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GUARDING THE GATES:

The essential role of a robust Pre-Trial Chamber in ensuring
the International Criminal Court's impartiality,
independence and legitimacy

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Abstract

The Pre-Trial Chamber (PTC) of the International Criminal Court (ICC) was conceived of as the Court's gatekeeper and empowered in the Rome Statute to provide an essential counterbalance to the significant discretionary powers granted to the Prosecutor. This thesis analyses in detail the PTC's powers at the different stages of the Court's proceedings in which it is called to intervene - ie pre-investigation, investigation and pre-trial stages - and argues that, in general terms and save some limitations, the PTC has the necessary tools to carry out its function. In particular, the PTC has been empowered to prevent possible abuses of power and shield the Prosecutor from external pressures through the judicial review of his most critical discretionary decisions. By way of that judicial control, the PTC is meant to examine the rationale behind the Prosecutor's decisions in order to guarantee that the exercise of discretion is not abusive or the result of improper political pressures. This is necessary to safeguard the legitimacy of the institution as a whole and to protect the rights of those that can be affected by the Court's investigations and prosecutions. However, a systematic evaluation of the way in which these powers have been applied reveals that the PTC's judges have adopted a rather cautious approach to their role, showing some reluctance to firmly scrutinise the Prosecutor's exercise of discretion.

As a result of the Court's inherent limitations and the political climate in which it operates, there is a concrete risk that external actors may try to politicise the role of the Court, exerting political pressures on the Prosecutor. The adoption of a more proactive and firm role by the PTC will not only encourage a more transparent decision-making process by the Prosecutor, but will also urge cooperation and genuine investigations and prosecutions at the national level, therefore minimising the risk of the Court's political instrumentalisation. Accordingly, this thesis argues that, for as long as the PTC boldly embraces its full powers, the ICC will function smoothly and strengthen its reputation as a fair and impartial means by which to obtain international criminal justice.

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Author's Declaration

I declare that, except where explicit reference is made to the contribution of others, this thesis is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

Signature _____

Name Ania Carola del Carmen Salinas Cerda

List of Abbreviations

American Convention on Human Rights	ACHR
African Union	AU
Appeals Chamber	AC
Assembly of States Parties	ASP
Central African Republic	CAR
Crown Prosecution Service	CPS
Democratic Republic of the Congo	DRC
Decision on the Confirmation of Charges	DeCC
Document Containing the Charges	DoCC
European Convention for the Protection of Human Rights and Fundamental Freedoms	ECHR
European Court of Human Rights	ECtHR
Human Rights Watch	HRW
Inter-American Court of Human Rights	IACtHR
International Criminal Court	ICC/Court
International Criminal Law	ICL
International Criminal Tribunal for Rwanda	ICTR
International Criminal Tribunal for the former Yugoslavia	ICTY
International Law Commission	ILC
Lord's Resistance Army	LRA
Non-Governmental Organisation	NGO
Nuremberg's International Military Tribunal	IMT
Pre-Trial Chamber	PTC
Rome Statute	Statute
Rules of Procedure and Evidence	Rules
Tokyo's International Military Tribunal for the Far East	IMTFE
Trial Chamber	TC
United Nations	UN
United Nations General Assembly	UNGA
United Nations Organisation Mission in the DRC	MONUC
United Nations Security Council	UNSC/Council
United States	US
Victims Participation and Reparation Section	VPRS
World War II	WWII

Introduction

I trust you will not flinch from creating a court strong and independent enough to carry out its task. It must be an instrument of justice, not expediency. It must be able to protect the weak against the strong.¹

Kofi Annan, Rome, 14 June 1998

These were the words with which Kofi Annan, then Secretary General of the United Nations (UN), launched the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome Conference). He knew that for the Conference to be successful it would have to create an institution legitimated by its strength and independence. He also knew that only a court with such qualities could break the cycle of impunity and provide effective justice for those who needed it the most. At the conclusion of the Conference, once the treaty establishing the International Criminal Court (ICC or Court), the Rome Statute (Statute),² had been finally adopted, Kofi Annan closed ceremonies stressing the complexity of the negotiations and acknowledging that the result, while by no means perfect, represented an enormous achievement. He highlighted:

No doubt, many of us would have liked a Court vested with even more far-reaching powers, but that should not lead us to minimize the breakthrough you have achieved. The establishment of the Court is still a gift of hope to future generations, and a giant step forward in the march towards universal human rights and the rule of law.³

Indeed, the Court's creation was one of the most important accomplishments in the enforcement of international justice during the 20th century. It took almost a century of discussions and failed attempts for the moment to arrive in which the

¹ Rome Conference, *Press Release. United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. UN Secretary-General Declares Overriding Interest of International Criminal Court Conference Must Be that of Victims and World Community as a Whole*, L/ROM/6, 14 June 1998 (Department of Public Information - News Coverage and Accreditations Service - Rome 1998).

² UN Doc A/CONF.183/9, Rome Statute for the International Criminal Court (United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 17 July 1998).

³ Rome Conference, *Press Release. United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. Secretary-General Says Establishment of International Criminal Court is Major Step in March Towards Universal Human Rights, Rule of Law*, L/ROM/23, 18 July 1998 (1998).

international community came together, truly determined to put an end to impunity for the perpetrators of unimaginable atrocities that deeply shock the conscience of humanity.⁴ The unprecedentedly swift process of ratification (by the standards of international law) allowed the Statute to enter into force shortly thereafter, on 1 July 2002, and since 16 June 2003 a fully operative Court has been a tangible reality.⁵

At the start of this project in the fall of 2008, the subject of my study was thus a very young international institution upon which enormous expectations had been placed. Yet, although still in its infancy, the Court had already been confronted by a series of challenges and criticisms.

The world's preeminent political powers, three out of the five veto-wielding members of the UN Security Council (UNSC or Council) - the United States (US), Russia and China - had declined to join the Court. Moreover, the US was directing an aggressive campaign against it. The Bush administration, with the support of the Congress, declared its intention not to become party to the treaty (previously signed by President Clinton) and began instead to negotiate bilateral agreements with the greatest possible number of states (102 signed) in order to shield US citizens from the ICC's jurisdiction. The US even passed a law - the American-Serbia Members' Protection Act⁶ - prohibiting cooperation with the ICC,⁷ and threatening to limit US involvement in peacekeeping operations unless US citizens were granted immunity from ICC prosecution.⁸ John R. Bolton, Bush's Under Secretary for Arms Control and International Security, passionately argued against the Court:

The Court's flaws are basically two-fold, substantive, and structural. As to the former, the ICC's authority is vague and excessively elastic, and the Court's discretion ranges far beyond normal or acceptable judicial responsibilities, giving it broad and unacceptable powers of interpretation

⁴ Statute Preamble paras 1, 2, 5.

⁵ This is the date on which the first Prosecutor was sworn in. The inaugural session with the swearing in ceremony of the first judges had taken place on 11 March 2003.

⁶ American-Serbia Members' Protection Act, HR 4775, Public Law 107-206, (US, 23 January 2002).

⁷ Ibid Sec. 2004.

⁸ Ibid Sec. 2005.

that are essentially political and legislative in nature. This is most emphatically *not* a Court of limited jurisdiction.⁹

A few years after the Court began to operate, African States, originally the Court's most enthusiastic supporters, started to become disillusioned by the fact that the Court's Prosecutor appeared in his¹⁰ selection of situations to be focusing exclusively on conflicts occurring in Africa, while disregarding those of comparable gravity occurring elsewhere in the world, such as in Colombia, Iraq, Afghanistan and Venezuela. The Prosecutor's selection of cases was subject to further criticism due to perceptions of bias against rebel groups and political opponents of established state and governmental powers. In fact, no cases for crimes allegedly committed by governmental forces or groups supporting them had been initiated in Uganda, the Democratic Republic of Congo (DRC) or the Central African Republic (CAR). Additionally, the Prosecutor's selection of crimes for prosecution was criticised for being too narrow and therefore failing to capture the full extent of criminality and disregarding the suffering of important groups of victims. With particular regard to the situation in the DRC, the charges in the *Lubanga* (only recruitment and use of child soldiers) and *Katanga* (relating to a single attack on a small village) cases seemed incongruous in view of the protracted armed conflict, punctuated by widespread and systematic attacks on the civilian population.

The practice of self-referrals, actively encouraged by the Prosecutor in the Court's early days, was also targeted by critics who considered this as implementing a form of *victor's justice* and therefore resulting in an instrumentalisation of the Court for political purposes not permitted within the Court's legal framework. The Court's proceedings were further attacked when attempts to find peaceful solutions to the conflicts in Uganda and Darfur failed. The Darfur situation created additional tensions when the Court issued its first warrant of arrest against a sitting Head of State, to which the African Union (AU) responded by encouraging States to withdraw from the Statute.

⁹ John R. Bolton, 'The United States and the International Criminal Court' (*Remarks to the Federalist Society*, 14 November 2002) <<http://201-2009.state.gov/t/us/rm/15158.htm>> accessed 13 October 2014.

¹⁰ In order to avoid resorting to excessive use of 'he or she' or 'his or her', hereafter 'he' has been chosen as a generic gender pronoun to refer to the Court's Prosecutor.

In a well-known speech to the UN General Assembly, Muammar Gaddafi, at the time the AU President, verbalised the frustration of African States with the supposed discriminatory treatment by the ICC:

It is easy for Charles Taylor to be tried, or for Bashir to be tried, or for Noriega to be tried. That is an easy job. Yes, but what about those who have committed mass murder against the Iraqis? They cannot be tried? They cannot go before the ICC? If the Court is unable to accommodate us, then we should not accept it. Either it is meant for all of us, large or small, or we should not accept it and should reject it.¹¹

Almost without exception, the mounting criticism focused on the independence of the Court's proceedings from domestic and international politics. The Court, and particularly its Prosecutor, was being accused of high politicisation and bias. The Court's proceedings were being denounced as either politically motivated or for allegedly jeopardising the potential for pacific political solutions to particular conflicts. As such, already at the early stages of this research, it appeared doubtful whether Kofi Annan's initial hopes for a strong and independent Court had actually been achieved at the Rome Conference. It should be remembered that Kofi Annan himself had said at the closing ceremony that he would have preferred the Court to have been vested with more powers. The question arose as to whether his words could be interpreted as recognition that the Court lacked the necessary independence.

As the research progressed the doubts augmented. It was of particular concern that, only five or six years after its inauguration, the critics were already claiming that the Court had become politicised. Accordingly, it appeared necessary to determine whether politicisation was indeed possible and, if so, whether this was a problem of design or a problem of practice.

