\textsuperscript{981}

Active and passive prosecutorial independence are safeguarded by the STL Statute, which obliges the Prosecutor not to seek or receive instructions from any government or other source.\textsuperscript{982} An obligation to be impartial is only expressly mentioned for Judges.\textsuperscript{983} In addition, prosecutorial discretion is limited by a principle of equality of accused persons before the Court.\textsuperscript{984} No prosecutorial practice has been clearly established yet regarding the exercise of

\textsuperscript{975} Rule 11 and Rule 68 (C) STL RPE.
\textsuperscript{976} Rule 11 (B) and 68 (H) STL RPE. On 5 July 2011, a confidential decision was issued by the Pre-Trial Judge establishing that the STL has jurisdiction over the attack perpetrated on 12 July 2005 against Mr Elias El-Murr (the ‘El-Murr Case’). See the reference in STL, Order Directing the Lebanese Judicial Authority Seized with the Case Concerning the Attack Perpetrated against Mr. Elias El-Murr on 12 July 2005 to Defer to the Special Tribunal for Lebanon, Prosecutor, Case No. STL-11-02/D/PTJ, PTJ, 19 August 2011, p. 2.
\textsuperscript{977} Rule 11 (D) STL RPE. The Appeals Chamber may request the Head of Defence Office to nominate independent counsel for appointment as \textit{amicus curiae} to act in opposition to the Prosecutor’s appeal. Where the investigation leads to an indictment, the Defence has the right to challenge the decision by the Pre-Trial Judge as a preliminary motion on jurisdiction.
\textsuperscript{978} STL, Rules of Procedure and Evidence: Explanatory Memorandum by the Tribunal’s President, 25 November 2010, par. 9.
\textsuperscript{980} Rule 12 (B) STL RPE.
\textsuperscript{981} Rule 12 (A) STL RPE.
\textsuperscript{982} Article 11 (2) STL Statute; Article 3 (4) STL Agreement.
\textsuperscript{983} Article 9 (1) STL Statute; Article 2 (4) STL Agreement.
\textsuperscript{984} Article 16 (1) and (4) STL Statute.
prosecutorial discretion. It seems that, to whatever extent is possible, investigations are conducted in parallel, rather than that a sequential approach is followed.\footnote{STL, Second Annual Report (2010 – 2011), p. 28.}

II.8. Conclusions

A number of conclusions may be drawn from the comparative overview above. First and foremost, all Prosecutors of international criminal courts and tribunals enjoy considerable discretion in the selection of cases for investigation.\footnote{Consider e.g. C. STAHN, Judicial Review of Prosecutorial Discretion: Five Years on, in C. STAHN and G. SLUITER (eds.), The Emerging Practice of the International Criminal Court, Leiden, Koninklijke Brill, 2009, p. 252.} Hence, it can safely be concluded that international criminal courts and tribunals are characterised by prosecutorial discretion in deciding to open an investigation. None of the international criminal tribunals scrutinised above adheres to a principle of legality. With regard to the decision to prosecute a case, the picture seems more varied. Some jurisdictions (e.g. the SPSC) do not seem to leave discretion to the Prosecutor as to whether or not to prosecute a case.

The statutory documents of several tribunals under review (SCSL, ECCC, ICTY) were found to contain ‘limiting language’, which may impact the exercise of prosecutorial discretion. With regard to the SCSL and the ECCC, such language (persons bearing “the greatest responsibility” (SCSL) and “senior leaders” as well as “those most responsible for the crimes” (ECCC)) was found to be jurisdictional in nature. However, this does not seem to find support in the jurisprudence of the SCSL and the ECCC, in that both consider this limiting language to offer mere guidance to the Prosecutor. It was also seen that the ICC Statute does not include such limiting language. In this regard, discretion at the ICC seems wider than at the other international criminal tribunals. Arguably, a limitation was introduced at some point through the interpretation of the gravity criterion. However, since the Appeals Chamber rejected this interpretation, there is, at present, no clearly discernible limitation. With regard to the ICC, it was shown that discussions on what parameters the Prosecutor should consider in determining whether or not to proceed with an investigation boil down to the question of whether they reflect a principle of legality or opportunity.
Discretion is limited by the principles of equality and non-discrimination. For example, such principles could be found in the Statutes and jurisprudence of the ad hoc tribunals and the SCSL. Likewise, they derive, among others, from Article 21 (3) ICC and Article 67 (1) Statute. These principles, ultimately, derive from human rights law. The principle of impartiality in investigating and prosecuting crimes is closely related. It entails that prosecutorial discretion be applied even-handedly to different groups or persons. Such a principle is found in the statutory frameworks of all courts and tribunals under review. Only the ECCC and the STL do not expressly provide for such a principle in relation to the Co-Prosecutors and the Prosecutor respectively. Rather this duty of impartiality is only provided for in relation to Judges. Furthermore, the principle of prosecutorial independence is important insofar that it entails that the Prosecutor does not seek or receive instructions from external sources.

Furthermore, the overview illustrates how the affiliation of a suspect to a certain faction or group is sometimes taken into account for the tribunal to have a balanced approach, prosecuting all parties that committed crimes within the tribunals’ jurisdiction. Such an approach would seem objectionable at the national level. However, with regard to international criminal tribunals, it may be argued that such an approach is legitimate, considering at least some of the goals these tribunals were intended to serve. Clearly, the goals of restoring peace and security or reconciliation will better be served by such a ‘balanced approach’.

In the following paragraphs, firstly, (1) some of the reasons as to why the international Prosecutor is guided by a principle of opportunity will be briefly explained. It was previously indicated how the rationales for prosecutorial discretion at the national level do not


988 Note that the rationales for awarding discretion to the international Prosecutor do not always emerge from the travaux préparatoires of the international(ised) criminal tribunal concerned. See G.-J.A. KNOOPS, Challenging the Legitimacy of Initiating Contemporary International Criminal Proceedings: Rethinking Prosecutorial Discretionary Powers from a Legal, Ethical and Political Perspective, in «Criminal Law Forum», Vol. 15, 2005, p. 371 (with regard to the ad hoc tribunals).
always easily translate to the international level and may sometimes diverge. Secondly, (2) most international Prosecutors have not made public the criteria that are used for determining which cases should be selected for investigation and prosecution. This practice will be critically assessed (2). Thirdly, (3) the comparative overview reveals that the forms of accountability, including judicial oversight, over prosecutorial decision-making are increasing.

(1) Reasons for the choice for prosecutorial discretion (opportunity)

A plethora of either practical or legal reasons may be provided for equipping the Prosecutors of the international(ised) criminal tribunals with discretion. First and foremost, the number of potential cases as well as the number of alleged perpetrators is overwhelming, turning the investigation and prosecution of all cases into a practical impossibility. This consideration is of special importance to the ICC, given its broad mandate and permanent jurisdiction. Secondly, the limited resources at the disposal of the tribunal further necessitate selectivity.
Again, ‘selectivity’ takes on different proportions at the international echelon. The level of selectivity required may necessitate another understanding of the principle of non-discrimination. The goals of international criminal tribunals may necessitate selection of defendants based on their membership to rival groups.993

Next, as previously discussed, the independence of the Prosecutor is important. All of the tribunals that have been scrutinised explicitly provide for a principle of prosecutorial independence. Such arguments consider prosecutorial discretion to be a cornerstone of prosecutorial independence.994 Nevertheless, this argumentation may easily be countered by arguing that the absence of discretion (as would judicial overview over the exercise of prosecutorial discretion995) may better protect prosecutorial independence, insofar that it insulates the Prosecutor from the risk of political pressure and/or interference. This is a risk that cannot be ignored in international criminal proceedings. Moreover, prosecutorial conception of the Prosecutor’s role as a truth-seeker does not directly affect the Prosecutor’s discretion, it suggests that investigations will be broad and may presumably be more resource intensive than an investigation which is solely gauged at identifying incriminating evidence). STAHN argues that these financial considerations favour judicial review, for example with regard to the selection of cases. Judicial review may serve the goal of preventing the waste of resources and avoid procedural challenges at a later stage of the proceedings. See C. STAHN, Judicial Review of Prosecutorial Discretion: Five Years on, in C. STAHN and G. SLUITER (eds.), The Emerging Practice of the International Criminal Court, Leiden, Koninklijke Brill, 2009, pp. 257 – 258; Consider also L. CÔTÉ, Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law, in «Journal of International Criminal Justice», Vol. 3, 2005, p. 165; G.-J.A. KNOOPS, Challenging the Legitimacy of Initiating Contemporary International Criminal Proceedings: Rethinking Prosecutorial Discretionary Powers from a Legal, Ethical and Political Perspective, in «Criminal Law Forum», Vol. 15, 2005, p. 369; H. TAKEMURA, Prosecutorial Discretion in International Criminal Justice: Between Fragmentation and Unification, in L. VAN DEN HERIK and C. STAHN (eds.), The Diversification and Fragmentation of International Criminal Law, Leiden, Martinus Nijhoff Publishers, 2012, p. 636.

993 M.M. DEGUZMAN, Choosing toProsecute: Expressive Selection at the International Criminal Court, in «Michigan Journal of International Law», Vol. 33, 2012, pp. 293 – 294 (referring to the ICTY policy to sometimes select defendants based on affiliation. However, the author admits that the current jurisprudence suggests that the principle of non-discrimination is not violated if only persons belonging to one group are selected (ibid., p. 295)).


995 Compare for example with Article 15 (4) ICC Statute. Consider ICC, Corrigendum to “Judge Fernández de Gurmendi’s Separate and Partially Dissenting Opinion to the Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Cote d’Ivoire”, Situation in the Republic of Cote d’Ivoire, Case No. ICC-02/11-15-Corr, PTC III, 5 October 2011, par. 8 (arguing that the system of judicial control over the Prosecutor’s decision to open an investigation was intended “to help insulate the Prosecutor from external pressure”).
independence may lead to abuse if no proper balance is found between independence and accountability.996

Furthermore, as several commentators have argued, the importance of political considerations (including uncertainties with regard to the timing and modalities of cooperation and arrest) may justify prosecutorial discretion. One scholar conceives the political implications of investigating and prosecuting as “the most compelling argument in favour of prosecutorial discretion.”997 However, Prosecutors tend to deny these political implications and proclaim that the exercise of prosecutorial discretion is solely based on objective criteria.998 For example, former ICC Prosecutor Moreno-Ocampo consistently argued that he exercises discretion “without political considerations.”999 However, reports have emerged that cast some doubt on the Prosecutor’s attitude.1000 As one scholar suggests, such downplaying of political considerations may be understandable in light of accusations of politicisation.1001 The political aspects inherent in decisions to investigate and prosecute are impossible to deny.1002

996 See C. STAHN, Judicial Review of Prosecutorial Discretion: Five Years on, in C. STAHN and G. SLUITER (eds.), The Emerging Practice of the International Criminal Court, Leiden, Koninklijke Brill, 2009, p. 258 (“It is therefore over-simplistic to justify prosecutorial discretion by the rationales of independence and necessity of choice. Discretion protects independence, but lends itself to abuse if it is concentrated in the hands of a hierarchically organised”).

997 Ibid., p. 256. Also other authors stress the important political consequences of decisions to investigate or to prosecute. Consider e.g. G.-J.A. KNOOPS, Challenging the Legitimacy of Initiating Contemporary International Criminal Proceedings: Rethinking Prosecutorial Discretionary Powers from a Legal, Ethical and Political Perspective, in «Criminal Law Forum», Vol. 15, 2005, pp. 365 – 366; L. CÔTÉ, Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law, in «Journal of International Criminal Justice», Vol. 3, 2005, p. 170 (arguing that Prosecutors “should not conceal the eminent political dimension of the exercise of prosecutorial discretion, particularly on the international scene, where conflicts are ongoing”).


1000 See http://www.guardian.co.uk/law/2010/dec/17/wikileaks-us-international-criminal-court, last visited 10 February 2014 (referring to a cable which details how the Prosecutor publicly announced that he would look into actions of British forces in Iraq, but privately told “that he wishes to dispose of Iraq issues (ie. not to investigate them)”).


It should be noted that the political nature of prosecutorial decisions does not necessarily rule judicial review out of these inherently political decisions. Keep in mind, for example, the possibilities for judicial intervention over prosecutorial discretion under the ICC Statute. Judicial intervention may arguably take some political decisions away from the Prosecutor and allocate them to the Judges. However, GREENAWALT cautions that “judge-imposed standards are unlikely to prove a more effective or legitimate means of resolving the underlying policy questions than is prosecutorial discretion” and is sceptical about “converting” political decisions into “immutable norms that are less subject to evolution or reconsideration.”

Additional justifications have been mentioned in the literature, including trust in the independent professional judgment of the Prosecutor and the ambition to foster the efficiency of investigations and prosecutions.

(2) Transparency

Prosecutors’ decisions lack transparency and are sometimes incoherent. To take the example of the ad hoc tribunals, it was found that the criteria used in exercising prosecutorial discretion were vague and undetermined. Moreover, the consecutive Prosecutors of the ad hoc tribunals never made the Prosecutor’s understanding of prosecutorial discretion public. Rather, internal guidelines were adopted in the absence of any guidance in the statutory frameworks of the ad hoc tribunals on how to exercise prosecutorial discretion. This

Justices, Vol. 3, 2005, p. 171 (stating that the real problem is the occult or secret nature of such political considerations).

1003 C. STAHI, Judicial Review of Prosecutorial Discretion: Five Years on, in C. STAHI and G. SLUITER (eds.), The Emerging Practice of the International Criminal Court, Leiden, Koninklijke Brill, 2009, p. 257 (however, the author notes that for some aspects of prosecutorial discretion (e.g. the allocation of resources) judicial review should be limited, whereas for other types of prosecutorial choices, stronger judicial review may be justified (e.g. equal application of the law)).

1004 A.K.A. GREENAWALT, Justice Without Politics? Prosecutorial Discretion and the International Criminal Court, in «NYU Journal of International Law & Politics», Vol. 39, 2007, pp. 659 – 660 (the author adds that Judges are “arguably less institutionally competent [then the Prosecutor] to address such questions”). For similar reasons, GREENAWALT is also skeptical about the usefulness of ex ante prosecutorial guidelines.


1006 See the discussion supra, Chapter 3, II.2.

1007 Several authors have expressed themselves critical about the lack of public prosecutorial guidelines at the ad hoc tribunals. See e.g. L. REYDAMS, The ICTR Ten Years On: Back to the Nuremberg Paradigm?, in «Journal
practice may be problematic in light of the broad prosecutorial discretion discussed previously. As one commentator puts it, “[b]road discretionary powers become a problem, if they are coupled with confidential and non-transparent decision-making processes which are often typical at the pre-trial stage.” “Such practices may easily distort public confidence, in particular by groups and individuals of affected communities.”