The first step was then to determine whether the Statute provided sufficient mechanisms to avoid or prevent the Court's politicisation. Were there sufficient restraints and checks and balances in order to safeguard the legality of the Court's actions? Was the Court strong and independent enough to carry out its

¹¹ UNGA, A/64/PV.3, *United Nations General Assembly Sixty-fourth session, Official Records 3rd plenary meeting, Wednesday, 23 September 2009. New York, Address by Colonel Muammar Al-Qadhafi, Leader of the Revolution of the Socialist People's Libyan Arab Jamahiriya* (2009) 24.

tasks? It was concerning that most of the criticism was directed at the Prosecutor's decisions, alleging that they were arbitrary or biased. Accordingly, the focus was directed at exploring the limits of the Prosecutor's discretion in order to determine whether, and if so to what extent, the Statute actually provided sufficient mechanisms of control in order to avoid abuses of power. In order to determine the limits of the Prosecutor's discretion the first question to be explored was whether, and if so to what degree, the Prosecutor was permitted to take into account political considerations in his selection of situations for investigation and cases for prosecution.

The Preamble to the Statute clearly indicates that the Court was created as the legal response to a political problem: threats to 'the peace, security and well-being of the world',¹² posed by grave crimes committed during war and power struggles. Accordingly, it was to be expected that the Court would deal with and have consequences for domestic and international politics. The Statute and its preparatory works also reveal that, on account of the high political nature of the issues underlying the Court's jurisdiction, the drafters, while outlining the general principles framing the scope of the Court's action, left the particularities of matters on which general agreement was not foreseeable to be decided upon by the Court itself. As such, international political questions once reserved for international politics alone were to be decided by the Court itself, which became the ultimate arbiter as to the controversial choices included in the Statute.

Thus, when the Prosecutor exercises his discretion, he not only decides on technical or procedural matters, but also necessarily takes a position on political issues. Of course, although affected by and - to a certain extent - affecting politics, the Prosecutor's choices are nonetheless always limited by the Court's legal framework. Nevertheless, due to the nature of the Prosecutor's function and the lack of means at his disposal, when operating in complicated political environments the Prosecutor may abuse his discretion or otherwise succumb to illegitimate political influences. The Court's legitimacy and the stability of the whole system however rest upon the essential requisite that the Court, and

¹² Statute Preamble para. 3.

above all its Prosecutor, is fully independent from external political pressures, ie does not become 'politicised'.

As to the mechanisms designed to avoid the Court's politicisation, as will be discussed throughout this thesis, one of the most remarkable features of the Statute is the combination of elements of different legal traditions. The drafters conceived of an independent Prosecutor with wide discretion to decide whether to initiate investigations and to select and prioritise cases for prosecution, ie a figure with powers approximate to those enjoyed by prosecutors within the common law tradition. At the same time however, the drafters also included a judicial branch - the Pre-Trial Chamber (PTC) - with powers to oversee the exercise of discretion by the Prosecutor, more akin - although not equivalent - to that of judges in the continental or civil law tradition. As such, it would appear clear that the traditions were combined as a way of dealing with the fact that, due to the high political nature of the issues underlying the Court's jurisdiction, the Prosecutor's discretion was necessarily going to touch upon political issues.

An initial review of the powers conferred to the PTC by the Statute provided an ostensibly clear answer to the initial question as to whether the Court's system includes sufficient mechanisms to avoid the Court's politicisation. Save for one critical limitation in the Statute - insofar as it fails to afford the PTC a supervisory role over the Prosecutor's positive assessment of a referral by the UNSC or a State Party - it appeared that the PTC was afforded with sufficient tools to scrutinise the legality of the Prosecutor's actions. The PTC judges are entrusted with the responsibility of providing checks and balances to the Prosecutor's discretion in order to avoid abuse of power, arbitrariness or bias and to ensure that the Prosecutor's decisions are a legitimate exercise of his powers under the Statute. The central argument of this thesis then became that, through the judicial review of the Prosecutor's most critical discretionary decisions, the PTC - the Court's gatekeeper - guarantees the legitimacy of the institution and protects the rights of those who may be affected by abuses of prosecutorial power. As such, within the context of the wide discretion afforded to the Prosecutor, the judicial control of his actions by the PTC is essential to

preserve the institution's legitimacy, as it ensures that the Prosecutor's actions are not abusive or the result of improper political pressures.

Accordingly, once it was determined that the Statute generally provides the PTC with the necessary tools to prevent the Court's politicisation, it became necessary to explore whether the perceptions of partiality and bias were due to problems in the implementation of such provisions. Unusually, for such an important function there was remarkably limited case law and few focused commentaries on the gatekeeping role of the PTC. The research then developed into a detailed analysis of the PTC's exercise of its powers during the Court's first decade of existence, in order to determine whether the PTC was effectively complying with its role of guaranteeing the independence and legitimacy of the Court.

The thesis is divided into six Chapters followed by general conclusions. Chapter 1 presents the theoretical framework through which the nature of the Prosecutor's discretion and the PTC's judicial review is considered. The indeterminacy or open texture of the Statute is recognised, following Herbert L.A. Hart, as an advantage rather than a disadvantage, insofar as it allows for reasonable interpretation in the Statute's application to situations and to types of problems that its drafters did not foresee or could not have foreseen, while additionally enabling a certain balancing between the requirements of stability and renewal. Regarding the issue of whether the Court is able to isolate itself from domestic and international politics, the thesis draws on the work of Alexander K.A. Greenawalt and Judith Shklar in arguing that there is, of course, politics and *politics*. Accordingly, it is possible to distinguish between the political considerations that should by definition remain outwith the Court's scrutiny and decision-making and those broader political ideals that may legitimately guide the Prosecutor's policy decisions. Subsequently, the work relies on Ronald Dworkin's notion of constructive interpretation to argue that the interpretation of the Statute cannot invite 'strong' (free-wheeling) discretion, but must remain faithful to the political rationale underlying its enactment - the Statute's goals and purposes - which alone circumscribe within proper legal limits the powers of the Court.

The discussion of the theoretical framework is followed by a descriptive Chapter, Chapter 2, which provides a review of the relevant drafting history of the Statute and a detailed description of the procedural steps through which the PTC exercises its functions.

The following Chapters are exploratory and explanatory, analysing the way in which the interaction between prosecutorial discretion and the PTC's judicial review has been interpreted and applied by the Court at the different stages of the proceedings.¹³ The analysis of the Court's practice in Chapters 3 to 6 is aimed at determining whether the main argument of this thesis - that the PTC, as the Court's gatekeeper, ensures the legality of the Prosecutor's actions - is supported by systematic evidence. This part of the work follows closely the practice of the Court and the letter of the Statute and other relevant legal instruments that, according to Article 21,¹⁴ constitute the Court's legal framework. It examines the way in which the principles and norms established by that legal framework are translated into prosecutorial and judicial decisions as well as considering whether and to what extent the Prosecutor and the PTC have, when incorporating political considerations, respected the constraints imposed by the goals and purposes of the Statute. The author, an ICC staff member, has also applied her own personal experience, particularly in identifying the points of controversy.¹⁵

Chapter 3 focuses on the PTC's role throughout the pre-investigative, investigative and pre-trial proceedings in determining the notions of complementarity, gravity and the interests of justice. These notions are critical in managing the tension between the legal goal of ensuring the prosecution of international crimes and the political aim of pursuing peace and preventing the

¹³ The date of 31 August 2014 has been used as the cut-off date for the consulted practice and case law.

¹⁴ In accordance with Article 21 of the Statute, the Court should apply: first, the Statute, the Elements of Crimes and the Rules of Procedure and Evidence; in second place, where appropriate, applicable treaties and principles and rules of international law, including the established principles of the international law of armed conflict; and, failing that, general principles of law derived by the Court from national laws of legal systems of the world. The latter include, as appropriate, the laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with the Statute and with international law and internationally recognized norms and standards.

¹⁵ The views expressed in this research are those of the author alone and in no way reflect those of the ICC.

commission of atrocities. They provide the necessary flexibility allowing the Court to adapt to different scenarios in order to achieve its goals. However, depending on how these concepts are interpreted, the Court may be at risk of being perceived as taking sides in a conflict, being influenced or manipulated by political actors or becoming an instrument of victor's justice. In principle, the Statute gives the Prosecutor independence and discretion to interpret and apply these concepts. However, in order to ensure the system's legitimacy, the PTC can examine the Prosecutor's choices under certain circumstances.

Chapter 4 analyses the PTC's role at the pre-investigative stage of the proceedings. The Court's involvement can only be triggered by a referral from the UNSC or a State Party, or *proprio motu* by the Prosecutor. However, as feared by the drafters, any of these mechanisms may involve the danger of 'politically motivated or frivolous proceedings',¹⁶ in which the independence, impartiality and credibility of the Court are at stake. The Chapter discusses the exercise of the PTC's powers under the Statute and whether the mechanisms it provides are sufficient for the PTC to effectively prevent the introduction of 'inappropriate political influence over the function of the institution'.¹⁷

Chapter 5 focuses on the PTC's limited but critical supervisory role over the Prosecutor during the investigation stage of the Court's proceedings. At this stage, the PTC's function is to protect the interests and rights of those that can be affected by possible future prosecutions. The Chapter first analyses the way in which the participation of victims at the investigation stage has been dealt with, to argue that the different PTCs have failed to provide victims with meaningful means to present their views and concerns at this stage. It further examines the PTC's partial but fundamental *proprio motu* powers to protect the rights of suspects, victims and States during the investigation of crimes, stressing the notorious reluctance of the PTC's judges to exercise these powers. Lastly, the Chapter focuses on the exercise (or lack of it) of the PTC's

¹⁶ Philippe Kirsch and Darryl Robinson, 'Initiation of Proceedings by the Prosecutor' in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press 2002) 657.

¹⁷ *Ad-Hoc Committee, UN Doc A/50/22, Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, 6 September 1995* (General Assembly Official Records, Fiftieth Session, Supplement No 22, 1995) para. 121.

assessment of the Prosecutor's decision whether to initiate proceedings for specific crimes against identified alleged perpetrators. It thus examines the exercise of the PTC's power to issue warrants of arrest and summonses to appear, as well as the way in which the Prosecutor has prevented the PTC's review of his decisions not to prosecute.

Chapter 6 analyses the PTC's function as to the proceedings for the confirmation of charges, ie the pre-trial stage of the proceedings. The confirmation is an additional safeguard provided by the Statute for any person to be brought to trial. It is aimed at ensuring the Court's efficiency, independence and impartiality, guaranteeing that only cases supported by sufficient evidence proceed to trial, protecting the interests of the suspects and providing access to justice for the victims. Accordingly, the judicial scrutiny of the charges is a necessary safeguard to avoid wholly unfounded prosecutions and to focus the Court's efforts and resources on cases for which substantial evidence going beyond mere suspicion exists.

Lastly, the concluding Chapter argues that, save for the critical limitation stressed above, the Court's legal framework grants the PTC sufficient tools to serve as the Court's gatekeeper, guaranteeing the legitimacy, fairness, effectiveness and expeditiousness of the Court's proceedings as a whole. However, a systematic evaluation of the way in which those powers have been applied by the Court's jurisprudence reveals that the PTC's judges have adopted a rather cautious approach to their role, showing some reluctance to firmly scrutinise the Prosecutor's policy decisions. It is argued that, for as long as the PTC boldly embraces its full powers, the ICC will function smoothly and strengthen its reputation as a fair and impartial means by which to obtain international criminal justice.

Chapter 1: The ‘gatekeeping’ role of the Pre-Trial Chamber of the International Criminal Court

1.1 Background of the thesis

1.1.1 *The Court’s Legal Framework*

The ambition of establishing a permanent world tribunal with jurisdiction over the most serious crimes of international concern was finally realised with the adoption of the Statute, the treaty that created the Court, on 17 July 1998. Its early ratification by an overwhelming number of States made the Court a tangible reality on 1 July 2002. The Court is an independent treaty-based institution, not part of the system of the UN, but brought into relationship with the UN pursuant to an agreement of mutual cooperation.¹⁸

What motivated the creation of the Court was the endemic impunity enjoyed by the perpetrators of human atrocities. As will be discussed in Chapter 2, save for some rare examples, up until the mid-twentieth century, crimes committed in the midst of political transformation, military campaigns, and wars were never prosecuted. The first serious attempts to bring to justice some of those responsible for heinous crimes came only in the late 1940s at the end of World War II (WWII). While the defendants were admittedly limited to those who had been on the defeated side of the conflict, the process, undertaken at both international and national levels, nevertheless produced the first body of substantive principles and jurisprudence, establishing the foundation upon which international criminal law (ICL) continues to rest.

However, during the Cold War, the world’s bitter division between two competing blocks of power inhibited any further attempts to prosecute and punish the perpetrators of serious crimes. After 1989-1990, a radical change in the course of international politics brought the necessary consensus for justice efforts not seen in decades. In the mid-1990s the political will to punish heinous crimes eventually crystallised within the UNSC and two new *ad hoc* institutions

¹⁸ Statute Article 2; UNGA, *UN Doc A/58/874 (ICC-ASP/3/Res.1)*, *Relationship Agreement between the United Nations and the International Criminal Court*, 20 August 2004 (2004).

were created for the criminal punishment of the atrocities committed in the former Yugoslavia and Rwanda. These tribunals contributed to the development of ICL with an additional body of substantive and procedural principles, within the setting of a more impartial approach to international criminal justice.

However, the crimes of the Nazis and their allies in Europe and Asia and those committed in the former Yugoslavia and Rwanda were not - unfortunately - the only massive crimes committed during the 20th century. For the remainder of the situations in which such crimes occurred, impunity persisted almost unchecked. In some cases it was achieved through amnesties, truth and reconciliation commissions or other mechanisms of transitional justice; but in many cases, crimes were simply ignored.¹⁹

During the 20th century States progressively came to agree on the existence of the obligation to prosecute heinous crimes or extradite their alleged perpetrators according to the principle *aut dedere aut judicare*.²⁰ However, although the relevant treaties normally contained agreed definitions of prohibited conduct, obliged the contracting parties to criminalise them at the national level and provided for mutual extradition of offenders, they were seldom employed by contracting States. Some States failed to pass the necessary implementing legislation or, when they did possess all necessary requirements for the exercise of criminal jurisdiction, they simply failed to make use of it.²¹ At the same time, several States incorporated into their national orders the principle of universal jurisdiction, recognising on their own part the duty and

¹⁹ For a detailed account of the different experiences and mechanisms implemented, if any, see, *inter alia*, Marta Minow, *Between Vengeance and Forgiveness: facing history after genocide and mass violence*. (Beacon Press 1998); Ruti G. Teitel, *Transitional Justice* (Oxford University Press 2000); Louise Mallinder, *Amnesty, Human Rights and Political Transitions. Bridging the Peace and Justice Divide*. (Hart Publishing 2008).

²⁰ See, *inter alia*, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), 75 UNTS 31, 12 August 1949 Article 49; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), 75 UNTS 85, 12 August 1949 Article 50; Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 75 UNTS 135, 12 August 1949 Article 129; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 75 UNTS 287, 12 August 1949 Article 146; Protocol Additional I to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 Article 85(1); UNGA, *UN Doc A/RES/39/46, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984 (1984) Article 5(2).

²¹ Antonio Cassese and others, *Cassese's International Criminal Law* (Third edn, Oxford University Press 2013) 19.

right to investigate and prosecute crimes of concern to the international community as a whole, regardless of where or by whom the crimes were committed.²² However, these mechanisms were subject in their application to the sovereign prerogatives of each State and were hardly ever used. In the few exceptions in which States decided to deal with such crimes, the approaches adopted varied tremendously and were guided by pragmatic considerations. Accordingly, budgetary and institutional priorities, internal power struggles and international relations defined the responses adopted by States in addressing human atrocities.

The entry into force of the Statute appeared to change the situation radically. In the Preamble, the drafters stated that they were ‘**Determined** to put an end to impunity for the perpetrators of these crimes and thus contribute to the prevention of such crimes’.²³ Pursuant to Article 12(1), upon becoming parties to the Statute, States conditionally delegate to the ICC their jurisdiction to investigate, prosecute and punish the crimes under the Statute. In accordance with Article 12(2) and (3), States may also accept the jurisdiction of the Court even without becoming party to the Statute. In addition, pursuant to Article 13(b), the UNSC, acting under Chapter VII of the UN Charter, may refer to the Prosecutor situations in which one or more of the crimes under the Statute appear to have been committed. In such a case, the Court can act even if the State in which the crimes were committed, or of which the alleged perpetrators are nationals, is a non-Party State and has not otherwise accepted the Court’s jurisdiction. The Court will thus exercise jurisdiction following the UNSC’s decision, which is binding on all UN Member States in accordance with Article 25 of the UN Charter.²⁴ Pursuant to Articles 13 to 15, the jurisdiction of the Court

²² For the legislative provisions establishing universal jurisdiction in different States see (n 19) Mallinder Appendix 3 and Amnesty International, ‘Universal Jurisdiction. A Preliminary Survey of Legislation Around the World - 2012 Update’ (*Amnesty International Publications*, 2012) <<http://www.amnesty.org/en/library/asset/IOR53/019/2012/en/2769ce03-16b7-4dd7-8ea3-95f4c64a522a/ior530192012en.pdf>> accessed 9 November 2014.

²³ Statute Preamble para. 5 [bold in the original].

²⁴ Some have contested the democratic legitimacy of the delegation of the power to investigate and prosecute from the UNSC to the Court. However, the creation an international criminal tribunal is a legitimate exercise of the Council powers under Chapter VII of the UN Charter. See, *inter alia*, *The Prosecutor v. Duško Tadić*, (ICTY) IT-94-1-AR72 Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction Appeals Chamber, 2 October 1995. The same power is exercised when the Council refers a situation to the Court. Héctor Olásolo has argued that the establishment of the Court represents the transfer of States’ sovereign powers to the Court to

can then be activated by a referral from a State Party or the Council or indeed *proprio motu* by the Prosecutor with the authorisation of the PTC.

A fundamental aspect of the Statute is that the condition under which the Court is allowed to exercise jurisdiction is the States' inaction, unwillingness or inability to bring to justice the perpetrators of heinous crimes. Pursuant to Articles 1 and 17(1)(a) to (c), the Court is complementary to national criminal jurisdictions. Accordingly, at least in theory, the Statute creates an incentive for States to exercise their primary obligation to prevent and prosecute international crimes, without trespassing unnecessarily upon the jurisdiction of national courts. The Court's *raison d'être* is to bridge the impunity gap that arises when crimes of concern to humanity as a whole are not prosecuted at the national level. The Statute includes both the recognition of the duty of every State to prosecute heinous crimes under its jurisdiction and the power of the Court to step in whenever States fail to comply with it.²⁵ Significantly, pursuant to Article 17, upon judicial action being taken by a State, the ICC is prevented from acting unless the unwillingness or inability of the State to genuinely investigate or prosecute is proven.

1.1.2 Substantive and Practical Dilemmas

One might be forgiven for assuming that the establishment under the Statute of a new integrated system of international criminal justice - composed of both States primarily exercising their punitive powers and the Court acting as the last resort - would be sufficient to 'put an end to impunity for the perpetrators of these crimes'.²⁶ On the face of it, the system is most logical, establishing as it does that the perpetrators of crimes under the Statute should be prosecuted at the national level, but further providing that whenever States fail to do so, the Court will assume jurisdiction over these crimes. To date, 122 States are Parties to the ICC,²⁷ ie 63 per cent of 193 UN Member States.²⁸ Therefore, if crimes are

exercise universal jurisdiction, see Héctor Olásolo, 'The prosecutor of the ICC before the initiation of investigations: A quasi-judicial or political body?' (2003) 3 IntCLR 87-150, footnote 19.

²⁵ Statute Preamble paras 6 and 10.

²⁶ Ibid Preamble para. 5.

²⁷ ICC, 'The States Parties to the Rome Statute' (*International Criminal Court, Assembly of States Parties*) <<http://www.icc->

committed in the territory or by nationals of any of the 122 States Parties, the Prosecutor may proceed against them directly, either by referral or *proprio motu*. As regards the remaining 37 per cent, the Court's jurisdiction can be activated by referral from the UNSC. Such conditions would appear to guarantee that the goal of the drafters of the Statute will be complied with, ensuring that the most serious crimes of international concern will not go unpunished, their effective prosecution being ensured by action at the national level and by enhanced international cooperation.²⁹ That conclusion, however, reflects an incomplete reading of the Statute and a rather naïve understanding of international politics, for the following reasons.