In this regard, international Prosecutors are subject to a lesser degree of transparency and scrutiny than their national counterparts, who are typically bound by guidelines on prosecutorial discretion. Many international criminal law commentators advocate the adoption of ex ante prosecutorial guidelines. DANNER refers to the ICTY NATO report as proof of how an ex ante standard ‘enhances’ the Prosecutor’s decision to decline investigations in controversial cases. They should outline the factors that are taken into consideration by the Prosecutor as well as those not considered. Many advantages have been associated with the adoption of prosecutorial guidelines. Outsiders can scrutinise decisions taken. The guidelines help to assure that prosecutorial decisions are made in a

of International Criminal Justice», Vol. 3, 2005, p. 978 (referring to the fact that publication of doctrinal articles by the ICTR Prosecutor “offer very rare glimpses into a secretive process”).


1009 Ibid., p. 243; A.M. DANNER, Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court, in «American Journal of International Law», Vol. 97, 2003, p. 541. At the same token, it is clear that prosecutorial guidelines at the national echelon cannot easily be translated to the international level. E.g. the ‘futility of events’ would not be a useful indicator for the international prosecutor. See A. MCDONALD and R. HAVEMAN, Prosecutorial Discretion – Some Thoughts on ‘Objectifying’ the Exercise of Prosecutorial Discretion by the Prosecutor of the ICC, Expert Consultation Process on General Issues Relevant to the ICC Office of the Prosecutor, 15 April 2003, p. 9.


1011 Ibid., p. 542 (the author adds that explanatory comments on these factors, detailing the Prosecutor’s understanding thereof, are desirable (ibid., pp. 542, 545).

transparent manner and that they respect the principles of equality and non-discrimination. They also ensure the predictability of the Prosecutor’s actions. Besides, they further insulate the Prosecutor from outside pressure. One commentator additionally notes the possible educational benefits of public prosecutorial guidelines. Furthermore, the adoption of such guidelines would be in line with the recommendations of the UN Guidelines on the Role of Prosecutors. At a regional level, the Council of Europe equally recommends that member states adopt prosecutorial guidelines. As far as the ICC is concerned, these guidelines facilitate the review task of the Pre-Trial Chamber. Moreover, they may be considered by the Security Council when deciding on whether or not to refer a case to the Court. Furthermore, they have an additional value since prosecutorial staff is drawn from various legal systems.

these guidelines offer “measurable benchmarks against which to gauge the Prosecutor’s actions”). Consider also B.D. LEPARD, How Should the ICC Prosecutor Exercise his or her discretion? The Role of Fundamental Ethical Principles, in «John Marshall Law Review», Vol. 43, 2010, pp. 564-565 (while the author argues that it may be difficult for the Prosecutor to draft comprehensive ex ante guidelines, it is argued that the Prosecutor should at least clarify why certain situations or cases deserve to be investigated or prosecuted respectively); A.M. DANNER, Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court, in «American Journal of International Law», Vol. 97, 2003, p. 512 (arguing that clear guidelines in the exercise of prosecutorial discretion are the “focal point for the critical evaluation of the Prosecutor’s actions”).


CoE, Recommendation Rec(2000) 19 of the Committee of Ministers to member states on the role of public prosecution in the criminal justice system, 6 October 2000, Recommendation 36 (a) : “With a view to promoting fair, consistent and efficient activity of public prosecutors, states should seek to: […] - define general guidelines for the implementation of criminal policy; – define general principles and criteria to be used by way of references against which decisions in individual cases should be taken, in order to guard against arbitrary decision-making.” The explanatory memorandum emphasises that “[t]hese requirements are even more pertinent in systems where the public Prosecutor is an independent authority or enjoys considerable discretion.” Additionally, the Explanatory Memorandum emphasizes that “[t]hese criteria must be framed in such a way as to have the desired effect without rigidly impeding the necessary evaluation of each case individually and in the light of local circumstances, or creating a grey area, within which offenders may operate with impunity.” See ibid., pp. 22 – 23.

OTP, Draft Regulations of the Office of the Prosecutor, p. 47, fn. 79.

However, it is important to understand that the adoption of these guidelines necessitates a reflection on the goals of international criminal prosecutions.\textsuperscript{1020} In turn, decisions on the goals of international criminal prosecutions will influence the understanding of the factors that the Prosecutor must take into consideration.\textsuperscript{1021} For example, since reconciliation is considered to be one of the goals of international criminal proceedings, this may lead to a broader understanding of the ‘interests of justice’ criterion, including amnesties and forms of restorative justice.\textsuperscript{1022} In this sense, a clear view of the Prosecutor’s goals will further legitimise the prosecutorial choices that are made. Indeed, as one scholar puts it, the Prosecutor’s task is to “decide the essentially political question of the extent of society’s interest in seeking criminal punishment.”\textsuperscript{1023} One scholar notes that the adoption of guidelines will enhance the Court’s legitimacy only if it shows coherence and a clear understanding of the Court’s goals and priorities.\textsuperscript{1024} Additionally, as previously noted, it will be necessary to identify a hierarchy of these different goals.\textsuperscript{1025} For example, some of the proclaimed goals of international criminal prosecution may justify a focus on ‘those most responsible’, such as deterrence or the expressive function.\textsuperscript{1026} Other goals, such as (specific) deterrence and


\textsuperscript{1022} A.M. DANNER, Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court, in «American Journal of International Law», Vol. 97, 2003, p. 544.


\textsuperscript{1025} Ibid., p. 267. The author, speaking on the ICC, suggests that the gravity has been used as a ‘stand-in’ to cover up for the lack of agreement of on the goals and priorities of the ICC. Consider also H. OLÁSOLO, The Prosecutor of the ICC before the Initiation of Investigations, in «International Criminal Law Review», Vol. 3, 2003, p. 110 (arguing, with regard to Article 53 (2) (c) ICC Statute, that it is unclear what the political goals are that have to be achieved: the Prosecutor needs to first define these goals and then assess the convenience or not of a criminal prosecution for achieving these goals); A. MCDONALD and R. HAVEMAN, Prosecutorial Discretion – Some Thoughts on ‘Objectifying’ the Exercise of Prosecutorial Discretion by the Prosecutor of the ICC, Expert Consultation Process on General Issues Relevant to the ICC Office of the Prosecutor, 15 April 2003, pp. 2, 8 (stating that “underlying the issue of prosecutorial discretion and when and how it can and should be exercised is the deeper and much more difficult question of what the Court is actually established to achieve”).

\textsuperscript{1026} Consider H. TAKEMURA, Big Fish and Small Fish Debate – An Examination of the Prosecutorial Discretion, in «International Criminal Law Reviews», Vol. 7, 2007, p. 679. The author admits that “[a]fter all, almost every reason [for] the existence of the existence of an \textit{ad hoc} tribunal contributes to the preference for focusing on big fish, such as limited budget, limited temporal jurisdiction, the massive scale of crimes and the consideration for international peace and security especially in case of [a] chapter VII oriented international or hybrid tribunal.” Consider also F. GUARIGLIA, The Selection of Cases by the Office of the Prosecutor of the International Criminal Court, in C. STAHN and G. SLUITER (eds.), The Emerging Practice of the International
retribution may militate against such a focus. Ranking goals is a difficult undertaking, particularly given that these goals should not necessarily be static.1027

A related question, then, is whether the so adopted prosecutorial guidelines should be made public. Arguably, publication runs the risk of leading the potential perpetrators to believe that they are not at risk of being prosecuted.1028 On the other hand, publication is necessary to enable external control. As previously noted, the primary value of such guidelines is that they facilitate external scrutiny over prosecutorial decision-making. In fact, public prosecutorial guidelines may be a valuable means for countering pressure exercised by external actors (i.e. states).1029

GREENAWALT, while supportive of the idea of ex ante prosecutorial guidelines, warns that it may bring unrealistic expectations. He notes that prosecutorial guidelines are of little value if the decisions that have to be taken do not lend themselves to rule-based decision-making.1030 According to the author, this scepticism is justified so long as scholars fail to come up with objective decisional rules that can be readily applied by the Prosecutor.1031 Abstract ex ante guidelines on the exercise of prosecutorial discretion may be difficult to establish for the ICC, since, for example, states have taken specific approaches to transitional justice.1032 This makes it difficult to draft general rules as to when it is necessary to defer to national transitional justice efforts. Such guidelines may fail to fully grasp the complexities and contingencies of a situation.1033 To a certain extent, the application of prosecutorial discretion will always need to be context-specific. Hence, prosecutorial guidelines will always be open-ended and vague, leaving too much flexibility to the Prosecutor to be of any use.1034

Criminal Court, Leiden, Koninklijke Brill, 2009, p. 210 (holding that the prosecution of “those in leadership positions will normally provide a ‘broader narrative’, tell ‘a more complete story’ about the crimes and their context than the prosecution of a low-level perpetrator”).

1027 A. MCDONALD and R. HAVEMAN, Prosecutorial Discretion – Some Thoughts on ‘Objectifying’ the Exercise of Prosecutorial Discretion by the Prosecutor of the ICC, Expert Consultation Process on General Issues Relevant to the ICC Office of the Prosecutor, 15 April 2003, p. 9 (the authors argue that while the ICC Prosecutor may initially focus on a more ‘exemplary’ or ‘symbolic’ role, “more utilitarian functions, such as crime control and deterrence, might assume greater significance [in a later phase]”).


1029 Ibid., p. 549.


1031 Ibid., p. 655.

1032 Ibid., p. 655.

1033 Ibid., p. 656.

1034 Ibid., p. 656.
Instead, GREENAWALT supports a ‘political deference’ model, which implies that the Prosecutor should seek to outsource difficult political questions to external actors that are better suited and equipped to answer such questions. This mirrors the approach that was taken by the ICTY Prosecutor with regard to the NATO bombing campaign.

Several authors have recently focused on legitimacy insofar that guidelines offer a way of measuring the exercise of prosecutorial discretion. It has been defined as “the justification of authority of the law.” Legitimacy does not follow from the political authority that created the institution but, rather, from the fairness of its procedures and punishments. Claims to legitimacy will be undermined when the law is not applied even-handedly. Hence, guidelines help to assure that prosecutorial decisions are perceived as legitimate.

For the reasons outlined above, the ICC Prosecutor’s publication of several policy papers may be a step in the right direction. Currently, however, these policy papers do not provide sufficient clarity with regard to the different criteria considered in decisions on investigations and prosecutions. While it is not the purpose of this section to draft such guidelines, it should be noted that some scholars have already proposed lists of criteria, for example, with

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1035 Ibid., p. 671, in general on political deference, see ibid., pp. 660 – 673.
1036 See supra, Chapter 3, II.2.
regard to the consideration of the ‘interests of justice’.\textsuperscript{1043} In any case, the adoption of these guidelines is a welcome improvement \textit{vis-à-vis} the \textit{ad hoc} tribunals, which explained prosecutorial choices on a case-by-case basis and did not make any prosecutorial guidelines public.\textsuperscript{1044}

\textit{(3) Accountability for prosecutorial decision-making}

It can be concluded from the overview that some restraints (institutional or judicial in nature) of prosecutorial discretion can be observed at all of the international(ised) tribunals scrutinised above. However, it appears that such forms of accountability, including forms of judicial oversight, are much more elaborate at the ICC than, for example, at the \textit{ad hoc} tribunals.\textsuperscript{1045} The more limited restraints of prosecutorial discretion in selecting cases for investigation and prosecution at the \textit{ad hoc} tribunals should be understood in light of the more circumscribed character of their mandate.

Nevertheless, it was shown above how there is a noticeable evolution towards more judicial oversight over prosecutorial discretion. This is also true at the \textit{ad hoc} tribunals.\textsuperscript{1046} In \textit{Ntuyahaga}, the ICTR Trial Chamber could rightly hold that “the Prosecutor has the sole responsibility for prosecutions and thus the decision on whether or not to proceed in any given matter rests with the Prosecutor.”\textsuperscript{1047} However, different procedural amendments have changed this picture. As an example, one can refer to the judicial review of the indictment at the ICTY prior to its confirmation. It entails an assessment of whether the indictment concentrates on one or more of the most senior leaders suspected of being most responsible for the crimes within the tribunal’s jurisdiction.

\textsuperscript{1043} Seven criteria were identified by WEBB, to know (1) gravity of the crime; (2) the interests of the victims; (3) the age or infirmity of the alleged perpetrator; (4) the role of the alleged perpetrator in the alleged crime; (5) international peace and security concerns; (6) transnational justice concerns and (7) resources. P. WEBB, The ICC Prosecutor’s Discretion not to Proceed in the “Interests of Justice”, in «Criminal Law Quarterly, Vol. 50, 2005, p. 346.

\textsuperscript{1044} See discussion supra, Chapter 3, II.2.

\textsuperscript{1045} Confirming, see e.g. N.J. JURDI, The International Criminal Court and National Courts, Farnham, Ashgate Publishing Limited, 2011, p. 98.

\textsuperscript{1046} See supra, Chapter 3, II.2.

The ICC is the only tribunal under review which provides for judicial overview over prosecutorial decisions not to investigate or not to prosecute. Article 53 (3) ICC Statute provides for the possibility of judicial scrutiny over the exercise of ‘negative’ prosecutorial discretion. Such an overview may be explained by the Statute’s unique referral mechanism and the wish of the drafters of the ICC Statute that the Prosecutor provide reasons for not proceeding to the referring State or the Security Council, so that they can ask for such a decision to be reviewed. Overall, it is clear that such forms of judicial oversight have the potential of reconciling prosecutorial discretion with the need for accountability.

III. PRINCIPLE OF (PROSECUTORIAL) OBJECTIVITY

III.1. Introduction

The ‘principle of objectivity’ (or the obligation to establish the truth and present incriminating and exonerating evidence equally) in conducting investigations is traditionally associated with civil law criminal justice systems. In these systems, the Prosecutor is required to investigate and examine incriminating and exonerating facts and circumstances equally.

The Prosecutor usually is a (quasi-) judicial officer, who enjoys the same independence as

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1048 However, some uncertainties still surround this power. See supra, fn. 211 - 212, and accompanying text.
1051 Compare K. AMBOS, International Criminal Procedure: Adversarial, Inquisitorial, or Mixed?, in «International Criminal Law Reviews», Vol. 1, 2003, p. 9 (“the obligation to establish the truth and present not only inculpatory, but also exculpatory evidence [….] may be seen as a typical feature of the civil law procedure”).
1052 For example, §160 (2) of the German Strafprozessordnung (StPO) requires the public prosecution office to not only investigate incriminating but also exonerating circumstances. A similar duty is incumbent on the Austrian Prosecutor and derives from §3 of the Austrian Strafprozessordnung (StPO). For Italy, consider Article 358 of the Italian Codice di procedura penale. Similarly, the Belgian Prosecutor has a duty to protect the public interest, by looking for the material truth. He or she should look for evidence both in favour and against the accused. See C. VAN DEN WYNGAERT, Strafrecht en Strafprocesrecht, Maklu, Antwerpen-Apeldoorn, 2009, p. 871; C. VAN DEN WYNGAERT, Criminal Procedures in the European Community, Brussels, Butterworths, 1993, p. 14. Consider also N. JÖRG, S. FIELDS and C. BRANTS, Are Inquisitorial and Adversarial Systems Converging?, in P. FENNELL, C. HARDING, N. JÖRG and B. SWART (eds.), Criminal Justice in Europe, a Comparative Study, Oxford, Clarendon Press, 1995, p. 47 (arguing that Prosecutors in civil law criminal justice systems would be acting in breach of Rules of professional ethics where they would not investigate circumstances which are favourable to the accused).
Judges do. Far from being a partisan actor, the Prosecutor is expected to perform his or her functions in an objective manner. In those criminal justice systems where an Investigating Judge is in charge of the investigation, he or she is equally required to investigate all evidence à charge and à décharge. Entrusting such a role to the Prosecutor or investigating magistrate is sometimes criticised insofar that it substantially weakens the position of the Defence by preventing or limiting the possibilities of defence investigations. Moreover, it has been questioned as to whether exonerating facts and circumstances are investigated with the same diligence in practice.

Since parties are expected to conduct their own investigation in adversarial criminal justice systems prior to the partisan contest at trial, it may seem objectionable that a duty is incumbent on the Prosecutor to look for exculpatory evidence. Investigations are traditionally guided by self-interest rather than the public interest. Moreover, in common law criminal justice systems, the investigations are normally in the hands of the police and the Prosecutor traditionally only assumes responsibility once the investigation is finished. However, the duty of objectivity becomes important when Prosecutors, for example in the U.S., gradually

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1053 For example, with regard to The Netherlands, consider BALLIN, who notes that Prosecutors formally are part of the judiciary and are referred to as ‘magistrates’. See M.F.H. HIRSCH BALLIN, Anticipative Criminal Investigation: Theory and Counterterrorism Practice in the Netherlands and the United States, The Hague, T.M.C. Asser Press, 2012, pp. 41 – 42; Consider also VERREST, describing the role of the Public Prosecution Service as that of a magistrate: P.A.M VERREST, Raison d’être: een onderzoek naar de rol van de rechter-commissaris in ons strafproces, Den Haag, Boom Juridische Uitgevers, 2011, pp. 221 – 244 (non-commercial edition).

1054 See Article 81 (1) Code of Criminal Procedure (France) and Article 56 (1) Code of Criminal Procedure (Belgium).


1056 Consider e.g. C. VAN DEN WYNGAERT, Criminal Procedures in the European Community, Brussels, Butterworths, 1993, p. 14 (noting that in practice “the dynamics of the proceedings usually put the ministère public in the role of a partisan prosecutor, and thus of a real party in the proceedings”); H-H. KÜHNE, Germany, in C. VAN DEN WYNGAERT, Criminal Procedures in the European Community, Brussels, Butterworths, 1993, p. 141 (“[e]mpirical data demonstate[s], however, that prosecutors usually do not obey this legal rule and predominantly look for incriminating evidence”).

1057 N. JÖRG, S. FIELDS and C. BRANTS, Are Inquisitorial and Adversarial Systems Converging?, in P. FENNELL, C. HARDING, N. JÖRG and B. SWART (eds.), Criminal Justice in Europe, a Comparative Study, Oxford, Clarendon Press, 1995, pp. 48 - 49 (although the authors note a trend in adversarial justice systems with the development of an organised police force and the acceptance of the police power to detain and interrogate suspects, they note that this changed status of parties has not yet resulted in the imposition of a clear truth-finding duty on the police to seek both incriminating and exonerating evidence).

assume a more important investigative role. 1059 Nevertheless, the U.S. Prosecutor’s ethical duties in this regard appear to be quite vague. It is true that the Prosecutor is traditionally thought “to seek justice rather than victory.” 1060 Furthermore, rules of professional ethics often require the Prosecutor to adhere to values of objectivity or impartiality in conducting investigations. These rules, including the ABA Model Rules of Professional Conduct or the ABA Standards for Criminal Justice, have held that the Prosecutor fulfils the role of a ‘minister of justice’. 1061 Nevertheless, in line with the practice in international criminal law, it seems that the exact value of such (lofty) statements remains ambiguous. 1062 Clearly, in common law criminal justice systems, there is a tension between the role of the Prosecutor as a party in the proceedings and his or her role as an administrator of justice.

1059 Consider e.g. R.K. LITTLE, Proportionality as an Ethical Precept for Prosecutors in their Investigative Role, in «Fordham Law Review», Vol. 68, 1999, pp. 728 - 729 (The author argues that “much of the modern-day prosecutor's time is spent making investigative decisions.” While the author argues that this is particularly the case for proactive investigations or complicated investigations such as organised crime, and to a lesser extent for reactive or routine investigations “the importance of the investigative role lies […] in the significance of the role in the matters where it arises”); N.L. PHILIPS and S. SMITH, Reinterpreting the Ethical Duties of a Prosecutor: Y-STR as a Model Investigative Tool in «The Georgetown Journal of Legal Ethics», Vol. 22, 2009, pp. 1083 – 1084.

1060 See e.g. Berger v. United States, 295 U.S. 78 (1935), 88 (“The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all, and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.” (emphasis added)); John L. Brady v. State of Maryland, 373 U.S. 83 (1963), 87 (where the Prosecutor had withheld exculpatory evidence from the accused, the Supreme Court held that prosecutors should seek justice and not victory). Consider also ABA, Model Code of Professional Responsibility, 1986, EC 7-13. This broad ethical duty has been criticised as offering little guidance in practice. Consider e.g. C. ZACHARIAS, Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics, in «Notre Dame Law Review», Vol. 69, 1993, p. 292 (arguing that in the absence of other constraints, such rule offers minimal guidance).


1062 Consider e.g. K. BRESLER, Pretty Phrases: The Prosecutor as Minister of Justice and Administration of Justice, in «Georgetown Journal of Legal Ethics», Vol. 9, 1995-1996, pp. 1301 – 1305 (noting that describing prosecutors as ‘ministers of justice’ is meaningless where the same terms were used to describe all other actors involved in criminal proceedings (p. 1302)); N.L. PHILIPS and S. SMITH, Reinterpreting the Ethical Duties of a Prosecutor: Y-STR as a Model Investigative Tool in «The Georgetown Journal of Legal Ethics», Vol. 22, 2009, p. 1084 (the authors note that the increase in investigative duties incumbent on prosecutors does not correspond to additional ethical rules, guidelines and constraints. The authors argue that the prosecutor’s ethical duties when undertaking an investigatory role “are in the nebulous middle ground between creating the opposition’s case and that of an ordinary advocate”); M. LANGER, The Rise of Managerial Judging in International Criminal Law, in «American Journal of Comparative Law», Vol. 53, 2005, p. 839 (arguing that the Prosecutor in the first place a party to the proceedings, notwithstanding rhetoric to the contrary, labeling the Prosecutor a ‘minister of justice’); F. BENSOUDA, The ICC Statute – An Insider’s Perspective on a Sui Generis System for Global Justice, in «North-Carolina Journal of International Law and Commercial Regulations», Vol. 36, 2010 - 2011, p. 280 (the author notes that many adversarial system have in codes of conduct rules that prosecutors cannot ignore or burry exonerating evidence. However, this falls short from an activity duty).
In a similar vein, in England and Wales, the role of Prosecutors within the criminal process, and with regard to investigations more precisely, has gradually increased in recent years. Here too, professional ethics require Prosecutors to be objective and thereby adopt a “quasi-judicial role” or to behave as “ministers of justice.” However, the role of UK Prosecutors still falls short of an obligation to actively oversee the investigative activities. However, since investigative acts are mostly carried out by the police, it is relevant to assess whether a duty to equally search for incriminating and exonerating evidence is incumbent on these police officers. The short answer is that it remains uncertain as to whether or not such a duty for police officers exists. In England and Wales, the Code of Practice under the Criminal Procedure and Investigations Act 1996 provides that “[i]n conducting an investigation, the investigator should pursue all reasonable lines of enquiry, whether these point towards or away from the suspect”. This provision has been interpreted as putting a positive duty on the police to actively search for exonerating evidence.

Several international (soft law) documents require Prosecutors to act objectively while performing their investigative role. According to the UN Guidelines on the Role of Prosecutors (‘Havana Guidelines’), Prosecutors are expected to ‘act with objectivity’, should ‘take proper account of the position of the suspect and the victim’ and ‘pay attention to all

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1063 CPS, Code for Crown Prosecutors, February 2010 (‘Code for Crown Prosecutors’), par. 2.4 (‘Prosecutors must be fair, independent and objective’). Critical is JACKSON, who notes that the characterisation of the prosecutorial role in “vague self-legitimising terms”, such as “quasi-judicial”, is not helpful where such terminology fails to delineate the precise role that prosecutors should play in the criminal process. See J. JACKSON, The Ethical Implications of the Enhanced Role of the Public Prosecutor, in «Legal Ethics», Vol. 9, 2006, pp. 37 – 38.


1065 N. JÖRG, S. FIELDS and C. BRANTS, Are Inquisitorial and Adversarial Systems Converging?, in P. FENNELL, C. HARDING, N. JÖRG and B. SWART (eds.), Criminal Justice in Europe, a Comparative Study, Oxford, Clarendon Press, 1995, p. 49 (the authors note the development whereby adversarial criminal justice systems increasingly adopt inquisitorial investigative instruments, including the police powers to detain and interrogate suspects. This necessarily distorts the equality between parties. They add that “[o]ne response to this changed status of parties might have been to place a clear truth-finding duty on the police to seek out both exculpatory and inculpatory evidence. But such profound change has not yet occurred”).

1066 Article 3 (5) Code of Practice under Criminal Procedure and Investigations Act 1996 (s 23(1)).

1067 Consider e.g. J.R. SPENCER, Evidence, in M. DELMAS-MARTY and J.R. SPENCER (eds.), European Criminal Procedure, Cambridge, Cambridge University Press, 2002, pp. 626-627 (arguing that such provision puts an affirmative obligation on the Prosecutor to search for evidence à charge and à décharge equally); C.J.M. SAFFELING, Towards an International Criminal Procedure, Oxford, Oxford University Press, 2001, p. 75 (arguing that the English police must be objective, in the sense that the police must not only consider whether there is sufficient evidence to charge a particular suspect but should also establish that all reasonable alternatives have been rebutted); J.D. JACKSON, The Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment?, in «Modern Law Review», Vol. 68, 2005, p. 760, fn. 122. For a divergent view, consider B. SWART, Damaska and the Face of International Criminal Justice, in «Journal of International Criminal Justice», Vol. 6, 2008, p. 109, fn. 81.
relevant circumstances, irrespective of whether they are to the advantage or disadvantage of
the suspect.\textsuperscript{1068} Also the more detailed ‘Standards of Professional Responsibility and
Statement of the Essential Duties and Rights of Prosecutors’, which were adopted by the
International Association of Prosecutors (IAP), should be mentioned. These standards require
Prosecutors to carry out their functions impartially and to act with objectivity when they
participate in an investigation.\textsuperscript{1069} They also require the Prosecutor to ‘have regard to all
relevant circumstances, irrespective of whether they are to the advantage or disadvantage of
the suspect’ and ‘to ensure that all necessary and reasonable enquiries are made and the result
disclosed, whether that points towards the guilt or the innocence of the accused’.\textsuperscript{1070}

On a regional level, Recommendation (2000)19 of the Council of Europe on ‘the Role of
Public Prosecution in the Criminal Justice System’ as well as the ‘Budapest Guidelines’,
which were adopted by the Conference of Prosecutors General in 2005, may be noted. Both
documents require that public Prosecutors carry out their functions ‘fairly, impartially and
objectively’ and have regard ‘to all relevant circumstances of a case including those affecting
the suspect, whether they are to his advantage or disadvantage’.\textsuperscript{1071}

III.2. The \textit{ad hoc} tribunals

The Statutes of the \textit{ad hoc} tribunals do not mandate that the Prosecutor investigate
incriminating and exonerating evidence equally.\textsuperscript{1072} Nevertheless, the ICTY emphasised in
Kupre\'skij \textit{et al.} that the role of the Prosecutor is not limited to that of a party to adversarial
proceedings. Rather, it is also that of an “organ of international criminal justice, whose object
is not simply to secure a conviction but to present the case for the Prosecution, which includes
not only inculpatory, but also exculpatory evidence in order to assist the Chamber discover
the truth in a judicial setting.”\textsuperscript{1073}

\begin{enumerate}
  \item Article 13 (b) UN Guidelines on the Role of the Prosecutors 1990.
  \item Article 3(a) and (c) and 4.2 (a) and (b) of the Standards of Professional Responsibility and Statement of the
  Essential Duties and Rights of Prosecutors 1999.
  \item \textit{Ibid.}, Article 3(d) and (e).
  \item Articles 24 (a) and 26 of Recommendation (2000)19 on the Role of Public Prosecution in the Criminal
  Justice System, Committee of Ministers, Council of Europe, 6 October 2000; CoE, European Guidelines on
  Ethics and Conduct for Public Prosecutors “The Budapest Guidelines”, as adopted by the Conference of
  Prosecutors General of Europe on 31 May 2005, guidelines III.b and III.f.
  \item Article 54 (1) (a) ICC Statute.
  \item ICTY, Decision on Communication Between the Parties and their Witnesses, \textit{Prosecutor v. Kupre\'skij et al.},
  Case No. IT-95-16-T, T. Ch. II, 21 September 1998, p. 3.
\end{enumerate}
Absent any express obligation incumbent on the Prosecutor to present ‘not only inculpatory, but also exculpatory evidence’, it is unclear what the exact value of this pronouncement is.\textsuperscript{1074} The only obligation to assist the Defence provided for under the RPE follows from the Prosecutor’s disclosure obligations regarding exculpatory materials in the Prosecution’s possession. More precisely, the Prosecutor should disclose to the Defence ‘material which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence’.\textsuperscript{1075} This falls short of any positive obligation on the Prosecutor to \textit{actively search and look} for exculpatory evidence.\textsuperscript{1076}

Similar to Trial Chamber II in the \textit{Kupreškić et al.} case, Judge Shahabuddeen underscored in his dissent in the \textit{Barayagwiza} case that, while the Prosecutor is a party to the proceedings and should not be neutral, he is not a partisan actor. Prosecutors should consider themselves “ministers of justice assisting in the administration of justice.”\textsuperscript{1077} They represent the public interest of the international community. Hence, they should act with the objectivity and fairness that is appropriate to that circumstance.\textsuperscript{1078}

Furthermore, the jurisprudence occasionally confirmed the responsibility incumbent on the Prosecutor to represent the interests of the international community, including victims and


\textsuperscript{1075} Rule 68 ICTY and ICTR RPE; Rule 68 (B) SCSL RPE.