First, in accordance with the Statute, the Prosecutor is under no obligation to initiate an investigation with respect to every situation in which crimes under the jurisdiction of the Court have been committed, even in the case of a referral. In accordance with Articles 15(1) and 53(1), the Prosecutor has discretion to decide whether to request the PTC's authorisation to initiate a *proprio motu* investigation and has the latitude to determine whether there is a reasonable basis to proceed with an investigation following a referral by a State Party or the UNSC. Similarly, the Council is under no obligation to reach an agreement under Chapter VII of the UN Charter and to refer a situation to the Court. In this respect, it may be noted that the US, Russia and China, all permanent veto-wielding members of the UNSC, are not as yet parties to the Statute.

Second, the investigation or prosecution of a case at the national level is not the only potential source of inadmissibility before the Court. In accordance with Article 17(1)(d), even where complementarity is not at issue, a crime under the jurisdiction of the Court may still be inadmissible if not 'of sufficient gravity to justify further action by the Court'. While all crimes under the jurisdiction of the Court are certainly grave, this provision establishes a further filtering mechanism by which the purview of the court may be concretely limited,

api.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx> accessed 9 November 2014.

²⁸ UN, 'Member States of the United Nations' (*United Nations*) <<http://www.un.org/en/members/index.shtml>> accessed 9 November 2014.

²⁹ Statute Preamble para. 4.

although the Statute does not provide further specification as to what should be understood by ‘sufficient gravity’.

Third, pursuant to Article 53(1)(c) and (2)(c), under certain circumstances the Prosecutor may decide that, although the situation or case falls within the jurisdiction of the Court and is admissible, the Court should avoid becoming involved because the investigation or prosecution would not serve the ‘interests of justice’. This concept is, again, not precisely defined, the provisions indicating only that a decision should be taken considering all the circumstances, including the gravity of the crime, the interests of victims, the age or infirmity of the alleged perpetrator and his or her role in the alleged crime.

In addition, the drafters, as any legislators, were certainly unable to foresee *ab initio* all the possible combinations of circumstances that might arise in the future.³⁰ They were also confronted by the intrinsic limitations of language in general and in the context of law in particular.³¹ More importantly, where the drafters were unable to reach a compromise - as was the case with a series of politically sensitive issues³² - they opted for a high degree of indeterminacy or ‘creative ambiguity’,³³ deepening, what Hart would have called, the ‘open texture’ of the Statute.³⁴ In principle, as stressed by even the most prominent positivists, the ‘open texture’ or indeterminacy of a rule should be considered as an advantage rather than a disadvantage, in that it allows for reasonable interpretation in the rule’s application to situations and to types of problems that their authors did not foresee or could not have foreseen.³⁵ However, it should then be acknowledged that, in order to interpret these vague terms of

³⁰ Herbert L.A. Hart, *The Concept of Law* (Paul Craig and Leslie Green eds, Third edn, Oxford University Press 2012) 128, 133.

³¹ Ibid 126. See also Brian Bix, ‘H. L. A. Hart and the “Open Texture” of Language’ (1991) 10 L & Phil 51, 58 and Brian Bix, *Law, Language and Legal Determinacy* (Oxford Scholarship Online: March 2012 1995) 7-35, referring as well to Waismann’s theory of the open texture of language.

³² Particularly the issues of complementarity, gravity and the interests of justice, as will be discussed in Chapter 3.

³³ David Hunt, ‘The International Criminal Court. High Hopes, ‘Creative Ambiguity’ and an Unfortunate Mistrust in International Judges’ (2004) 2 JICJ 56, 67.

³⁴ For discussion as to the ‘open texture’ of law see (n 30) Hart Chapter VII, Section 1, 124-136. See also, (n 31) Bix, ‘H. L. A. Hart and the “Open Texture” of Language’ and Bix, *Law, Language and Legal Determinacy* 7-35. For an answer to Hart’s previous arguments on the issue see Lon L. Fuller, ‘Positivism and fidelity to law - a reply to Professor Hart’ (1957) 71 HarvLRev 630, 661-669.

³⁵ (n 30) Hart 129.

the Statute, the Prosecutor will necessarily have to employ his discretion.³⁶ The Prosecutor's conclusions will be, in effect, the result of a choice from an ample universe of alternatives where he will have to strike a balance, in light of the circumstances, between competing interests that may vary in weight from situation to situation and from case to case.³⁷ As such, one could also argue, borrowing Dworkin's terms, that the Prosecutor will have to find the 'right answers' to 'hard cases'.³⁸

Last but not least, crimes falling under the jurisdiction of the Court will generally involve hundreds, if not thousands, of victims and perpetrators. The Prosecutor will therefore need to select and prioritise situations and cases to be brought before the Court. In addition, these crimes may be committed far from the Court's headquarters in The Hague, and most probably, by powerful actors with the capacity to dissuade witnesses and tamper with or destroy evidence. The situation is further complicated by the fact that the Court has a limited budget and does not have police or enforcement powers of any kind nor subpoena powers for witnesses. The Court is therefore heavily dependent on States' cooperation in issues like access to the information and evidence necessary for the investigation of crimes, the arrest and surrender of suspects, and for the facilitation of the voluntary appearance of witnesses. When cooperation is not available, the Prosecutor will be materially incapacitated in his endeavours to actually investigate and prosecute the crimes under the Statute, even if the conduct fall within the jurisdiction of the Court. In those situations, he may also use his discretion to choose to focus his efforts and resources only upon the situations and cases that he will be able to actually pursue before the Court.

Consequently, in order to fulfil his role, the Prosecutor is afforded ample although not unlimited discretion. The exercise of discretion by the Prosecutor

³⁶ (n 31) Bix, Law, Language and Legal Determinacy 20.

³⁷ (n 30) Hart 135.

³⁸ It should be noted that this reference is not intended to enter into the debate about the existence of a single 'right answer' to every 'hard case'. The reference to Dworkin refers to the fact that the Prosecutor will not exercise his discretion in the darkness, and that depending on the particularities of the situation or case there will be some courses of action that will be sounder than others, see Ronald Dworkin, *Law's Empire* (Frank Kermode ed, Fontana Press 1986) 225-227; and for Dworkin's more recent arguments on the discussion Ronald Dworkin, *Justice in Robes* (The Belknap Press of Harvard University Press 2006) 41-43.

will be guided by his policy decisions as to where, when, how, why and against whom the Court's limited resources should be focused, as framed by the object and purpose of the Statute. However, the ICC's Prosecutor, unlike his national colleagues, is called upon to make these policy decisions within the context of an international political order where powerful global actors interact with less powerful ones. The Prosecutor cannot isolate himself from the political international order that actually created the Court to tackle a problem of common concern to the international community as a whole. In effect, far from being immune to politics, the Prosecutor must acknowledge his place within the international order and pursue policies that, while excluding partisan politics, take into account the Court's setting and limitations.³⁹ Accordingly, the Prosecutor is not expected to completely disregard the political circumstances in which he is called to act, or to be 'apolitical' in that sense. He is given in the Statute sufficient tools to effectively address and take into account political concerns. Nevertheless, the Prosecutor, and the Court as a whole, ought to be impartial and not take sides in any conflict. The fact that the Prosecutor enjoys discretion should not be interpreted as license to make merely arbitrary decisions. In the context of the Statute the Prosecutor's discretion is better qualified as 'a negative freedom, an absence of constraint, but not necessarily (or usually) an absolute freedom'.⁴⁰

It should also be taken into account that if the Prosecutor does not, for whatever reason, focus or deal with certain situations and cases, States will retain their sovereign powers to investigate and prosecute them. This may lead to States putting pressure on the Prosecutor to focus only on 'convenient' situations or cases. The Prosecutor may also want to avoid political difficulties and opt to focus on 'easy' targets, regardless of whether other situations or cases may objectively deserve more attention. The risk of arbitrary decisions being taken in a solitary fashion or otherwise being influenced by political prejudices and pressure from external actors is indeed very high.

³⁹ Matthew R. Brubacher, 'Prosecutorial Discretion within the International Criminal Court' (2004) 2 JICJ 71-95, 93-95.

⁴⁰ See (n 31) Bix, Law, Language and Legal Determinacy 27.

Accordingly, there are numerous dynamics through which the Court's contribution to the fight against impunity may be curtailed - from the Statute's legal limitation of admissible situations and cases, through the lack of resources and the failure of States to cooperate, to the risk that the Prosecutor, operating in a complicated political environment, may abuse his discretion in the selection of situations and cases for investigation and prosecution.

1.1.3 The Fears of Politicisation and the PTC gatekeeping function

Concerned by the dilemmas detailed above, the drafters of the Statute included within the Court's architecture an additional judicial section, the Pre-Trial Division, conceived as a stronghold to protect the Court against the dangers of politicisation. The PTC was devised as the organ in charge of overseeing and controlling the Prosecutor's exercise of discretion, aimed at preventing abuse of power and shielding the Prosecutor from external pressures.⁴¹ Judicial review of the Prosecutor's discretion was recognised as having the potential to diminish 'the risk of politically motivated investigations as a result of abuse of political discretion by the Prosecutor'.⁴² The PTC was meant to act as a 'bulwark against "politicisation"'.⁴³ The different PTCs have also understood their role to be that of 'prevent[ing] the Court from proceeding with unwarranted, frivolous, or politically motivated investigations that could have a negative effect on its credibility',⁴⁴ and 'providing a judicial safeguard against frivolous or politically-motivated charges'.⁴⁵ However, the exact meaning of the term 'politicisation', which the drafters wanted to avoid, still remains a matter of uncertainty.

⁴¹ Silvia A. Fernández de Gurmendi, 'The Role of the International Prosecutor' in Roy S. Lee (ed), *The International Criminal Court The making of the Rome Statute Issues, Negotiations, Results* (Kluwer Law International 1999) 183-184.

⁴² (n 24) Olásolo 104.

⁴³ William A. Schabas, 'The Short Arm of International Criminal Law' in William A. Schabas, Yvonne McDermott and Niamh Hayes (eds), *The Ashgate Research Companion to International Criminal Law Critical Perspectives* (Ashgate 2013) 397.

⁴⁴ *Situation in the Republic of Kenya, ICC-01/09-19-Corr* Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya Pre-Trial Chamber II, 31 March 2010 para. 32.

⁴⁵ *Situation in the Republic of Côte d'Ivoire, ICC-02/11-15-Corr* 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 Côte d'Ivoire' Pre-Trial Chamber III, 5 October 2011 para. 16.