\textsuperscript{1078} \textit{Ibid.}, par. 18.
witnesses.\textsuperscript{1079} Most clearly, the Appeals Chamber has confirmed that one of the purposes of the Prosecution’s investigative function is “to assist the Tribunal to arrive at the truth and to do justice for the international community, victims, and the accused.”\textsuperscript{1080}

To some extent, there is support for the Prosecutor’s position as a minister of justice, going beyond his or her role as a partisan actor, in the ‘Standards of Professional Conduct for Prosecution Counsel’ (Regulation No. 2) that apply to the staff of the ICTY and ICTR OTP.\textsuperscript{1081} Among others, these standards refer to counsel as ‘officers of the court’, implying broader duties and responsibilities than those of the Defence.\textsuperscript{1082} This includes the obligation to ‘serve and protect the public interest, including the interests of the international community, victims and witnesses, and to respect the fundamental rights of suspects and accused’ and to ‘be, and to appear to be, consistent, objective and independent in the conduct of investigations’.\textsuperscript{1083} Of equal importance is the Prosecutor’s obligation to assist the tribunal to arrive at the truth and to do justice for the international community, victims and the accused.\textsuperscript{1084} Also, the ICTY Manual on Developed Practice confirms— as best practice— that prosecution staff should be prepared to investigate “with an open mind” and to consider conflicting evidence, especially at the early stages of the investigation.\textsuperscript{1085}

\textsuperscript{1079} Consider e.g. ICTY, Decision on Prosecutor’s Appeal on Admissibility of Evidence, 	extit{Prosecutor v. Aleksovski}, Case No. IT-95-14/1-AR73, A. Ch., 16 February 1999, par. 25; ICTR, Decision on Interlocutory Appeals of Decision on Witness Protection Orders, 	extit{Prosecutor v. Bagosora et al.}, Case No. ICTR-98-41-AR73 & ICTR-98-41-AR73 (B), A. Ch., 6 October 2005, par. 44; ICTR, Decision on Defence Motions Alleging Violation of the Prosecutor’s Disclosure Obligations Pursuant to Rule 68, 	extit{Prosecutor v. Ndadililyimana et al.}, Case No. ICTR-00-56-T, 22 September 2008, T. Ch. II, p. 22.


\textsuperscript{1081} Prosecutor’s Regulation No. 2 of 1999, Standards of Professional Conduct – Prosecution Counsel.

\textsuperscript{1082} Article 2 (a) and 2 (c) of Prosecutor’s Regulation No. 2. Confirming, see F. MÉGRET, Accountability and Ethics, in L. REYDAMS, J. WOUTERS and C. RYNGAERT (eds.), International Prosecutors, Oxford, Oxford University Press, 2012, p. 440.

\textsuperscript{1083} Article 2 (b) of Prosecutor’s Regulation No. 2.

\textsuperscript{1084} ICTY Manual on Developed Practices, p. 15 (“Particularly in the early stages of an investigation, prosecutors and investigators should keep an open mind about the responsibility of individuals, and should be prepared to consider conflicting evidence, alter the direction of an investigation, and avoid focusing on simply trying to build a selective case against a particular individual because of early discovery of some evidence that appears to inculpate that individual”). Consider M. FEDOROVA, The Principle of Equality of Arms in International Criminal Proceedings, Antwerp, Intersentia, 2012, (non-commercial edition), p. 170 (noting that “[i]t is clear that in these cases the prosecutor appears to be acting in a manner consistent with, and in line with, the need to protect the interests of the defence.”).
Overall, however, the reference to the Prosecutor and to members of the prosecution staff as ‘ministers of justice’ should be understood in conformity with the Prosecution’s procedural role at the ad hoc tribunals, in particular its disclosure obligations. On a more general level, the RPEs of the ad hoc tribunals conceive the criminal procedure as a contest between two parties. It follows that the use of vague terminology (such as ‘organ of international criminal justice’ or ‘minister of justice’) in referring to prosecutorial ethics is not helpful in clarifying the Prosecutor’s role during investigations. Rather, such terminology should be understood in light of the overall structure and design of proceedings. Such phrases should be understood and are only meaningful in light of the concrete function of prosecutorial practice.

Staff of the ICTR OTP acknowledged their ongoing duty to disclose any exculpatory evidence to the Defence. In that regard, every trial team assesses the files on a continuing basis for potentially exculpatory evidence. On the other hand, the ICTR practice seems to confirm that there is no policy for the Prosecution to go out and to actively search for and gather exculpatory evidence. Rather, the Prosecution will look for evidence that supports the

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1086 As confirmed in the jurisprudence. See e.g. ICTY, Decision on the Appellant’s Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, Prosecutor v. Blaškić, Case No. IT-95-14-A, A. Ch., 26 September 2000 par. 32 (referring to the status of the Prosecutor and the prosecution staff as ministers of justice assisting in the administration of justice while also reiterating that the Prosecution is under a legal obligation to continually disclose exculpatory evidence under Rule 68); ICTY, Decision on Motions to Extend Time for Filing Appellant’s Briefs, Prosecutor v. Krdić and Ćerkez, Case No. IT-95-14/2-A, A. Ch., 11 May 2001, par. 14 (also referring to the role of the Prosecutor as a ‘minister of justice’ in the context of its obligations under Rule 68); ICTR, Decision on Defence Motions Alleging Violation of the Prosecutor’s Disclosure Obligations Pursuant to Rule 68, Prosecutor v. Nahiditiyimana et al., Case No. ICTR-00-56-T, T. Ch. II, 22 September 2008, p. 22 (reprimanding the Prosecutor for its lack of diligence in disclosing exculpatory material and reminding the Prosecution of its responsibility as ministers of justice to assist the Chamber discover the truth about the allegations in the indictment).


1089 Interview with a member of the OTP, ICTR-09, Arusha, 20 May 2008, p. 3.

1090 Interview with Ms. Christine Graham of the OTP, ICTR-14, Arusha, 28 May 2008, p. 4 (“There is nothing affirmative in the rules that says we have to go out and collect that [exculpatory] evidence. It says that if we have the evidence, in a signed statement, then we have to disclose it”); ibid., p. 4 (“It may not necessarily mean that the statement of witness number 2 and 3 is taken, because it does not support our case, from an investigation point of view. However, the whole point of an adversarial system is that the other party must have its own resources to do its own investigation. If they do a good job, they should go and find these things”). Interview with Dr. Alex Obote Odora of the OTP, ICTR-11, Arusha, 21 May 2008, p. 5 (“But to specifically go and look for exculpatory materials? I do not recall any policy like that. In the course of our work, as you work on a particular file and you get exculpatory material, you disclose”); Interview with a member of the OTP, ICTR-12, Arusha, 21 May 2008, p. 3 (“But simply to look for inculpatory evidence, that is a bit broad in my view”); Interview with a member of the OTP, ICTR-17, Arusha, 3 June 2008, p. 4 (“The obligation set out in Rule 68...”)
charges when collecting evidence. One member of the ICTR OTP explained that when, in the
course of the investigation, an interview with a witness reveals information that is
unfavourable to the Prosecution’s case, there is no obligation to take that witness statement. In
practice, no statement is necessarily taken.\textsuperscript{1091} Another member of the OTP gave the example
of a potential witness who is the suspect’s sister and therefore unlikely to tell the investigators
about her brother’s guilt. In a case like this, the Prosecution investigators will not interview
her.\textsuperscript{1092}

However, at least one interviewee held a different view, contending that in case the
Prosecution hears of a witness that may provide exculpatory evidence, the Prosecution is
obligated to gather such evidence.\textsuperscript{1093} One other member of the ICTR OTP underlined the fact
that if the Prosecution does learn that a witness may provide exculpatory evidence regarding a
suspect, the prosecution investigators should follow up on this in order to be prepared for

\textsuperscript{1091} Interview with Ms. Christine Graham of the OTP, ICTR-14, Arusha, 28 May 2008, p. 4.

1092 Interview with a member of the OTP, ICTR-15, Arusha, 29 May 2008, p. 6 (“We look for evidence that
supports our charge. For example, if we know that X is the sister of a suspect, and X is not likely to tell us about
the guilt of the brother, ordinary logic dictates that this is not where you go. You do not waste resources to go
there. But if you know that there is a sure source that can give you evidence of an incriminating nature, you go
there. And in the process of talking to that witness, examining the witness critically, you may discover that there
is also exculpatory material. Once that comes into your possession, you have an obligation to disclose that under
the rules”).

\textsuperscript{1093} Interview with a member of the OTP, ICTR-16, Arusha, 4 June 2008, p. 5 (“Q. For example, if you have a
witness who suggests you speak to another person to get exculpatory evidence, would you look and search for
that evidence? A. Absolutely. You have to do that. You have to satisfy yourself, at least. It is about justice. It is
not just about completion. Once you suspect somebody, it is a very heavy penalty for that person. That person is
subject to arrest and incarceration before his trial comes. That in itself is a penalty. You have to be very careful
that you satisfy yourself about that. At least, even if you do not have the ability to get to the witness, you should
as soon as possible reveal this to defence counsel. You say that, “look, I have this document, and I want you to
look at this.” Of course you do not go to exactly that level. We assume that he is a well-trained lawyer, so that
when we say “this is exculpatory,” he will definitely find that witness. He will follow it up. You may weigh the
evidence and find that even if one witness says that the suspect did not participate, he is one voice that we can
ignore because there is overwhelming evidence to the contrary. […] That does not mean that you should ignore
it. You should be aware. But there is a point where you should say, “look, we have proof beyond reasonable
doubt.” This is other doubt. If there are two or three people who say that this never happened, that is where the
balance of the adversarial and the inquisitorial systems has to be struck”). \textit{Ibid.}, p. 4 (“you may find from
assessing the demeanor of a witness or in the course of finding the accused person that a witness has very
interesting perceptions as to what happened. If one of them is sure that your suspect did not do it, you have an
obligation to follow that evidence to see whether it is credible. Although you may have 10 or 20 witnesses who
say that your suspect is responsible, if you find that one person who says he was not there, or he was not
responsible, or that he tried to save people, you have an obligation to disclose it and to find out more, and also to
change your accused person if you find out more”).
what the Defence may say at trial. However, first and foremost, it appears that trial strategies underlie the collection of such exonerating evidence.

### III.3. The Special Court for Sierra Leone

In a similar vein, the procedural framework of the Special Court does not provide for an obligation incumbent on the Prosecution to actively search for exculpatory evidence. The Prosecution’s responsibilities are limited to the disclosure of (possibly) exculpatory evidence in its possession. The Special Court’s jurisprudence likewise confirms the Prosecutor’s role as a ‘minister of justice’. It has been argued that a broader role for the Prosecutor, encompassing an obligation to actively ‘investigate on the alternative forensic scenarios than those which led to the indictment and tend to suggest the accused’s guilt’ follows from the ‘Code of Professional Conduct for Counsel with the Right to Audience before the Special Court of Sierra Leone’. Article 24 (B) of this Code states on ‘impartiality’:

> “Prosecution Counsel shall assess the materiality of facts and the probative value of evidence according to all relevant circumstances and irrespective of whether they are to the disadvantage of the suspect or accused.”

Indeed, this provision not only requires the Prosecutor to assess the probative value of the evidence (which may be interpreted as being on par with the responsibility of the Prosecutor of the ad hoc tribunals to assess the evidence gathered and disclose exonerating evidence) but also to assess ‘the materiality of the facts’ ‘according to all relevant circumstances’. This latter obligation arguably requires the Prosecutor to assess all circumstances (incriminating

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1094 Interview with a member of the OTP, ICTR-13, Arusha, 21 May 2008, p. 3.
1095 Rule 68 SCSL RPE.
1096 SCSL, Decision on Complaint Pursuant to Article 32 of the Code of Professional Conduct for Counsel with the Right to Audience before the Special Court for Sierra Leone, *Prosecutor v. Sesay*, President, SCSL-04-15-CCC52, 20 February 2006, par. 30 (citing the Separate Opinion of Judge Shahabuddeen to the Barayagwiza decision with approval).
1097 SCSL, Code of Professional Conduct for Counsel with the Right to Audience before the Special Court of Sierra Leone, as adopted on 14 May 2005 and amended on 13 May 2006 (pursuant to Rule 46 (G) SCSL RPE). Contrary to what the title of this Code of Conduct may suggest, Article 2 clarifies that the Code does not solely apply to counsel that appear of have appeared before the Court, but also to people that act or have acted on behalf of the Prosecutor, the Defence, witnesses or any other person before the Court. See S. VASILIEV, Trial, in L. REYDAMS, J. WOUTERS and C. RYNGAERT (eds.), International Prosecutors, Oxford, Oxford University Press, 2012, p. 708.
1098 Article 24 (B) Code of Professional Conduct for Counsel with the Right to Audience before the Special Court of Sierra Leone.
and exonerating) relevant to the case. However, it cannot be denied that such a rule of professional ethics falls short of a clear-cut procedural obligation on the Prosecutor ‘to investigate incriminating and exonerating evidence equally’.\(^{1099}\) Besides, it is debatable as to whether such an obligation requires the Prosecutor to go out and actively search for exonerating items of evidence. Interviews with prosecution staff at the Special Court confirmed that in practice, the prosecution staff does not actively search for exculpatory evidence.\(^{1100}\)

### III.4. The International Criminal Court

Unlike the Prosecutors of the *ad hoc* tribunals, their ICC counterpart carries an explicit statutory duty to ‘investigate incriminating and exonerating circumstances equally’.\(^{1101}\) In order to ‘establish the truth’, the Prosecution is required to ‘investigate all facts and evidence relevant to an assessment of whether there is criminal responsibility under the Statute’.\(^{1102}\) This duty is limited to the investigation phase.\(^{1103}\) Several provisions of the Code of Conduct for the Office of the Prosecutor reflect this principle of objectivity.\(^{1104}\) As the Appeals Chamber has stated: “[t]he fact that the Prosecutor is required ‘to investigate incriminating and exonerating circumstances equally’, pursuant to article 54 (1) (a) of the Statute, means that the Prosecutor will be aware, during the course of his investigations, of material that may be of assistance to the Defence.”\(^{1105}\) This duty of objectivity was also explicitly included in the Draft Regulations of the Office of the Prosecutor, in the form of a ‘truth-seeking standard’. This encompasses the Prosecution’s obligation to investigate ‘both incriminating

\(^{1099}\) Compare Article 54 (1) (a) ICC Statute.