It is commonplace amongst members of the legal profession, most of us (if not all) trained as positivist lawyers, to defend a 'strictly legalistic' approach to judicial work in general. For the majority, to suggest that politics may play a role in criminal trials appears 'equivalent to questioning the integrity of the courts, the morals of the legal profession'.⁴⁶ The same view, of an 'apolitical' Court,⁴⁷ extends to the ICC. As will be discussed in the following Chapters, the 'legalistic' approach to the role of the Court is deeply rooted in the general understanding of its function. Under this perspective, the Prosecutor's discretion and the PTC's supervisory role should be strictly 'technical' and guided by 'uniform', 'legal' criteria.

It seems however rather artificial to approach the role of the ICC, or that of any organ of the Court, from the perspective of 'law in a vacuum'. Such a view would appear to affirm the ideological posture that 'politics' and 'law' can be completely isolated from each other, because they are autonomous spheres of reality. However, particularly within the context of the Court, it is hard to argue that 'law' is absolutely autonomous from 'politics'. If Judith Shklar had lived to witness the establishment of the ICC, she would have probably argued that the creation of the Court represents a new legalistic attempt at judicialisation of a political process, in accordance with the idea that political issues ought to be solved by court-like procedures.⁴⁸ She described the legalistic program in international law as that where the aim was that all politics must be assimilated to the paradigm of just action: the judicial process.⁴⁹ A process in which 'politics' itself becomes a word of scorn, an ideological anarchy hardly distinguished from uncontrolled physical violence, or 'pure chaos that reigns'.⁵⁰ Thus, in her view, for the legalists, and to a certain extent traditional legal thought in general,⁵¹ in order to maintain the opposition between 'legal order' and 'political chaos', it is not only necessary to define 'law' out of 'politics', but

⁴⁶ Otto Kirchheimer, *Political Justice. The Use of Legal Procedure for Political Ends* (Princeton University Press 1961) 47.

⁴⁷ An ideal shared by many commentators as noted by Alexander K.A. Greenawalt, 'Justice Without Politics: Prosecutorial Discretion and the International Criminal Court' [2007] NYUJInt'l L & Pol 583, 612.

⁴⁸ Judith N. Shklar, *Legalism. Law, Morals and Political Trials* (Harvard University Press 1964) 117-118.

⁴⁹ Ibid 122.

⁵⁰ Ibid.

⁵¹ Ibid 123.

further necessary to ‘subdue this irrational political world’ by ‘a policy of uncompromising rules and rule following’.⁵²

Some would argue that ‘law’ should indeed preserve its autonomy from ‘politics’, because politics is in fact not part and parcel of justice but rather of the realm of ‘power’, which is determined by war or ‘active or potential physical violence’.⁵³ However, even if one accepts such a narrow understanding of the term ‘politics’, how can the rules of the Court – which was created precisely to deal with the consequences of war and violence – magically lift themselves above and beyond politics?⁵⁴ Has international law eventually managed not only to regulate politics but also to replace it altogether?⁵⁵ Or have we rather succumbed to the ‘intellectual fantasy’ of the replacement of politics by law as the solution to all the problems of international conflict?⁵⁶

The problem lies, as Greenawalt stresses, in the imprecision in the use of the terms ‘politicisation’, ‘politics’ and ‘political’.⁵⁷ As noted by Shklar, ‘[t]he answer, of course, is that there is politics and politics’.⁵⁸ Within the context of the Court, certain political considerations are indeed illegal by definition and should play no role in the Court’s decision-making. An illegal political consideration would be, for example, the fact that a government involved in the commission of crimes has a friendly relationship with or economic ties to a permanent member of the UNSC.⁵⁹ However, the proscription against ‘politicisation’ does not debar certain other extra-legal considerations, which are not concerned with illicit motives and may legitimately inform the proper exercise of the Prosecutor’s discretion.⁶⁰ These would include, for example, a policy decision to focus on ‘those who bear the greatest responsibility’,⁶¹ understood as meaning exclusively the highest in command, or that of

⁵² Ibid 122.

⁵³ As defined by the realists according to Shklar, *ibid* 125.

⁵⁴ Ibid 122.

⁵⁵ Ibid 130.

⁵⁶ Ibid 139.

⁵⁷ (n 47) Greenawalt 613.

⁵⁸ (n 48) Shklar 143.

⁵⁹ (n 47) Greenawalt 613.

⁶⁰ Ibid.

⁶¹ OTP, *Paper on some policy issues before the Office of the Prosecutor* (International Criminal Court, 2003) 3.

‘prosecuting lower level perpetrators where their conduct has been particularly grave and has acquired extensive notoriety’.⁶²

Accordingly, in order to ensure that the Prosecutor’s decisions are a legitimate exercise of his powers under the Statute and are not arbitrary or the result of improper political influence that may lead to the Court’s ‘politicisation’, the PTC is tasked with the judicial scrutiny of the Prosecutor’s exercise of discretion. The PTC’s function should further contribute to the Court’s impartiality and independence – which are essential for its credibility and legitimacy – and serve to protect the rights of those affected by the Court’s investigations and prosecutions.

This is what will be referred to herein as the ‘gatekeeping’ function of the PTC. This function includes the PTC’s power to ‘filter-out’ unsubstantiated, inadmissible, unlawful, or politically motivated situations and cases that the Prosecutor may want to pursue. It also includes the PTC’s power to ‘filter-in’ (i) legitimate and legally grounded situations and cases that the Prosecutor has arbitrarily excluded on the sole basis of considerations of the ‘interests of justice’; and (ii) sufficiently substantiated cases and charges that the Prosecutor wants to pursue. Part of the PTC’s gatekeeping function is also the protection of the rights of those affected by investigations and prosecutions.

1.2 The extent of the Prosecutor’s discretion

1.2.1 *The Concept of Prosecutorial Discretion and its applicability in the context of the Statute*

Black’s Law Dictionary defines discretion as ‘[a] public official’s power or right to act in certain circumstances according to personal judgment and conscience, often in an official or representative capacity.’⁶³ Prosecutorial discretion is further defined as ‘[a] prosecutor’s power to choose from the options available in a criminal case, such as filing charges, prosecuting, not prosecuting, plea-

⁶² OTP, *Strategic Plan June 2012-2015* (International Criminal Court, 2013) 14.

⁶³ Bryan A. Garner, *Black’s Law Dictionary* (available at Westlaw BLACKS, 9th edn, Thomson Reuters 2009).

bargaining, and recommending a sentence to the court.’⁶⁴ To what extent can this definition be applied to the ICC Prosecutor’s discretion? How free is he in deciding to act in accordance with his personal judgment and conscience or within his own perception of what is fair and equitable? How loose or constricted is the Prosecutor’s power under the Statute? Is he subject to strict rules?

The degree of prosecutorial freedom varies substantially from one system to another; of course, prosecutorial arbitrariness is not permitted under any system of criminal justice.⁶⁵ However, already within the ‘continental’ or ‘civil law’ system it is possible to find two main approaches. On the one hand, in the Spanish legal system (*Obligatoriedad de la Acción Penal*) as well as the Italian one (*Obbligatorietà dell’azione penale*),⁶⁶ the prosecutor is under a duty to investigate and prosecute whenever there are sufficient reasons to suspect that a criminal offence has been committed. Similarly, in Germany (*Legalitätsprinzip*),⁶⁷ the prosecutor is under the same duty to investigate and prosecute, although there are some exceptions in relation to certain offences that are investigated and prosecuted only when there is a complaint from the victim and, more importantly, the prosecutor has the right to drop cases under certain circumstances. On the other hand, there are systems like the French (*Opportunité des Poursuites*)⁶⁸ and Dutch (*Opportuniteitsbeginsel*),⁶⁹ in which the prosecutor will be guided in his decisions by considerations related to the opportunity or desirability of prosecutions. The degree of judicial oversight and authority will also depend on the particular system, although the civil law traditions generally include - to different degrees - judicial oversight and control over the prosecutorial process.

At the other end of the spectrum, in the US, save for unconstitutional motivations, the prosecutor has nearly unfettered discretion in deciding whether

⁶⁴ Ibid.

⁶⁵ Lenore F. Horton, ‘Prosecutorial discretion before international criminal courts and perceptions of justice: How expanded prosecutorial independence can increase the accountability of international actors’ (2010-2011) 7 *Eyes on the ICC* 5, 7-10.

⁶⁶ Héctor Olásolo, *Corte Penal Internacional ¿Dónde investigar? Especial referencia a la Fiscalía en el Proceso de Activación* (Tirant Lo Blanch 2003) 298-300.

⁶⁷ See K. Tiedemann and J. Vogel, ‘National Report of Germany’ in Mireille Delmas-Marty and J.A.E. Vervaele (eds), *The Implementation of the Corpus Juris in the Member States*, vol II (Intersentia 2000) 363.

⁶⁸ Jacques Leroy, *Procédure Pénale* (2 edn, L.G.D.J. Lextenso éditions 2011) 247-250.

⁶⁹ Geert J.M. Corstens, *Het Nederlands Strafrechtsrecht* (4th edn, Kluwer 2002) 51-52.

to investigate and prosecute.⁷⁰ Considerations such as the likelihood of conviction and the public interest in the prosecution will determine the prosecutor's decision whether to proceed against certain individuals or crimes. In England and Wales, the police retain almost exclusive control over the investigation, while the Crown Prosecution Service (CPS) is the government department responsible for prosecuting criminal cases. The police will generally have control over the decision whether a case should be prosecuted and the charges to be brought against an accused, although the CPS will advise the police on cases for possible prosecution and determine the charges in more serious or complex cases.⁷¹

Héctor Olásolo explains that the discretion granted to prosecutors in systems like the American one is explained by reference to their democratic legitimacy and political responsibility.⁷² In these systems, he argues, the organs of investigation and prosecution form part of the executive power and their discretion is thus a reflection of their role as instruments at the service of the criminal policy of the executive.⁷³ Conversely, in systems following mandatory prosecutions, the mere communication of the *notitia criminis* activates the initiation of the criminal investigation, and the existence of a 'reasonable basis' will automatically trigger the commencement of a criminal prosecution.⁷⁴ Olásolo argues that in the systems featuring mandatory prosecution, the functions of investigation and prosecution would be considered 'quasi-judisdictional' as their main goal is the protection of the general interests defined by law.⁷⁵ Consequently, in Olásolo's view, the choice between discretionary or mandatory investigation and prosecution will depend on whether these functions are conceived as tools to implement governmental anti-crime policies or are aimed at preserving the general interests defined by law.⁷⁶

⁷⁰ See, *inter alia*, (n 65) Horton 8; (n 66) Olásolo, Corte Penal Internacional ¿Dónde investigar? Especial referencia a la Fiscalía en el Proceso de Activación 296, footnote 61.