\(^{1100}\) Consider e.g. Interview with a member of the OTP, SCSL-08, Freetown, 22 October 2009, pp. 2-3 (“You are not obliged to go out there and investigate for exculpatory information, like you have in the case of the ICC where you have to go and find exculpatory information. But if you, in the course of the investigation, in any form come into contact with information that will assist the Defence and the accused, that forms the exculpatory aspect and you have to disclose it and there is a very high standard relating to disclosure. The minimum, the least thing that will assist the Defence must be disclosed”).

\(^{1101}\) Article 54 (1) (a) ICC Statute.

\(^{1102}\) Article 54 (1) (a) ICC Statute.

\(^{1103}\) Article 54 (1) (a) ICC Statute (‘In order to establish the truth, extend the investigation…’ (emphasis added)).

\(^{1104}\) Article 49 (b) of the Code of Conduct for the Office of the Prosecutor: Prosecutors shall ‘[c]onsider all relevant circumstances when assessing evidence, irrespective of whether they are to the advantage or disadvantage of the prosecution’ and Article 49 (c): Prosecutors shall ensure that all necessary and reasonable enquiries are made and the result disclosed in accordance with the requirements of a fair trial, whether they point to the guilt or innocence of the suspect’.

\(^{1105}\) ICC, Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, *Prosecutor v. Lubanga*, *Situation in the DRC*, Case No. 01/04-01/06-1433 (OA11), A. Ch., 11 July 2008, par. 36.
and exonerating circumstances as a matter of equal priority and with equal diligence’. However, this standard was removed in the final version of the Regulations.\textsuperscript{1106} The Prosecution considers the investigation into potentially exonerating information and evidence to be a ‘continuous’ and ‘simultaneous’ process. Therefore, the search for such information or evidence is not the task of a separate investigative team.\textsuperscript{1107} In the event that the Prosecutor encounters potentially exonerating information by questioning witnesses, the Prosecution will actively pursue such leads and try to identify new witnesses and evidence.\textsuperscript{1108}

It follows that the Prosecution acts as an ‘officer of justice’, rather than a partisan actor.\textsuperscript{1109} This explicit obligation of objectivity was intended “to build a bridge between the adversarial common law approach to the role of the Prosecutor and the role of the Investigating Judge in certain civil law systems.”\textsuperscript{1110} One commentator acknowledged the time-saving potential of such a prosecutorial obligation. FRIMAN argues that “an objective investigation with some type of defence involvement has a potential for narrowing the scope of the prosecution case.”\textsuperscript{1111} Among others, it allows for some coordination between the Defence’s and the Prosecution’s investigations, even some level of Defence involvement in the Prosecutor’s investigation, including “the presence of both the prosecution and the suspect/defence during certain investigative measures, the Prosecutor’s compliance with requests by the suspect/defence to take investigative measures, and the seeking of the Prosecutor’s view in cases envisaged in Rule 116 (2) [requests by the Defence for the collection of evidence].”\textsuperscript{1112}

In deciding upon requests by the Defence to undertake investigative acts, the Prosecutor then needs to have due regard to his or her obligation to investigate exonerating circumstances.
equally. Nevertheless, the ICC’s statutory documents do not formally provide for the possibility for the Defence to request the Prosecutor to conduct certain investigative actions. Besides, the principle of objectivity may not be understood to imply that the Defence should exclusively rely on the investigations conducted by the Prosecutor.

Some authors have expressed scepticism about the realisation in practice of such nonpartisan attitude, given the primarily adversarial nature of proceedings. In *Mbarushimana*, for example, the Prosecution was reprimanded by PTC II, which found the confrontational questioning methods used by some investigators to be inappropriate in light of their duty of objectivity and held that such techniques may significantly weaken the probative value of evidence so obtained. More precisely, the Pre-Trial Chamber stated that:

“[t]he reader of the transcripts of interviews [of insider witnesses] is repeatedly left with the impression that the investigator is so attached to his or her theory or assumption that he or she does not refrain from putting questions in leading terms and from showing resentment, impatience or disappointment whenever the witness replies in terms which are not entirely in line with his or her expectations. Suggesting that the witness may not be “really remembering...”

1114 W. WEI, Die Rolle des Anklägers eines internationalen Strafgerichtshofs, Frankfurt am Main, Peter Lang, 2007, p. 36. However, the Prosecution seems willing to accommodate such requests. Consider the exchange between the Ngudjolo Chui defence team and an OTP head of investigations on the witness stand: “Q. […] are you able to favourably receive possible requests from the Defence with regards to possible exonerating investigations and, if this is the case, could you guarantee to the Defence teams that the – there would be total objectivity in the accomplishment of the duties which are so required?” “A. The Prosecution has an equal obligation to investigate the exonerating facts and, of course, that would be conducted with the required objectivity”. See ICC, Transcript, *Prosecutor v. Katunga and Ngudjolo Chui, Situation in the DRC*, Case No. 01/04-01/07-T-81, T. Ch. II, 25 November 2009, p. 72.
1116 Consider e.g. M. DAMASKA, Problematic Features of International Criminal Procedure, in A. CASSESE (ed.), The Oxford Companion to International Criminal Justice, Oxford, Oxford University Press, 2009, p. 176 (arguing that where two cases exist at the pre-trial and trial stage, notwithstanding the requirement that Prosecutors adopt non-partisan attitudes, “it becomes difficult for them to refrain from using their evidence selectively, focusing only on information favourable to their allegations”). A. ZAHAR and G. SLUITER, International Criminal Law: A Critical Introduction, Oxford, Oxford University Press, 2008, p. 374 (the authors are critical about the effective realisation of such impartial role in an adversarial model); K. AMBOS, Confidential Investigations (Article 54 (3)(e) ICC Statute) vs. Disclosure Obligations: the Lubanga Case and National Law, in «New Criminal Law Review», Vol. 12, 2009, pp. 566 - 567 (noting the tension between the two roles of the Prosecution, on the one hand to vigorously pursue criminal conduct and to gather incriminating facts and on the other hand to act as an objective investigation organ that also has to take into consideration the interests of defendants and to look for exonerating evidence); C. BUISING, Ascertainment of the Truth in International Criminal Justice, 2012, (available at: http://bura.brunel.ac.uk/handle/2438/6555, last visited 18 November 2013), p. 250 (“It is debatable whether the notion of a truly independent Prosecutor searching for evidence that undermines his own case is a workable concept in international criminal justice systems”).
exactly what was said”, complaining about having “to milk out” from the witness details which are of relevance to the investigation, lamenting that the witness does not “really understand what is important” to the investigators in the case, or hinting at the fact that the witness may be “trying to cover” for the Suspect, seem hardly reconcilable with a professional and impartial technique of witness questioning.”

To some extent, this practice illustrates the difficulties in ascribing a more neutral role to the Prosecutor in conducting investigations (through an active duty to search for exculpatory evidence) while following a two-case approach during trial. DAMAŠKA noted that a non-partisan role during investigations:

“is easier to postulate in theory than to achieve in practice. For if prosecutors know that at the trial the defense’s case follows their own case, a procedural dynamic develops in which it becomes difficult for them to refrain from using evidence selectively. No wonder when truth is expected to emerge from two competing vectors, their sum is skewed whenever one side exaggerates while the other side refrains from doing so.”

While DAMAŠKA’s fears relate to the selective use of evidence at trial, this does not necessarily influence the Prosecutor’s gathering of evidence. However, the aforementioned passages in the confirmation of charges decision in Mbarushimana may be seen as proof of partisan postures contaminating the ‘neutral’ role of the Prosecutor in conducting investigations.

Also, one can refer to what Trial Chamber I described in the Lubanga case as the unsupervised reliance on intermediaries, and which led the Chamber to conclude that the evidence by a series of witnesses could not safely be relied upon. It is recalled that the Trial Chamber held that:

“A series of witnesses have been called during this trial whose evidence, as a result of the essentially unsupervised actions of three of the principal intermediaries, cannot safely be relied on. The Chamber spent a considerable period of time investigating the circumstances of a substantial number of individuals whose evidence was, at least in part, inaccurate or dishonest.

1118 Ibid., par. 51.
The prosecution’s negligence in failing to verify and scrutinise this material sufficiently before it was introduced led to significant expenditure on the part of the court. An additional consequence of the lack of proper oversight of the intermediaries is that they were potentially able to take advantage of the witnesses they contacted.” 1120

In addition, since the intermediaries relied upon were former child soldiers, the Trial Chamber acknowledged that they were vulnerable to manipulation because of their youth and likely exposure to the conflict. 1121 Besides, one of the intermediaries that assisted the OTP’s work had previously worked for the Congolese intelligence services and was assisted by at least one person who, at the time being, was employed by the Congolese intelligence services. Remarkably, the intermediary (‘P-0316’) testified that he had always remained loyal to his government. 1122 The Trial Chamber stated that it “is particularly concerned that the prosecution used an individual as an intermediary which such close ties to the government that had originally referred the situation in the DRC to the Court.” 1123 The Trial Chamber added that:

“Given the likelihood of political tension, or even animosity, between the accused and the government, it was wholly undesirable for witnesses to be identified, introduced and handled by one or more individuals who, on account of their work or position, may not have had, to a sufficient degree or at all, the necessary qualities of independence and impartiality. Whilst it is acceptable for individuals in this category to provide information and intelligence on an independent basis, they should not become members of the Prosecution team. Moreover, any information and intelligence they provide should be verified and scrutinised by the prosecution, in order to avoid any manipulation or distortion of evidence.” 1124

Clearly, since the Congolese government referred the situation in the DRC to the Court, the reliance on intermediaries with close ties to the government casts doubt on the neutrality of the Prosecutor.

1120 ICC, Judgement pursuant to Article 74 of the Statute, Prosecutor v. Lubanga Dyilo, Situation in the DRC, Case No. ICC-01/04-01/06-2842, T. Ch. I, 14 March 2012, par. 482. See supra, Chapter 2, VII.1.
1121 Ibid., par. 482.
1122 Ibid., par. 367.
1132 Ibid., par. 368.
1134 Ibid., par. 368.
Further reference can be made to the broad use by the Prosecutor in the Lubanga case of confidentiality agreements pursuant to Article 54 (3) (e) ICC Statute and the potential tension of these agreements with the Prosecutor’s requirement of objectivity. It is recalled that the Trial Chamber stayed the proceedings after the Prosecutor appeared unable to disclose exculpatory materials in its possession which were obtained through confidentiality agreements to the Defence or to the Trial Chamber. These exculpatory materials included evidence that tended to suggest that the accused had acted in self-defence, that he was acting under duress or compulsion, that he had made efforts to demobilise child soldiers and that he had insufficient control over the persons who allegedly perpetrated the crimes he was charged for. In short, the Appeals Chamber stated that such confidentiality agreements may only be used to generate new evidence. It further stated that the use of such agreements should not lead to violations of the rights of the suspect or the accused person. The Prosecutor remains bound by his or her obligations under Article 54 (1) (c) ICC Statute to “[f]ully respect the rights of persons arising under this Statute” including the suspect or the accused person’s disclosure rights. Hence, the Prosecutor should apply Article 54 (3) (e) “in a manner that will allow the Court to resolve the potential tension between the confidentiality to which the Prosecutor has agreed and the requirements of a fair trial.”

In his separate opinion to the Appeals Chamber decision on the Prosecutor’s appeal to the stay of proceedings, Judge Pikis argued that the Prosecutor may have breached his obligation of objectivity. More precisely, the Prosecutor should have used the ‘lead-evidence’ obtained through confidentiality agreements “to generate evidence reproducing or corresponding to

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1125 ICC, Decision on the Consequences of Non-disclosure of Exculpatory Materials Covered by Article 54 (3) (e) Agreements and the Application to Stay the Prosecution of the Accused, together with certain other Issues Raised at the Status Conference on 10 June 2008, Prosecutor v. Lubanga, Situation in the DRC, Case No. ICC-01/04-01/06-1401, T. Ch. I, 13 June 2008. Most of this confidential evidence was obtained from the UN. In this regard, consider Article 18 (3) of the Negotiated Relationship Agreement between the International Criminal Court and the United Nations, 2283 UNTS 195, entry into force 4 October 2004 (‘The United Nations and the Prosecutor may agree that the United Nations provide documents or information to the Prosecutor on condition of confidentiality and solely for the purpose of generating new evidence and that such documents or information shall not be disclosed to other organs of the Court or to third parties, at any stage of the proceedings or thereafter, without the consent of the United Nations’).

1126 Ibid., par. 22.

1127 ICC, Judgment on the Appeal of the Prosecutor against the Decision of Trial Chamber I entitled “Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54 (3) (e) Agreements and the Application to Stay the Prosecution of the Accused, together with certain other Issues Raised at the Status Conference on 10 June 2008”, Prosecutor v. Lubanga Dyilo, Situation in the DRC, Case No. ICC-01/04-01/06-1486 (OA 13), A. Ch., 21 October 2008, par. 1 – 2.

1128 Ibid., par. 42.

1129 Ibid., par. 44.
evidential material collected from the providers”. Otherwise, the Prosecutor would fall short of his obligation of objectivity.\footnote{ICC, Judgment on the Appeal of the Prosecutor against the Decision of Trial Chamber I entitled “Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54 (3) (e) Agreements and the Application to Stay the Prosecution of the Accused, together with certain other Issues Raised at the Status Conference on 10 June 2008”, Prosecutor v. Lubanga Dyilo, Situation in the DRC, Case No. ICC-01/04-01/06-1486 (OA 13), A. Ch., 21 October 2008, Separate Opinion of Judge Georgios M. Pikis, par. 41 (“As may be gathered from the position of the Prosecutor advanced before the Trial Chamber, he is not free of responsibility for the failure to generate evidence reproducing or corresponding to evidential material collected from the providers. Article 54 (1) (a) of the Statute binds the Prosecutor to collect not only inculpatory but exculpatory evidence too. The omission of the Prosecutor in this case to gather exculpatory evidence of which he was aware is another reason marking the failure of the Prosecutor to make disclosure of exculpatory evidence to the defence”).} Hence, insofar that the information was not used to gather exonerating evidence corresponding to the evidence obtained through confidentiality agreements the Prosecutor may have breached his or her obligation of objectivity under Article 54 (1) (a) ICC Statute. According to Judge Pikis, “[t]here is nothing to suggest that any consistent effort was made to generate evidence from the material received. On the contrary, the indications are that little, if anything, was done in that direction, resting on the hope that the providers would consent to disclosure of such confidential material to the accused.”\footnote{Ibid., par. 42.} However, whether the Prosecutor did in fact fall short of his obligation of objectivity is difficult to assess. Before the Trial Chamber, the Prosecution argued that it was looking in its documents to identify alternatives in case the information providers would not agree to restrictions on the disclosure of exculpatory evidence being lifted.\footnote{ICC, Transcript, Prosecutor v. Lubanga Dyilo, Situation in the DRC, Case No. ICC-01/04-01/06-T-52, T. Ch. I, 10 October 2007, p. 18.} Later, the Prosecution suggested that “the exculpatory value of the non-disclosed material has been covered in other documents or information that have already been served.”\footnote{ICC, Decision on the Consequences of Non-disclosure of Exculpatory Materials Covered by Article 54 (3) (e) Agreements and the Application to Stay the Prosecution of the Accused, together with certain other Issues Raised at the Status Conference on 10 June 2008, Prosecutor v. Lubanga, Situation in the DRC, Case No. ICC-01/04-01/06-1401, T. Ch. I, 13 June 2008, par. 60; S. SWOBODA, The ICC Disclosure Regime – A Defence Perspective, in «Criminal Law Forum», Vol. 19, 2008, p. 469.} However, the Trial Chamber rejected such arguments insofar it would not offer a valuable solution insofar as it would require the Trial Chamber to see the original evidence for it to assess whether it was analogous.\footnote{R. KATZMAN, The Non-Disclosure of Confidential Exculpatory Evidence and the Lubanga Proceedings: How the ICC Defense System Affects the Accused’s Right to a Fair Trial, in «Northwestern Journal of International Human Rights», Vol. 8, 2009, p. 91.} Besides, as Pikis argued, this ‘alternative evidence’ would not offer a solution to the Prosecutor’s disclosure obligations with regard to exculpatory evidence in its possession.\footnote{ICC, Judgment on the Appeal of the Prosecutor against the Decision of Trial Chamber I entitled “Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54 (3) (e) Agreements and}
disclosure obligations, it is not possible to assess whether this ‘alternative evidence’ would, in fact, be sufficient for the Prosecutor to respect his obligation of objectivity.

It may be added that the ECtHR has also occasionally expressed a certain mistrust of prosecutorial objectivity. In Sanoma Uitgevers BV v. The Netherlands, for example, the Grand Chamber emphasised that while the Dutch public Prosecutor “like any public official, is bound by requirements of basic integrity, in terms of procedure […] [he or she] is a ‘party’ […] “and can hardly be seen as objective and impartial so as to make the necessary assessment of the various competing interests.”

III.5. The Internationalised criminal tribunals

§ ECCC

The Co-Prosecutors are under an obligation to be ‘independent’ in the execution of their duties. Unlike the Co-Investigating Judges, they are not subject to an explicit obligation to investigate incriminating and exonerating circumstances evenly. However, like the Prosecutors of the ad hoc tribunals and the Special Court, the Co-Prosecutors are obliged to disclose to the Co-Investigating Judges ‘any material that in the actual knowledge of the Co-Prosecutors may suggest the innocence or mitigate the guilt of the suspect or the charged person or affect the credibility of the prosecution evidence’ as soon as possible after the introductory submission is filed. Besides, since proceedings are mainly of a civil law nature, it may be argued that the Co-Prosecutors should assist the Court in its truth-finding mission, and, accordingly, equally investigate facts and circumstances à charge and à décharge. Notably, the Co-Prosecutors are appointed by the Supreme Court of the Magistracy
and should, as far as the national Co-Prosecutor is concerned, be selected from among the
Cambodian professional Judges. Consequently, they may be expected to behave as
‘officers of the court’. However, to a certain extent, the Co-Prosecutors’ obligation to actively
pursue exonerating circumstances or facts remains uncertain, both during the preliminary
investigation and thereafter.

During interviews, members of the Office of the Co-Prosecutors maintained, first and
foremost, that the Co-Prosecutors should strive to get to the truth. The Co-Prosecutors are
under an obligation to not only gather incriminating evidence:

“[If, in the judicial investigation phase or the trial phase we come across something that is
exculpatory that would affect the outcome of the case we feel that we have an obligation to
provide that to the investigative judges and the defense. In the preliminary investigation, my
view has been and always is that our role is to pursue suspects for these crimes. But at the same
time as we come across and identify exculpatory evidence, [our role is] to collect that and to
make sure that goes across with the introductory submission.”

However, such an obligation is nowhere mentioned explicitly. Rather, the obligation to gather
exculpatory evidence follows from the understanding by the Co-Prosecutors of their role.
Staff members emphasise that they are public officials, investigating crimes on behalf of the
public interest and society. They emphasise that the Co-Prosecutors mission is to discover
the truth.

1139 Article 18 new ECCC Law, Article 6 (5) ECCC Agreement.
1140 Interview with a member of the OCP, ECCC-11, Phnom-Penh, 9-11 November 2009, p. 3.
1141 Ibid., p. 3. Consider also ibid., p. 4 (“during the preliminary investigation we have a joint role. Our first role
is to make sure that we are finding inculpatory evidence to help bring people to account. But when we discover
or when we feel that the person that we are investigating or the crime that we are investigating did not occur or
the person is not guilty or there would be something that would really diminish or undermine the allegation that
the person was involved or that the crime happened, we would have to actively pursue that. […] In principle if
anything would indicate that person’s innocence, there is definitely an obligation for us to pursue that. Otherwise
we are starting a process which we do not really believe in or we do not believe that it is necessarily true. That is
not our business. That is our responsibility to justice generally, as opposed to our particular duty to make sure
that we collect inculpatory evidence”).
1142 Interview with a member of the OCP, ECCC-14, Phnom-Penh, 13 November 2009, p. 3 (“in any system, the
prosecutor’s role is one of an executive, or part of the executive, who basically investigates crime on behalf of
the public interest and society at large, and if he or she finds sufficient evidence, proceeds with charges”); ibid.,
p. 3 (“that’s my view, that the prosecutor, just like a judge, is being a public official”).
1143 Interview with a member of the OCP, ECCC-14, Phnom-Penh, 13 November 2009, p. 4 (“When a Prosecutor
looks for evidence in investigating a crime, he or she looks for evidence of a crime and the truth of that matter.
That means, irrespective whether it is inculpatory or exculpatory, you are searching for the truth”); Interview
with a member of the OCP, ECCC-11, Phnom-Penh, 9-11 November 2009, p. 3 (“It is to get to the truth”).
One interviewee stressed the fact that the Office of the Co-Prosecutors proposed an amendment to enlarge the provision on disclosure of exculpatory evidence.\textsuperscript{1144} More precisely, insofar that the current obligation in the Internal Rules for the Co-Prosecutors to provide exculpatory evidence seems to end with the sending of the introductory submission to the Co-Investigating Judges, the Office of the Co-Prosecutors requested that the Rules be amended to maintain that there is an obligation to provide exculpatory evidence to the Judges whenever exculpatory evidence is found and throughout the entire proceedings.\textsuperscript{1145}

Other staff members of the Office of the Co-Prosecutors are less convinced of the Co-Prosecutors’ role in gathering exculpatory evidence. One staff member holds the view that:

“The key role of the prosecution is to find inculpatory evidence. But of course, during the course of our evidence, if we find exculpatory evidence, we will then put them in the case file, along with the inculpatory ones.”\textsuperscript{1146}

From the foregoing, it appears that there are divergent views within the Co-Prosecutors’ Office regarding the duty to investigate incriminating and exonerating circumstances evenly.

In turn, the Co-Investigating Judges should be impartial and independent in executing their function.\textsuperscript{1147} They may take such investigative measures that are ‘conducive to ascertaining the truth’ and should, to that extent, equally investigate incriminating and exonerating circumstances.\textsuperscript{1148} Hence, the judicial investigation should be objective in nature.\textsuperscript{1149} On one occasion, the Pre-Trial Chamber established that the Co-Investigating Judges had committed an error when they stated that “an investigating judge may close a judicial investigation once

\begin{itemize}
\item \textsuperscript{1144} Ibid., p. 3.
\item \textsuperscript{1145} Ibid., pp. 3-4.
\item \textsuperscript{1146} Interview with a member of the OCP, ECCC-13, Phnom-Penh, 10 November 2009, p. 2.
\item \textsuperscript{1147} Article 5 (2) and (3) ECCC Agreement. Consider also Article 25 ECCC Law according to which Co-Investigating Judges should have ‘a spirit of impartiality’ and should be independent as well as Article 2 ECCC Code of Judicial Ethics, according to which ‘Judges shall be impartial and ensure the appearance of impartiality in the discharge of their judicial functions’.
\item \textsuperscript{1148} Rule 55 (5) ECCC IR.
\item \textsuperscript{1149} It may be noted that a considerable amount of litigation concerns the alleged partiality of the Co-Investigating Judges or of members of the OCIJ. Consider e.g. ECCC, Decision on IENG Sary’s and on Ieng Thirith’s Application under Rule 34 to Disqualify Judge Marcel Lemonde, NUON Chea et al., Case No. 002/07-12-2009-ECCC/PTC (05), PTC, 15 June 2010; ECCC, Decision on IENG Sary’s Rule 35 Application for Judge Lemonde’s Disqualification, NUON Chea et al., Case No. 002/07-12-2009 (07), 29 March 2010; ECCC, Decision on NUON Chea’s Application for Disqualification of Judge Marcel Lemonde, NUON Chea et al., Case No. 002/29-10-2009-ECCC/PTC (04), PTC, 23 March 2010. However, such claims were never upheld by the Pre-Trial Chamber.
\end{itemize}
he has determined that there is *sufficient evidence* to indict a charged person” (principle of sufficiency).1150 Instead, the Judges should first close their investigation when they consider that they have accomplished all acts deemed necessary to ascertain the truth. Before issuing a closing order, they should then (upon receiving the final submissions from the Co-Prosecutors) assess whether there is sufficient evidence to send the charged person to trial.1151

Their obligation to search for exculpatory evidence implies that they have to review documents and other materials, when there is “*prima facie* reason to believe” that these may contain exonerating evidence.1152

§ STL

It follows from Rule 55 (C) of the STL RPE that the Prosecutor should ‘assist the Judges in establishing the truth’. According to the Pre-Trial Judge, “the Prosecutor must act, not merely as a party to the proceedings, but also as an agent of Justice, representing and safeguarding the public interest.” In that capacity according to Rule 55 (C), he shall “assist the Tribunal in establishing the truth and protect the interests of the victims and witnesses. He shall also respect the fundamental rights of suspects and accused.”1153 This language reflects the ICTY’s and the Special Court’s case law by describing the Prosecutor as a ‘minister of justice’. Further in line with the *ad hoc* tribunals’ and the Special Court’s procedural set-ups, the Prosecutor is obligated to disclose exculpatory materials, notwithstanding certain exceptions.1154 The Prosecutor’s role is that of an ‘organ of justice’. However, like the *ad hoc* tribunals, he or she is neither obligated to actively search for exculpatory material nor to investigate incriminating and exonerating circumstances equally. The Prosecutor is thus meant to investigate from a prosecutorial perspective.

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1150 ECCC, Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, NUON Chea et al., Case No. 002/19-09-2007-ECCC/OCDJ (PTC24), PTC, 18 November 2009, par. 37 (emphasis added). The Co-Investigating Judges reasoned that where it is an impossible task to conduct an exhaustive search for all evidence, “[t]he logic underpinning a criminal investigation is that the principle of sufficiency of evidence outweighs that of the exhaustiveness” (emphasis added).

1151 Rules 66 (1) and 67 ECCC IR.

1152 ECCC, Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, NUON Chea et al., Case No. 002/19-09-2007-ECCC/OCDJ (PTC24), PTC, 18 November 2009, par. 36.

1153 STL, Order Regarding the Detention of Persons Detained in Lebanon in Connection with the Case of the Attack against Prime Minister Rafiq Hariri and Others, Case No. CH/PTJ/2009/06, PTJ, 29 April 2009, par. 25.

1154 Rule 113 (A) STL RPE.
§ SPSC

At the SPSC, requirements of objectivity and impartiality on the Public Prosecutor derived from the constitution of East-Timor.\textsuperscript{1155} They were reflected in the TRCP which required the Public Prosecutor to conduct criminal investigations ‘in order to establish the truth’, and further that ‘[i]n doing so, the public Prosecutor should investigate incriminating and exonerating circumstances equally’.\textsuperscript{1156} Such a prosecutorial role coincides with the ICC’s procedural model and requires the Public Prosecutor to actively investigate exonerating circumstances and leads.

§ Conclusion

Overall, the previous overview indicates that not at all tribunals under review, an obligation of objectivity is incumbent on the Prosecutor. More precisely, not at all tribunals scrutinised there is an active duty incumbent on the Prosecution to go out and gather exonerating evidence, over and above the disclosure obligations that pertain to (potentially) exonerating information and evidence in the Prosecution’s possession. More troublesome is the finding that staff members within the Prosecutor’s office hold different opinions on whether or not the Prosecutor should actively search for exculpatory evidence. At least, this was the case at the ICTR and the ECCC. It illustrates how the use of terminology such as ‘organs of international criminal justice’ is not of any use insofar that such phrases mean different things to different people and so long as Prosecutors define their ethical obligations in different ways. Moreover, to describe the Prosecutor as an ‘organ of international criminal justice’ may, in the absence of any express obligation to gather exculpatory evidence, work to the disadvantage of the accused. Indeed, as one commentator puts it, such a characterisation “allowed the [ICTY]

\textsuperscript{1155} Section 132 (3) of the Constitution of East-Timor (2002) (“In performing their duties, Public Prosecutors shall be subject to legality, objectivity and impartiality criteria, and obedience toward directives and orders as established by law”). According to Section 4.1 UNTAET Regulation 2000/16, Public Prosecutors shall perform their function impartially. They should “act without bias and prejudice and in accordance with their impartial assessment of the facts and their understanding of the applicable law in East Timor, without improper influence, direct and indirect, from any source, whether within or outside the civil administration of East Timor” (Section 4.2 UNTAET Regulation 2000/16).