⁷¹ (n 65) Horton 8; The Code for Crown Prosecutors (January 2013), England.

⁷² (n 66) Olásolo, Corte Penal Internacional ¿Dónde investigar? Especial referencia a la Fiscalía en el Proceso de Activación 297.

⁷³ *Ibid* 298.

⁷⁴ (n 24) Olásolo, 'The prosecutor of the ICC before the initiation of investigations: A quasi-judicial or political body?' 114.

⁷⁵ *Ibid* 115.

⁷⁶ *Ibid* 116.

Olásolo's theory, although an analytical frame worth holding on to, leaves some questions unanswered. In particular, it is not exactly clear whether he implies that the options are mutually exclusive in the sense that, in a system based on discretion, the functions of investigation and prosecution are conceived (only) as tools to implement governmental anti-crime policies, and that only a system of mandatory investigation and prosecution is aimed at preserving the general interests defined by law. It is difficult to see how such an interpretation can be squared with the English system for example, where discretion is guided by public interests and not only by 'governmental anti-crime policies'. Indeed, in accordance with the 2013 Code for Crown Prosecutors, the CPS discretion to decide not to investigate or not to prosecute or to accept out-of-court disposals or guilty pleas is based upon whether the 'public interest' would be properly served by those measures.⁷⁷

Olásolo also appears to argue that the choice between mandatory and discretionary investigation and prosecution will be guided by the supreme values of the particular legal system. He argues that the systems based on legal stability and equality before the law would adopt mandatory prosecution or the 'principle of legality' (as it is known in the German tradition) and systems based on representative application of the law, democratic legitimacy, and political accountability would be more inclined to adopt the principle of political discretion.⁷⁸ This distinction, although arguably applicable to some specific examples, does not seem to be easily extrapolated to other systems national or international. In effect, for example, although strictly speaking based on discretion, the French and Dutch 'principle of opportunity' is conceived within legal systems in which equality before the law and legal stability are pillar values of the system as much as in Spain and Italy.⁷⁹ Similarly, although the Procurator Fiscal in Scotland enjoys considerable discretion, he is only

⁷⁷ The Code for Crown Prosecutors (January 2013), England paras 4.1-4.2, 4.7-4.12, 7.2, 9.3.

⁷⁸ (n 24) Olásolo, 'The prosecutor of the ICC before the initiation of investigations: A quasi-judicial or political body?' 116.

⁷⁹ (n 68) Leroy 256-257; (n 69) Corstens 482-483.

answerable to the Lord Advocate and generally declines to explain his decisions to anyone else.⁸⁰

The same can be said about the Statute. It could not be reasonably argued that the drafters have chosen that the Prosecutor should implement governmental anti-crime policies over preserving the general interests defined by law or that they have opted for political accountability or democratic legitimacy over equality before the law or legal stability, or the other way around. Articles 22, 23 and 24 recognise the general principles of law providing for legal stability: *nullum crimen sine lege*, *nulla poena sine lege* and non-retroactivity *ratione personae*. Article 27(1) provides for equality before the law, stating that the Statute applies equally to all persons. However, at the same time, in accordance with Articles 42(4) and 46(2) the Prosecutor is elected and may be removed from office by an absolute majority of the Assembly of States Parties (ASP). The ASP is the representative-political organ of the Court, in which each State that has ratified the Statute is represented pursuant to Article 112. The ICC's Prosecutor is therefore politically accountable to the 'democratic' political organ of the Court. At the same time, however, he is not elected in order to implement the ASP's policies, but to preserve the 'general interest' defined by the objects and purposes of the Statute. Further, as referred to in the previous section, the Prosecutor's discretion is not unlimited but subject to considerable judicial control and oversight by the PTC.

Accordingly, the extent of the Prosecutor's discretion cannot be determined or rationalised through assimilation of the system created by the Statute to any of the traditional models of criminal justice. As stressed by Alexander Greenawalt, the policy dilemmas faced by the Prosecutor are heavily influenced by institutional goals and limitations that fundamentally distinguish international prosecution from its domestic counterparts.⁸¹ It should be acknowledged that the Court's system is unique and does not emerge directly from principles or traditions of criminal justice commonly shared by all of its members. It is not the dreamed of 'world penal court' established on the basis of a 'unified world

⁸⁰ Alastair N Brown, *Criminal Evidence and Procedure. An Introduction* (3rd edn, Avizandum Publishing 2010) 21.

⁸¹ (n 47) Greenawalt 600.

community’,⁸² but rather represents the result of political compromise between diverse and, at times, contradictory perspectives on the intrinsic values and purposes of criminal justice and punishment. As such, and as stressed above, the drafters opted for ‘creative ambiguity’ in circumstances where agreement would have proved difficult if not impossible to obtain.⁸³ The extent and limits of the Prosecutor’s discretion should be therefore analysed in light of his concrete powers under the Statute and degree of judicial oversight at the different stages of the proceedings.

1.2.2 The Prosecutor’s Discretionary Powers in Accordance with the Statute

Previous models of international criminal justice, such as Nuremberg’s International Military Tribunal (IMT),⁸⁴ Tokyo’s International Military Tribunal for the Far East (IMTFE),⁸⁵ and the *ad hoc* Tribunals - International Criminal Tribunal for the former Yugoslavia (ICTY)⁸⁶ and International Criminal Tribunal for Rwanda (ICTR)⁸⁷ - were created to deal with specific situations of crisis that were delimited *ab initio*. The political bodies that created them made the ‘political’ choices of determining whether international adjudication was indeed justified, the margins of their jurisdiction, and, in certain cases, even the individuals who were to be investigated and prosecuted.

⁸² (n 46) Kirchheimer 334.

⁸³ (n 33) Hunt 67.

⁸⁴ The London Charter states at Article 6 that the tribunal was established ‘for the trial and punishment of the *major war criminals of the European Axis countries* (...) who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations committed any of the following crimes (...) (a) crimes against peace (...) (b) war crimes (...) (c) crimes against humanity’, United States - France - Great Britain - Soviet Union: Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 August 1945 (The American Journal of International Law 1945, 39) 257-264 [emphasis added].

⁸⁵ The Charter of the IMTFE states at Article 5: ‘[t]he Tribunal shall have the power to try and punish *Far Eastern war criminals* who as individuals or as members of organizations are charged with offences which include Crimes against Peace’, Charter of the International Military Tribunal for the Far East (26 April 1946) in ‘Documents on the Tokyo International Military Tribunal. Charter, Indictment and Judgments’ (Oxford University Press 2008) 7-11.

⁸⁶ When creating the ICTY, the UNSC limited the jurisdiction of the Court to the prosecution of ‘[p]ersons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined by the Security Council upon the restoration of peace’, UNSC, *UN Doc S/RES/827, International Criminal Tribunal for the former Yugoslavia (ICTY)*, 25 May 1993 (1993).

⁸⁷ When creating the ICTR, the UNSC limited the jurisdiction of the Court to the prosecution of ‘[p]ersons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda between 1 January 1994 and 31 December 1994’, UNSC, *UN Doc S/RES/955, Establishment of the International Criminal Tribunal for Rwanda (ICTR) and adoption of the Statute of the Tribunal*, 8 November 1994 (1994).

The system of the Court differs substantially. Provided that one of the triggering mechanisms operates, the ICC's Prosecutor can investigate almost any situation of crisis, as long as it relates to a crime which falls under the subject matter jurisdiction of the Court, was committed after the entry into force of the Rome Statute, and - except in cases of UNSC referral - was committed by a national of a State Party and/or occurred in the territory thereof.⁸⁸

Pursuant to Article 53(1), when the UNSC or a State Party refer a situation to the Prosecutor, the jurisdiction of the Court will only be activated if the Prosecutor decides that there is indeed a 'reasonable basis to proceed'. Consequently, the Prosecutor is not bound by the UNSC or State's assessment of the necessity of the investigation or of the fulfilment of the Statute's requirements. Similarly, in accordance with Article 15(1) and (3), based on the information he receives, the Prosecutor may request the PTC's authorisation to initiate an investigation *proprio motu*. However, he is not obliged to initiate an investigation following every single communication of crimes under the jurisdiction of the Court that he may receive. Although Article 15(3) includes the mandatory expression 'shall', the operative term in sub-paragraph 1 of the same provision is 'may', giving discretion to the Prosecutor to decide whether to request authorisation to initiate investigations *proprio motu*. The Statute therefore does not recognise the principle of mandatory investigation triggered automatically by the communication of the *notitia criminis*.

As will be discussed in Chapter 4, although subject to the PTC's judicial scrutiny in the case of referrals and its authorisation when acting *proprio motu*, the Prosecutor is the key decision-maker as regards the situations to be investigated by the Court. He has to determine of his own accord whether the requirements to initiate an investigation are fulfilled, whether situations fall within the competence of the Court, whether they are of sufficient gravity to justify further action by the Court, and finally whether the interests of justice militate against the initiation of an investigation. It could be argued that when all the requirements of Article 53(1) are 'objectively' fulfilled, the Prosecutor has no option but to - in the language of the provision he 'shall' - initiate an

⁸⁸ For the Court's subject matter, temporal, territorial and personal jurisdiction, see Chapter 2, Section 2.2.4.

investigation. However, the threshold of ‘reasonable basis to proceed’ at which the Prosecutor should be satisfied is again nowhere defined with more precision. Accordingly, it will be for the Prosecutor to assess, in accordance with his own wisdom and experience whether or not the ‘objective’ requirements are complied with at the relevant threshold. When he reaches a positive conclusion as to the reasonable basis for the investigation, then the exact geographical, temporal and substantive boundaries of the situation to be investigated also have to be determined, which again, is not a pure mathematical assessment. As will be discussed in Chapter 4, the determination of the boundaries of a situation of crisis will depend on a series of - not necessarily ‘objective’ - factors.