\textsuperscript{1156} Section 7.2 TRCP.
Tribunal to confer a large measure of discretion on the prosecution in terms of the assistance it is required to give the accused.\textsuperscript{1157}

It has been argued that an obligation of objectivity follows from human rights law. JACKSON argues that the ECtHR’s case law regarding the right to a fair trial, necessitates a “change in legal culture on the part of public authorities”, including police and prosecutors, calling for “a much more protective stance towards defendants.”\textsuperscript{1158} Among others, this would require prosecutors and police to search for evidence \textit{à charge} and \textit{à décharge} in the course of criminal investigations and to share the information gathered with the Defence.\textsuperscript{1159}

However, it is not quite clear as to how much this finding derives from the ECtHR’s jurisprudence. The author identifies four ‘principles’ regarding the ECtHR’s vision of on Defence participation in the criminal process: to know (1) the principle that defendants cannot be required to take part in the criminal process, (2) the principle that any participation of the defendant in the criminal process must be informed, (3) that the Defence should be given the opportunity to challenge the evidence and finally, (4) that the national courts must clarify the grounds on which they base their decisions.\textsuperscript{1160} He adds that states enjoy considerable discretion on how to implement these principles in their domestic systems.\textsuperscript{1161} Nevertheless, these principles seem to not require an ‘objective’ Prosecutor in the sense of a Prosecutor who equally investigates \textit{à charge} and \textit{à décharge}. Moreover, SUMMERS has argued that the ECommHR has consistently rejected any allegations of partiality of the investigative authorities. Also the ECtHR rejected allegations of violations of Article 6 based on the partiality of the investigative authorities. In this rejection, SUMMERS finds proof of the “Court’s construction of a criminal trial in which the investigators are automatically assumed to be partial”.\textsuperscript{1162} Hence at present, an obligation of objectivity---in the sense of an obligation

\begin{itemize}
\item \textit{Ibid.}, pp. 759 - 760.
\item \textit{Ibid.}, pp. 758 – 759.
\item \textit{Ibid.}, p. 759.
\item S.J. SUMMERS, Fair Trials: the European Criminal Procedural Tradition and the European Court of Human Rights, Oxford, Hart Publishing, 2007, p. 127 (however, whereas the author acknowledges that the Court has constructed the pre-trial phase in an adversarial manner, she adds that such was done in an “instinctive” rather than a “deliberate” manner).
\end{itemize}
incumbent on the Prosecutor to search for exculpatory evidence—, does not seem to derive from human rights law.

Nevertheless, an objective prosecutorial investigation may be required to fulfil the special goals that these tribunals were set up for. Besides, due consideration should be given to the post-conflict contexts in which these investigations are carried out. For example, the Defence’s difficulties in accessing evidence, typically associated with these tribunals, favour imposing an obligation on the Prosecutor to search for exculpatory evidence. Notably, the ‘Model Code of Criminal Procedure for Post-Conflict Criminal Justice’ prefers a prosecutorial model whereby the Prosecutor gathers evidence both for and against the suspect. This includes a positive obligation to take investigative measures which may reveal exonerating evidence.

IV. DUE PROCESS OBLIGATIONS

§ The ad hoc tribunals and the SCSL

Rules of professional ethics, though often disregarded, are incumbent on the different participants in the investigations. The benchmark cases regarding the prosecutorial duty of due diligence in conducting investigations are Barayagwiza and Kajelijeli. According to the ICTR Appeals Chamber, the duty of due diligence requires the Prosecution to ensure, once it initiates a case, that “the case proceeds to trial in a way that respects the rights of the accused.” This obligation attaches to the Prosecutor’s authority to set the whole legal process in motion by starting an investigation and by submitting an indictment for confirmation. Both the Kajelijeli and the Barayagwiza cases concerned the Prosecutors’ responsibilities regarding the detention of a suspect in the custodial state and prior to their transfer to the Tribunal.

1164 Ibid., p. 93.
1165 ICTR, Decision, Prosecutor v. Barayagwiza, Case No. ICTR-97-19-AR72, A. Ch., 3 November 1999, par. 91-92; ICTR, Judgement, Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-A, A. Ch., 23 May 2005, par. 220. Both cases concerned the responsibilities of the Prosecutor regarding the detention of a suspect, prior to his or her transfer to the Tribunal.
1166 ICTR, Decision, Prosecutor v. Barayagwiza, Case No. ICTR-97-19-AR72, A. Ch., 3 November 1999, par. 91. The Appeals Chamber emphasised that the ultimate responsibility to bring a defendant to trial rests with the Prosecutor. In that regard, the Prosecutor can be likened to the ‘engine’ driving the work of the tribunal.
transfer to the tribunal. The ordinary meaning of ‘due diligence’ connotes ‘appropriate, sufficient, or proper care and attention’. Additionally, the notion (in the way it was referred to by the ICTR Appeals Chamber) denotes an element of ‘diligence’ in the sense of expeditiousness.

However, prosecutorial diligence is not limited to instances where liberty is deprived. Rather, due diligence is an overarching ethical obligation for the Prosecutor when conducting investigations. On several occasions, the Prosecution was reminded of its task to proceed diligently or expeditiously. While the Trial Chamber in Furundžija acknowledged “the constraints under which both parties operate”, it reminded the Prosecution that it should act “particularly diligent, for example, in searching its evidence, records and databases for information relevant to the case in hand and locating witnesses as a matter of urgency.”

The Trial Chamber “cannot condone inaction, inefficiency, shoddiness and incompetence of any sort.” Besides, due diligence may lead the Prosecution to abstain from relying on certain information contained in witness statements where the Prosecution (based on documents in its possession) should have known that such information was incorrect.

However, this is not to say that the prosecutorial requirement of due diligence is identical whether or not a suspect or accused has been deprived of liberty. Rather, it seems that the jurisprudence subscribes to a ‘strengthened’ due diligence notion in cases where a suspect or accused has been deprived of his or her liberty at the tribunal’s behest. As the Trial Chamber acknowledged in Furundžija, “it is reasonable for a Trial Chamber to expect a higher level of urgency and expediency” in such cases. This jurisprudence reflects the ‘special diligence’ requirement in the ECtHR’s case law in relation to proceedings regarding persons that have been ‘charged’ and are deprived of liberty. More precisely, in its assessment of the ‘reasonable time’ requirement under Article 5 (3) ECHR, the Court will consider (on a case

1169 ICTY, The Trial Chamber’s Formal Complaint to the Prosecutor Concerning the Conduct of the Prosecution, Prosecutor v. Furundžija, Case No. IT-95-17-PT, T. Ch., 5 June 1998, par. 6.
1170 Ibid., par. 6.
1171 ICTR, Decision on Callixte Nzabonimana’s Appeal against the Trial Chamber’s Decision on Motion for Rule 91 Proceedings against Prosecution Investigators, Prosecutor v. Nzabonimana, Case No. ICTR-98-44D-AR91, A. Ch., 27 April 2012, par. 14.
1172 Ibid., par. 8.
by case basis), whether the national authorities displayed ‘special diligence’ in the conduct of proceedings. It was this ‘special diligence’ requirement that led ICTR Trial Chamber III to observe in Protais Zigiranyirazo that such a requirement may have been violated when the Prosecutor sought and obtained leave to amend the indictment on three occasions after Protais Zigiranyirazo’s arrest and detention. The issue of the length of pre-trial detention and the respective requirements under human rights law will be discussed in detail in Chapter 8.

These due diligence standards in the jurisprudence are reflected in prosecutorial, ethical ‘good conduct’ standards. According to the ICTY and ICTR Standards of Professional Conduct for Prosecution Counsel (Regulation No. 2), counsel should always adopt the ‘highest standards of professional conduct’ in the course of investigations and ‘exercise the highest standards of integrity and care, including the obligation always to act expeditiously when required and in good faith’. Besides, the ICTY ‘Code of Professional Conduct for Counsel Appearing Before the International Tribunal’ and the ICTR ‘Code of Professional Conduct for Defense Counsel’ contain due diligence obligations for counsel. At the SCSL, the ‘Code of Professional Conduct for Counsel with the Right to Audience before the Special Court of Sierra Leone’ stipulates that counsel will act with ‘competence, honesty, skill and professionalism in the presentation and conduct of the case’.

Furthermore, a duty of due diligence is reflected in several provisions of the RPE, requiring the parties to conduct their respective investigations with proper care. It was previously illustrated how a due diligence standard is relevant for the late introduction of evidence. For example, when parties seek to present additional evidence before the Appeals Chamber or

1173 See e.g. ECtHR, Kudła v. Poland, Application No. 30210/96, Reports 2000-XI, Judgment (Grand Chamber) of 26 October 2000, par. 111; ECtHR, Labita v. Italy, Application No. 26772/95, Reports 2000-IV, Judgment (Grand Chamber) of 6 April 2000, par. 153; ECtHR, Stögmüller v. Austria, Application No. 1602/62, Series A, No. 9, Judgment of 10 November 1969, par. 5. Consider also ICTR, Decision on Protais Zigiranyirazo’s Motion for Damages, Prosecutor v. Zigiranyirazo, T. Ch. III, 18 June 2012, par. 34.
1175 See infra, Chapter 8, II.10.
1177 Article 2 (d) of the Prosecutor’s Regulation No. 2 of 1999, Standards of Professional Conduct - Prosecution Counsel.
1179 Article 5 (i) of the Code of Professional Conduct for Counsel with the Right to Audience before the Special Court of Sierra Leone, as adopted on 14 May 2005 and amended on 13 May 2006.
when one of the parties seeks a review of the proceedings on the basis of new facts (not known to the moving party at the time of proceedings), it should be shown that the new evidence or the new facts could not have been discovered through the exercise of due diligence during trial. The Appeals Chamber normally refuses to admit evidence that was available at an earlier stage but was not presented, due to a lack of due diligence of the party concerned. Besides, a duty of due diligence in the conduct of the investigations can be derived from the abovementioned jurisprudence on the re-opening of a party’s case in exceptional circumstances. The primary consideration, when a party seeks to introduce ‘fresh evidence’, is whether “with reasonable diligence, the evidence could have been identified and presented in the case in chief of the party making the applications.” The Trial Chamber in Milošević noted that while “the Chamber is cognisant of the difficulties that parties before the Tribunal face in investigating and preparing cases of such scope and complexity, it considers that a party seeking evidence intended for use in its case in chief should not wait until several months after the commencement of its case to begin the process of obtaining it.” With the exception of situations where the Prosecutor is ignorant of the existence of an item of evidence, the reasonable diligence standard is not satisfied in cases where no attempt to locate or obtain the evidence in question was made until after the close of the party’s case and no explanation for such delay is provided. In this sense, the duty of reasonable diligence requires the Prosecutor to secure evidence before it closes its case.

1180 Such an obligation of due diligence is explicitly provided for under Rule 119 (A) ICTY RPE and Rule 120 (A) ICTR RPE (on new facts) and not in Rule 120 SCSL RPE. Rule 115 ICTY, ICTR and SCSL RPE (on new evidence) does not explicitly call for a showing of due diligence. Nevertheless, it was already illustrated how the case law requires a showing of due diligence. See Chapter 3, I.3.1.


1182 In addition to the references cited supra, Chapter 3, I.3, fn. 151, consider ICTY, Decision on Motion to Re-Open the Prosecution Case, Prosecutor v. Popović et al., Case No. IT-05-88-AR73.5, A. Ch., 9 May 2008, par. 23; ICTY, Decision on Application for a Limited Re-Opening of the Bosnia and Kosovo Components of the Prosecution Case with Confidential Annex, Prosecutor v. Milošević, Case No. IT-02-54-T, T. Ch., 13 December 2005, par. 25. On the Re-opening of the Defence case, see e.g. ICTY, Decision on the Praljak Defence Motion to Reopen its Case, Prosecutor v. Prlić et al., Case No. IT-04-74-T, T. Ch. III, 23 November 2010, par. 17; ICTY, Decision on the Petković Defence Motion to Reopen its Case, Prosecutor v. Prlić et al., Case No. IT-04-74-T, T. Ch. III, 23 November 2010, par. 12; ICTY, Decision on Jadranko Prlić’s Defence Motion to Admit Evidence Rebutting Evidence Admitted by the Decision of 6 October 2010, Case No. IT-04-74-T, T. Ch. III, 24 November 2010, par. 15; ICTY, Decision on the Stojić Defence Request to Reopen its Case, Prosecutor v. Prlić et al., Case No. IT-04-74-T, T. Ch. III, 25 November 2010, par. 15.

1183 ICTY, Judgment, Prosecutor v. Delalić et al. (Čelebići case), Case No. IT-96-21-A, A. Ch., 20 February 2001, par. 283 (emphasis added).

1184 ICTY, Decision on Application for a Limited Re-Opening of the Bosnia and Kosovo Components of the Prosecution Case with Confidential Annex, Prosecutor v. Milošević, Case No. IT-02-54-T, T. Ch., 13 December 2005, par. 25.

1185 Ibid., par. 25.
In a similar vein, parties in the proceedings before the ICC should exercise due diligence in conducting their respective investigations. It follows from Article 54 (1) (b) ICC Statute that the Prosecutor should ‘[t]ake appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court’ and in doing so, respect the interests and personal circumstances of victims and witnesses’. Besides, several provisions hint to the existence of a duty of due diligence. For example, it follows from Article 84 (1) (a) ICC Statute that a conviction or sentence can be revised in the event that new evidence is discovered and where such evidence ‘was not available at the time of trial, and such unavailability was not wholly or partially attributable to the party making such application’. This latter part may be interpreted as requiring that the evidence would not have been available at trial through the exercise of due diligence by the party.\footnote{C. STAKER, Article 84, in O. TRIFTERER (ed.), Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article, München, Verlag C.H. Beck, 2008, p. 1493.}

The Regulations of the Office of the Prosecutor do not include an explicit duty of diligence in the conduct of investigations. Nevertheless, such a duty may be read into the requirement that OTP staff should uphold the highest standards of efficiency, competence and integrity.\footnote{Regulation 17 ICC of the Regulations of the Prosecutor. Earlier drafts of the Regulations included an explicit duty to act diligently in the course of investigations, also with regard to the issue of pre-trial detention, but such duty does not appear in the final version of the Regulations.} Besides, according to the Code of Conduct for the Office of the Prosecutor, staff should be guided by the principles of ‘fair, impartial, effective and expeditious investigation and prosecution’.\footnote{Article 8 (c) of the Code of Conduct for the Office of the Prosecutor.} They should ‘act with competence and diligence’ and ‘fully respect the rights of persons under investigation and the accused’.\footnote{Article 51 of the Code of Conduct for the Office of the Prosecutor.} On several occasions, criticisms of the Court of the Prosecutor’s investigatory methods called the Prosecutor’s diligence in conducting investigations into doubt. It was discussed above how extensive post-confirmation investigations are a reason for concern.\footnote{See supra, Chapter 3, I.3.5. Additionally, consider the harsh criticism of Judge Van den Wyngaert with regard to the “negligent attitude” of the Prosecution in verifying the trustworthiness of evidence collected. See ICC, Decision on Defence Application pursuant to Article 64(4) and Related Requests, Prosecutor v. Uhuru Muigai Kenyatta, Situation in the Republic of Kenya, Case No. ICC-01/09-02/11-728, T. Ch. V, 26 April 2013, Concurring Opinion of Judge Christine Van den Wyngaert, par. 4} Therefore, it is important to understand that the possibility for the Prosecutor to continue investigations post-confirmation is limited by the overarching obligations of diligence and expeditiousness.
A duty of due diligence is incumbent on the Co-Investigating Judges. Besides, and in line with the previously discussed human rights law, the diligence displayed in the conduct of the investigation is a factor that the Co-Investigating Judges or the Pre-Trial Chamber should consider when assessing the continuation of detention or release of a person deprived of his or her liberty. In this regard, the Pre-Trial Chamber sought guidance in the ‘special diligence’ requirement found in the ECtHR’s practice. A more general duty of due diligence, in the sense of expeditiousness, can be found in Rule 21 (4) ECCC IR.