More generally, it should be acknowledged that it is practically impossible for the Prosecutor to deal with all the situations that could come under the Court’s scrutiny. The mere application of the margins of jurisdiction, complementarity and gravity will not sufficiently narrow the range of possible situations and cases that qualify to justify action by the Court. Similarly, it would appear that only a limited number of situations and cases, if any, would qualify to be dismissed based on the ‘interests of justice’. The Prosecutor will therefore realistically need to choose which investigations and prosecutions to pursue among several situations and cases deserving attention. In order to reach that decision the Prosecutor will have to make difficult choices for which there is no clear answer in the Statute. For example, should he be guided by qualitative or quantitative factors? Should he focus on the situations with more victims or those with more political impact? Would it be sensible to prioritise the prosecution of genocide over war crimes? Should he start by focusing on a particular geographical area or should he rather initiate investigations in different parts of the world in order to avoid perceptions of bias? Might he seek to pursue situations in which cooperation will be readily available or should he aim at the symbolic impact that an investigation involving powerful actors may have, even if the likelihood of cooperation is negligible? Would it be worthwhile to draw attention to international crimes and encourage international political action, even if there are limited prospects for immediate arrests and trials? Should he apply a comparative perspective as to the gravity of the different situations that may

deserve the Court's attention? What should his approach to amnesties and transitional justice mechanisms in general be? These are the types of difficult questions that the Prosecutor will have to answer in order to select from various meritorious situations.

Once the investigation is eventually launched, a particular feature of the Court's system is that, pursuant to Article 54(1)(a) 'the Prosecutor shall: (a) in order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute'. As stressed by Kress, the drafters of the Statute devised a role for the Prosecutor resembling that of an 'officer of justice' rather than a partisan advocate.⁸⁹ Strictly speaking, the Statute does not give the Prosecutor the choice to decide whether to focus his investigations on specific incidents, crimes or individuals, but imposes on him the obligation to investigate the full extent of the situation of crisis for which the jurisdiction of the Court has been activated, 'in order to establish the truth'. Consequently, the Prosecutor's duty in this context is not 'merely' to discharge the burden of proof by demonstrating beyond reasonable doubt the guilt of an accused in terms of Article 66, but rather to 'establish the truth', the same responsibility that is borne by the Trial Chamber (TC) in accordance with Article 69(3). As such, the Prosecutor cannot simply focus on obtaining a conviction, but must investigate the full extent of criminality in a given situation and only afterwards, 'upon investigation' in terms of in Article 53(2), will he enjoy discretion to decide whether to prosecute. As will be discussed in Chapter 4, this responsibility of the Prosecutor is consistent with the powers granted by Articles 56(3) and 57(3)(c) to the PTC, allowing it to intervene during the Prosecutor's investigation and take measures for the protection and privacy of victims and witnesses, the preservation of evidence, the protection of suspects and the protection of national security information.

As such, although the Prosecutor is, in principle, obliged to investigate all facts and evidence, he is under no obligation to initiate criminal proceedings against every individual and for every crime that he may investigate. As stated, 'upon investigation', the Prosecutor may conclude that there is 'no sufficient basis for

⁸⁹ Claus Kress, 'The procedural law of the International Criminal Court in outline: Anatomy of a unique compromise' (2003) 1 JICJ 603, 608.

a prosecution'. However, even where such a basis is found to exist, the Prosecutor is still not obligated to initiate a criminal investigation. Pursuant to Article 58(1), at any time after the initiation of the investigation the Prosecutor 'may' request the PTC to issue a warrant of arrest or a summons to appear, if satisfied that there are 'reasonable grounds to believe' that the person has committed a crime within the jurisdiction of the Court. Again the operative term is 'may' rather than 'shall'.

In addition, the thresholds of 'no sufficient basis' and 'reasonable grounds to believe' are nowhere defined in the Statute. It may be argued that the Article 58 standard of 'reasonable grounds' is a threshold higher than the 'sufficient basis' of Article 53. Consequently, even where the Prosecutor finds 'sufficient basis' for a prosecution, such that Article 53(2) does not operate to dismiss the case, he still has to be satisfied that there are also 'reasonable grounds to believe' that the person identified has committed a crime under the Statute before he may apply for an arrest or summons pursuant to Article 58.

As will be discussed in Chapter 5, pursuant to Article 58 it is incumbent on the PTC to decide whether a warrant or summons will be issued, but only at the request of the Prosecutor. The Prosecutor has indeed ample discretion to decide against whom - and for what crimes - to request the initiation of criminal prosecutions. This decision has proven to be one of the most controversial discretionary powers of the Prosecutor. A single situation of crisis under investigation would normally involve numerous perpetrators, all of whom may be suitable targets for prosecution by the Court. In effect, Articles 25(3) and 28 identify a wide range of modes of participation in the crimes under the Court's jurisdiction. These include direct participation, indirect participation, ordering, aiding and abetting, contribution to the commission of a crime by a group acting with a common purpose, attempts, acts of omission where committed by responsible commanders and other superiors and - in the case of genocide - public incitation. Further, pursuant to Articles 27 and 33, official capacity, immunities, and superior orders are irrelevant under the Statute. The Prosecutor could therefore prosecute almost anyone in the chain of command or even persons not belonging to the groups principally involved in the conflict if they

contributed to the commission of the crime. Who then shall be the target? Might the Prosecutor go against the most notorious figure(s) or those most readily available for arrest and surrender? Could he try to pursue everyone in the chain of command or would it be more reasonable to maintain focus on particular levels? Should he target persons on all sides of the conflict in order to avoid perceptions of bias, or, rather, should he focus on those committing the gravest crimes? Again, these are the type of questions that the Prosecutor will ask himself before deciding whom to prosecute.

Once the PTC has issued a warrant or summons and the individual concerned has been surrendered or otherwise appeared voluntarily before the PTC, the Prosecutor has to further decide on the charges for which that person should be brought to trial. As will be discussed in Chapter 6, while subject to the approval of the PTC, Article 61 leaves to the Prosecutor the power to determine the specific charges to be brought against the individual. As is demonstrated by the cases brought before the Court in its first ten years of existence, this is, again, not a straightforward or mathematical decision. Indeed, it has also been a vigorously contested aspect of the Prosecutor's discretion. Considerations related to complementarity, investigative capacities, availability of evidence and, most significantly, the Prosecutor's policy decisions have determined the type and extent of the charges that have been brought before the Court.

1.2.3 The nature of the Prosecutor's discretion

As detailed above, the Prosecutor is entitled, in accordance with the Statute, to exercise discretion in the selection of situations and cases to be heard before the Court, the individuals to be prosecuted and the charges to be brought against them. Most of these decisions will be subject to the judicial control of the PTC, but the Prosecutor will preliminarily answer them himself, in accordance with his personal judgment. The Prosecutor will therefore exercise discretion, which is not unlimited and is subject to the restrictions imposed by the Court's legal framework.

According to Olásolo, the ICC's Prosecutor has two types of discretion: 'inherent' or 'technical' on the one hand and 'political' on the other.⁹⁰ For Olásolo, technical or inherent discretion is the margin of appreciation within which the Prosecutor may assess facts and interpret the law in order to find a technical solution to his legal tasks, exclusively guided by legal criteria.⁹¹ These tasks would include the selection of the facts to be investigated within the context of a situation, the determination of the best legal characterisation of the facts to be brought to trial, the means of proof to be submitted at pre-trial or trial, the assessment of whether there are reasonable grounds to submit a request for an arrest warrant and the decision as to when an investigation should be concluded.⁹²

In Olásolo's view, the Prosecutor has also been granted 'political' discretion, particularly pursuant to Article 53, which allows him to make value judgments about whether certain actions will be convenient or appropriate to the fulfilment of determined political goals.⁹³ The 'political' discretion afforded to the Prosecutor, Olásolo stresses, may be either limited or unlimited. It could be considered 'limited' where the ultimate political goals to be achieved through its exercise are specified and the Prosecutor is unable to alter them.⁹⁴ Conversely, absent such specification, as for example with the 'interests of justice' in terms of Article 53(1)(c) and (2)(c), the discretion given to the Prosecutor should be regarded as 'unlimited'.⁹⁵ Consequently, according to Olásolo's approach, the Prosecutor is free to determine by himself the nature of the 'political' goals to be achieved through his discretion under provisions that do not specify these ends.

As stressed above, there are politics and *politics*, and problems arise from the imprecision in the use of the terms 'politics' and 'political'. Olásolo is correct in that within the framework of the Statute, the Prosecutor's discretion is not

⁹⁰ (n 24) Olásolo, 'The prosecutor of the ICC before the initiation of investigations: A quasi-judicial or political body?' 109.

⁹¹ Ibid 110.

⁹² Ibid.

⁹³ (n 66) Olásolo, Corte Penal Internacional ¿Dónde investigar? Especial referencia a la Fiscalía en el Proceso de Activación 295.

⁹⁴ (n 24) Olásolo, 'The prosecutor of the ICC before the initiation of investigations: A quasi-judicial or political body?' 110-111.

⁹⁵ Ibid 111.

simply and strictly ‘technical’, in the sense that it will be always guided by legal criteria previously defined by the law. It is true that the Prosecutor is allowed to take into account certain extra-legal considerations when exercising his discretion and interpreting the vague terms of the Statute. However, the Prosecutor is not absolutely free to determine the ‘political’ goals to be achieved through his choices.

As discussed in Sections 1.1.2 and 1.1.3 above, the Prosecutor should not isolate himself from the international political order that actually created the Court, which is aimed at the ultimate political goal of preventing threats to ‘the peace, security and well-being of the world’.⁹⁶ The Prosecutor is thus not expected to completely disregard the political scenario within which he is called to act; he is given in the Statute sufficient tools to properly address political concerns. However, although free to set his ‘policy options’ within the framework of the Statute, the Prosecutor does not have license to operate arbitrarily and ought to be impartial and not take sides in any conflict. Indeed, although the Prosecutor may take into account extra-legal considerations, his decisions cannot be arbitrary or biased. As such, within the context of the Statute, certain ‘political considerations’ will be illegal by definition and should play no role in the Court’s decision-making.

Yet how can the Prosecutor distinguish between the ‘politics’ or ‘political considerations’ that are illegal and those that are not? Dworkin’s constructive interpretation theory seems helpful in finding the distinguishing parameters.⁹⁷ He argues that interpretation is essentially concerned with purpose. The interpreter cannot make of the object of interpretation anything he might have wanted it to be, since the object itself constrains its available interpretations: interpretation is a matter of interaction between purpose and object.⁹⁸ Accordingly, when exercising his discretion, the Prosecutor is not allowed to make the Statute ‘anything he would have wanted it to be’, but is rather constrained in the policies he devises and applies by the Statute itself, which has its own purposes and goals.

⁹⁶ Statute Preamble para. 3.

⁹⁷ See (n 38) Dworkin, *Law’s Empire* 52.