The ECCC’s procedural framework does not explicitly provide for a prosecutorial duty of due diligence in the conduct of investigations. No such duty of (due) diligence seems to be explicitly provided for by the ECCC’s procedural framework. Again, however, different provisions reflect such a duty. For example, the revision of a final judgment is possible on the ground that new evidence has been discovered. One of the preconditions for such a revision is that the evidence ‘was not available at the time of trial, and such unavailability was not wholly or partially attributable to the party making the application’. Such a requirement presupposes the existence of a duty of diligence in the conduct of investigations, incumbent on the parties.

1191 Article 5 ECCC Code of Judicial Ethics. One example is the exercise by the Co-Investigating Judges of due diligence in keeping victims informed and ensuring that their rights are protected throughout the proceedings (pursuant to Rule 21 (1) (c) ECCC IR). See ECCC, Decision on Appeals against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, Nuon Chea et al., Case No. 002/19-09-2007-ECCC/OCIJ (PTC 76, PTC 112, PTC 113, PTC 114, PTC 115, PTC 142, PTC 157, PTC 164, PTC 165, and PTC 172), PTC, 24 June 2011, par. 51 – 54.

1192 Consider e.g. ECCC, Decision on IENG Sary’s Appeal against Order on Extension of Provisional Detention, NUON Chea et al., Case No. 002/19-09-2007-ECCC/OCIJ (PTC32), PTC, 30 April 2010, par. 16, 57 – 61; ECCC, Decision on the Appeal against Order on Extension of Provisional Detention, NUON Chea et al., Case No. 002/19-09-2007-ECCC/OCIJ (PTC13), PTC, 4 May 2009, par. 44; ECCC, Decision on Appeal of Ieng Sary against OCIJ’s Order on Extension of Provisional Detention, NUON Chea et al., Case No. 002/19-19-2007-ECCC/OCIJ (PTC17), PTC, 26 June 2009, par. 38.

1193 ECCC, Decision on Appeal of Ieng Sary against OCIJ’s Order on Extension of Provisional Detention, NUON Chea et al., Case No. 002/19-19-2007-ECCC/OCIJ (PTC17), 26 June 2009, par. 41.

1194 Rule 21 (4) ECCC IR stipulates that “[p]roceedings before the ECCC shall be brought to a conclusion within a reasonable time.”

1195 Rule 112 (1) (a) ECCC IR.
§ STL

No explicit requirement for the parties to conduct their respective investigations with due diligence can be found in the procedural framework of the STL. However, such a requirement, incumbent on the parties, can indirectly be construed. Firstly, additional evidence may only be presented before the Appeals Chamber by a party when such evidence was not available at trial and could not have been discovered through the exercise of due diligence when conducting the investigation. \(^{1196}\) Secondly, a review of a final conviction is only possible when ‘material new evidence’ has been discovered that could not have been discovered by the parties through the exercise of due diligence. \(^{1197}\)

Furthermore, a more general duty of due diligence is reflected in rules of professional ethics. In this regard, note the ‘Code of Professional Conduct for Counsel Appearing before the Tribunal’. It also applies to ‘Counsel whose work outside the courtroom directly supports their co-counsel’s in-court representation and whose conduct may impact the integrity and fairness of the Tribunal’s proceedings’. \(^{1198}\) Among others, it states that counsel shall ‘act with integrity’, shall ‘conduct himself or herself professionally’, in keeping with the fair trial rights of the accused and shall ‘diligently’, ‘expeditiously’ and to the best of his or her abilities represent the client’s interests. \(^{1199}\) However, this latter duty of diligence seems ‘partisan’ in the sense that it is limited to the representation of the interests of counsel’s own client.

§ SPSC

In line with what was said regarding other international criminal tribunals, a duty of due diligence in the conduct of the investigation was incumbent on the parties in the proceedings before the SPSC. In a similar vein, such a duty is not expressly provided for but this duty may be derived from limitations as to the introduction of new evidence on appeal. Here too, the introduction of new evidence was limited to instances where the evidence ‘was not known to

\(^{1196}\) Rule 186 (C) STL RPE.
\(^{1197}\) Rule 190 (A) STL RPE.
\(^{1199}\) Ibid., pp. 1 - 2.
the moving party at the time of the prior proceedings and could not have been discovered through the exercise of due diligence’. 

PRELIMINARY FINDINGS

No uniform approach could be identified regarding a minimum threshold for the commencement of investigations. Such a threshold is provided for at some tribunals (the ad hoc tribunals (‘sufficient basis to proceed’), the ICC (‘reasonable basis to proceed’) and the ECCC, regarding judicial investigations (‘reason to believe’)). In the absence of this minimum threshold at other tribunals under review, it appears that the Prosecutor’s authority to rely on the investigative measures at his or her disposal is not limited by any requirement of initial suspicion.

From the existence of a minimum threshold follows the existence of what has been labelled a ‘pre-investigation’ phase. The purpose of this phase is to establish whether or not the minimum threshold for the commencement of a ‘full investigation’ has been reached. The procedural frameworks of only some of the tribunals explicitly provide for and regulate such a pre-investigation phase (ICC (‘preliminary examinations’) and the ECCC (‘preliminary investigations’)). In turn, the Statute and the RPE of the ad hoc tribunals do not regulate this preliminary phase of proceedings. Those tribunals that do envisage such a preliminary phase share the fact that the Prosecutor’s powers at this stage are limited. Where these powers are normally ‘passive’ in nature, the Co-Prosecutors at the ECCC possess broader law enforcement powers, including limited search and seizure powers and the power to take suspects into police custody for up to 72 hours. These broader powers betray the more civil law nature of pre-trial proceedings at the ECCC. Only when a threshold has been met, the opening of a judicial investigation by the Co-Investigating Judges—thereby allowing for wider investigative powers—, is possible. In turn, the ECCC’s procedural framework does not define a minimum threshold for the commencement of the preliminary investigation.

Besides, unlike the other tribunals scrutinised, at the ECCC, the preliminary investigation is the responsibility of another organ than conducts the investigation proper. Whereas the former is the joint responsibility of the Co-Prosecutors, the Co-Investigating Judges are in charge of

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1200 Section 41.2 TRCP.
the judicial investigation. It was shown how this set-up, while not unfamiliar to civil law criminal justice systems, is not found at any of the other international (ised) tribunals. It was illustrated how the unfamiliarity with this division of investigative responsibilities over different actors in practice prevents the system from being fully applied as it was intended. In turn, this results in a duplication of investigative efforts and a loss of efficiency. Notwithstanding these differences, the pre-investigation phase at the different tribunals was found to serve the same function; that is, to determine whether the minimum threshold is met for opening a full investigation. In that regard, this preliminary phase will protect the interests of the individuals targeted by the investigation. Besides, it protects against the spending of scarce resources on investigations that do not stand any chance of resulting in an actual prosecution. With the exception of when the ICC Prosecutor makes use of his or her proprio motu powers, there is no explicit judicial control over a positive determination that the minimum threshold for opening a full investigation is met.

With the exception of the ECCC, the Prosecutor is in charge of the investigation sensu stricto. Most courts and tribunals under review (the ad hoc tribunals, SCSL, SPSC, STL) define the investigation as ‘all investigative activities undertaken by the Prosecutor for the collection of information or evidence’. It was concluded that such a definition is faulty insofar that the more adversarial nature of proceedings before these tribunals requires the Defence to conduct its own investigations. In a similar vein, the statutory documents of these tribunals nowhere explicitly detail the Defence’s investigative powers. With the exception of the ECCC, it was found that no strict temporal limitation applies to the investigation insofar that it may, under certain conditions, continue after the commencement of the prosecution phase. It was argued that because any continuation of prosecutorial investigations after the confirmation of charges interferes with defence preparations, this should remain exceptional. Besides, they are limited by the Prosecutor’s obligations of due diligence and expeditiousness.

At the ECCC, the Defence is not allowed to undertake its own investigations (with the exception of ‘preliminary inquiries’). Rather, further reflecting the civil law style of proceedings at this stage of proceedings, the Defence can (as can the Co-Prosecutors or the civil parties) request the Co-Investigating Judges to undertake certain investigative acts. A similar possibility existed at the SPSC insofar that the Defence could request the Public Prosecutor or the Investigating Judge to order or conduct certain investigative acts. In practice, however, the Defence was not prohibited from conducting its own investigations.

353
It was concluded that, in the course of international criminal investigations, the judicial role is traditionally limited. Again, the exception are the ECCC, where the investigation is in the hands of the Co-Investigating Judges, and the SPSC, where a judicial authorisation was required to resort to the use of coercive measures during the investigation. Nevertheless, there is a notable trend towards a greater judicial role in the conduct of investigations. At the ICC and the STL, the Pre-Trial Chamber and the Pre-Trial Judge, respectively, possess limited but important powers during the investigation in order to assist the parties in the preparation of their respective cases. Besides, the ICC Pre-Trial Chamber confirmed its role in protecting the rights of suspects during the investigation.

Investigations before international criminal tribunals are normally reactive in nature. Although the same holds true for investigations into ‘situations’ by the ICC Prosecutor, it was shown how the Court’s jurisprudence may be interpreted as allowing for investigations into situations to become partly proactive in nature. Such interpretation is based on the understanding by several Pre-Trial Chambers that a situation ‘can include not only crimes that had already been or were being committed at the time of the referral, but also crimes committed after that time, in so far as they are sufficiently linked to the situation of crisis referred to the Court as ongoing at the time of the referral’. If such an interpretation, allowing for investigations to become partly proactive, were to be upheld in the future, a number of requirements should apply to the proactive application of investigative measures. These include (i) the requirement of a judicial purpose, (ii) the need for a precise definition of proactive investigative powers, (iii) the related requirements of proportionality, subsidiarity and judicial approval, insofar that proactive investigative techniques interfere with the right to privacy as well as (iv) the requirement of independent and impartial supervision of proactive investigative efforts. It was shown how most of these requirements would be problematic if the ICC’s procedural framework were to be understood as allowing for proactive investigative efforts. Additionally, it was shown how there is no adequate legal basis for the storage of information gathered proactively. Among others, it would be unclear as to what information could be stored, to what use such information could be put or how long and under what conditions information gathered proactively could be stored. In that regard, human rights law may be instructive. For all of the above reasons, the ICC’s procedural framework should not be understood as allowing for proactive investigative efforts.
It was also concluded that the international Prosecutor enjoys considerable discretion in initiating investigations. Hence, it could be argued that the Prosecutor is guided by a ‘principle of opportunity’. Nevertheless, since this terminology originates from national criminal procedural law (where it is distinguished from the principle of legality), it was concluded that it does not translate well to investigations and prosecutions by the international tribunals under review. Therefore, it is preferable to refer to the international Prosecutor’s ‘considerable discretion’. No uniform approach could be discovered with regard to the decision to prosecute.

The statutory documents of several tribunals (SCSL, ECCC, ICTY) include limiting language, requiring the Prosecutor to focus on a specific group or category of persons. At all tribunals, such language offers ‘guidance’ to the Prosecutor on how to exercise his or her discretion. Regarding the SCSL and the ECCC, the Appeals Chamber and the Supreme Court Chamber’s positions, that such limiting language offers mere guidance and does not encompass a jurisdictional threshold, were criticised.

Discretion is further limited by the principles of equality and non-discrimination, both of which ultimately derive from human rights law. Closely related is the principle of impartiality in investigating and prosecuting crimes. It entails that prosecutorial discretion is applied even-handedly to different groups or persons. The principle of prosecutorial independence is also important insofar that it entails that the Prosecutor does not seek or receive instructions from external sources.

None of the tribunals under review made prosecutorial guidelines on the exercise of prosecutorial discretion public. It was argued that it is preferable for tribunals to provide for public ex ante prosecutorial guidelines. Among others, such guidelines ensure transparency and coherence and ensure the protection of the aforementioned principles of equality and non-discrimination. Besides, they shield the international Prosecutor from outside political pressure. It would bring the prosecutorial practice in accordance with international and regional ‘guiding principles’ for Prosecutors. Nevertheless, one obstacle to the adoption of these guidelines is the need to first determine and rank the goals of international criminal prosecutions insofar that these influence any guidelines on the exercise of prosecutorial discretion.
No uniform approach regarding institutional and judicial restraints of prosecutorial discretion could be found. However, it was concluded that forms of judicial review over prosecutorial discretion are increasing.

The principle of objectivity is another principle that is not firmly established in international criminal procedural law. It requires the Prosecutor to investigate incriminating and exonerating evidence or information equally. Such a principle was found at the ICC and the SPSC. At the ECCC, such a principle is incumbent on the Co-Prosecutors during the preliminary investigation and on the Co-Investigating Judges during the judicial investigation. While the Prosecutors of the ad hoc tribunals, the SCSL and the STL have been described in the case law as an ‘organ of international criminal justice’ or a ‘minister of justice’, it was concluded that such language means little in the absence of any express obligation to gather exculpatory evidence. It was recommended that a principle of objectivity be adopted by all tribunals. In particular, to some extent it may offer a solution regarding the Defence’s difficulties in accessing evidence. Besides, it may better serve the idiosyncratic goals of international criminal proceedings.

Lastly, it was found that an ethical duty of due diligence is incumbent on the participants in the conduct of investigations.