⁹⁸ *Ibid.*

1.2.4 The Prosecutor's Policy Options

Although constrained by the purposes and goals of the Statute, the Prosecutor has the power to take policy decisions exercising his discretion to interpret the ambiguity of the legal criteria included in the Statute and the subjective elements purposely attached to them.⁹⁹ As stressed by Goldston, the Prosecutor's discretion is:

grounded in law and evidence, but, of necessity [takes] into account broader considerations of strategy and policy, even while refraining from 'politics' in the sense of partisanship and/or bias for or against any interest external to the Court.¹⁰⁰

The Prosecutor is indeed entitled to choose between different possible ways of fulfilling his mandate, but the legitimacy of his choices will be determined in light of the purposes and goals of the Statute.

For example, within different expressions of policy options adopted by the Prosecutor it is possible to identify, *inter alia*, the decision: (i) that the OTP 'should endeavour to maximise its impact while operating a system of low costs';¹⁰¹ (ii) that the selection of individuals and charges to be brought before the Court should be guided by a strategy of focusing on 'the leaders who bear most responsibility for the crimes';¹⁰² and (iii) that the OTP will endeavour to conduct 'short investigations (...) [where] incidents will be selected to provide a sample that is reflective of the gravest incidents and the main types of victimization'.¹⁰³ The legitimacy of these policy options should therefore be assessed in light of the objects and purposes of the Statute. Particular consideration should be given as to whether they constitute a proper way of complying with the goal of 'put[ting] an end to impunity for the perpetrators of these crimes and thus contribut[ing] to the prevention of such crimes',¹⁰⁴

⁹⁹ John T. Holmes, 'The Principle of Complementarity' in Roy S. Lee (ed), *The International Criminal Court The making of the Rome Statute Issues Negotiations Results* (Kluwer Law International 1999) 75.

¹⁰⁰ James A. Goldston, 'More Candour about Criteria. The Exercise of Discretion by the Prosecutor of the International Criminal Court' (2010) 8 JICJ 383, 387.

¹⁰¹ OTP, Policy Paper September 2003 3.

¹⁰² Ibid.

¹⁰³ OTP, *Report on Prosecutorial Strategy* (International Criminal Court, 2006) 5-6.

¹⁰⁴ Statute Preamble para. 5.

bearing in mind that these crimes ‘threaten the peace, security and well-being of the world’.¹⁰⁵

Although not specifically required by the Statute, prosecutorial strategy should be transparently reflected in *ex ante* policy papers or sufficiently explained in his specific decisions. In principle, this fosters accountability and ensures transparency - a critical element of any institution’s legitimacy - as well as preventing arbitrariness and inequality and enhancing fairness and consistency. As is the case in domestic systems that allow prosecutorial discretion, the establishment of policy rules is essential to the legitimate exercise of discretion.¹⁰⁶ A clear and transparent policy is all the more important in the ICC’s context where, as discussed above, the Prosecutor’s discretion is wide and where the specific purposes of criminal justice or punishment that he may consider to be within the objects and purposes of the Statute may not necessarily be recognised as such by all States Parties. Greenawalt notes, however, the risk that the kind of guidelines that provide for meaningful *ex ante* decisional rules likely to demonstrate the Prosecutor’s impartiality may not be the kind likely to embrace the full complexity and contingency of each situation.¹⁰⁷ Certainly, policy papers should explain the different policy options to be adopted by the Prosecutor, but be delineated in sufficiently broad terms so as to preserve the intrinsic nature of discretion.

The problem identified by Greenawalt arises when *ex ante* policy papers do not capture the complexity of certain discretionary decisions and the Prosecutor does not sufficiently explain the policy options adopted. It is of great concern, as emphasised by Goldston among others, that certain considerations that have crucially informed the Prosecutor’s determination in a number of cases, such as the prospects of arrest and State cooperation, have not been properly acknowledged.¹⁰⁸

¹⁰⁵ Ibid Preamble para. 3.

¹⁰⁶ W.E.C.A. Valkenburg, ‘Commentaar op Artikel 167’ in C.P.M. Cleiren and J.F. Nijboer (eds), *Tekst en commentaar Strafvoeding* (Kluwer 2001) 563-575.

¹⁰⁷ (n 47) Greenawalt 656.

¹⁰⁸ (n 100) Goldston 394-397.

As described in this section, discretion allows the Prosecutor to take into account extra-legal considerations and the particularities of each case, but that does not give him *carte blanche* to act with arbitrariness or bias. The main safeguard provided by the Statute against possible abuse of prosecutorial discretion is the PTC's scrutiny. The PTC is the organ responsible for ensuring that the Prosecutor's decisions are a legitimate exercise of his powers under the Statute and that they are not arbitrary or the result of improper political influence.

1.3 The PTC's gatekeeping function

1.3.1 *The Counterbalancing Power of the PTC*

The idea of the inclusion of a PTC within the Court's system grew in support throughout the Statute negotiations. The PTC was seen as the organ necessary to counterbalance the wide discretion given to the Prosecutor and to ensure that his actions were not abusive or the result of improper political pressures.¹⁰⁹ The inclusion of the PTC within the Court's architecture was the decisive element that sealed agreement between the opposing views as to the Prosecutor's independence. On the one hand, there were those supporting the idea of a fully empowered Prosecutor able to initiate investigations and prosecutions whenever heinous crimes were committed in the territory or by nationals of a State Party. On the other hand, there were those who considered essential the authorisation of the relevant State(s) or the UNSC before the commencement of any investigation or prosecution. The main argument bringing the PTC into the equation was that, in the absence of political backing from the State or the Council, the Prosecutor would need the judicial backing of the Court.¹¹⁰ Therefore, politically sensitive decisions would not be taken in a solitary fashion by the Prosecutor but in a collective manner, ie by the Prosecutor under the judicial control of the PTC, thus not only preventing possible abuses of power but also shielding the Prosecutor from external pressures.¹¹¹

¹⁰⁹ *Côte d'Ivoire, ICC-02/11-15-Corr* para. 8.

¹¹⁰ (n 41) Fernández de Gurmendi 184.

¹¹¹ *Ibid.*

The role assigned to the PTC has been described in terms of its activities as: (i) a filter against futile, irrelevant, unreasonable or duplicate investigations; (ii) a safeguard for the rights of the accused and victims and the fairness and completeness of the investigation; and (iii) an impulse for the proceedings in view of the trial.¹¹² The PTC may also be seen in more general terms to provide crucial supervision over the activities of the Prosecutor.¹¹³ The PTC exercises judicial control over fundamental prosecutorial choices as regards the situations and cases to be brought before the Court and ensures protection of the rights of those affected by the Court's investigations and prosecutions.

It could be argued that the fact that certain of the Prosecutor's decisions are subject to judicial control by the PTC does not necessarily provide for further safeguards. Some may argue that there may be little reason to suspect that judicial decisions would be necessarily less susceptible to external pressures than those of a Prosecutor. In effect, Article 42 recognises the Prosecutor's independence as a separate organ of the Court, who shall not seek or act on instruction from any external source and has full authority over the management and administration of the office. However, a contextual reading of the Statute supports the view that the PTC's judicial review of the Prosecutor's discretionary decisions does indeed make the Court less susceptible to manipulation from external actors.

First, the PTC judges are also independent in the performance of their functions pursuant to Article 40(1). In practical terms, judges are more independent than the Prosecutor from the ASP - the, strictly speaking, 'political' organ of the Court - in particular considering their mechanism of election,¹¹⁴ and removal.¹¹⁵ In addition, while the Prosecutor will take his discretionary decisions in a

¹¹² Michele Marchesiello, 'Proceedings before the Pre-Trial Chambers' in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, vol II (Oxford University Press 2002) 1235.

¹¹³ Olivier Fourmy, 'Powers of the Pre-Trial Chamber' in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, vol II (Oxford University Press 2002) 1229.

¹¹⁴ Pursuant to Article 36(6)(a) judges are elected by, at least, a two-thirds majority of the States Parties present and voting in the ASP meeting convened for that purpose. Pursuant to Article 42(4), the Prosecutor is elected by an absolute majority of the members of the ASP.

¹¹⁵ Pursuant to Article 46(2)(a) a decision as to the removal of a Judge has to be taken by a two-thirds majority of the ASP upon a recommendation adopted by a two-thirds majority of the other judges. However, pursuant to Article 46(2)(b), for the removal of the Prosecutor an absolute majority of States Parties is sufficient.

solitary fashion, the judges are required to reach a collegial consensual decision on sensitive matters. While in accordance with Article 39(2)(b)(iii), a single judge can carry out the functions of the PTC, the most important decisions involving judicial control over the Prosecutor's discretion must be concurred in by the majority of a PTC pursuant to Article 57(1)(a).

Further, while both the Prosecutor and the judges are tasked with the same obligation of 'finding the truth' pursuant to Articles 54(1) and 69(3), the judicial function in itself makes the PTC judges less susceptible to pressures from States or the Council to act in one way or another. The PTC will be simply complying with its function if it decides not to authorise the commencement of an investigation, not to issue a warrant of arrest or not to confirm the charges brought by the Prosecutor. In contrast, the Prosecutor's role is different insofar as he is tasked with conducting investigations and prosecutions and has the onus to prove the guilt of the accused beyond reasonable doubt pursuant to Article 66(2) and (3). As such, unlike the judges, the Prosecutor's performance will be judged by the number of situations and cases that he is able to successfully investigate and prosecute. As previously discussed, the Prosecutor does not have at his disposal a police force or enforcement or subpoena powers of any kind. Therefore, for the success of his investigations and prosecutions the Prosecutor is highly dependent on the cooperation of States and the Council.

Within this context, the Statute gives the PTC the function of ensuring that the exercise of the ample discretion given to the Prosecutor is not an arbitrary or abusive exercise of his powers under the Statute. However, as will be discussed in the following Chapters, the drafters were rigorous in striking a balance between the need to counterbalance the Prosecutor's discretionary powers and the necessity of preserving his independence. Accordingly, only some of the Prosecutor's discretionary decisions are subject to judicial control by the PTC. The PTC does not have a general oversight power over the Prosecutor's activities: it is better characterised as the Court's 'gatekeeper'.

1.3.2 *The Instances of Control of the Prosecutor's Discretion by the PTC*

The most important function of the PTC is the exercise of judicial control over fundamental prosecutorial choices as regards the situations and cases that the Prosecutor wants to bring to the Court's attention. The PTC would then 'filter-in' the situations and cases that can be allowed to pass through the Court's gates. This includes the PTC's powers to authorise investigations *proprio motu*, pursuant to Article 15, to issue warrants of arrest or summons to appear in accordance with Article 58 and to confirm the charges for which the individual will be committed to trial, pursuant to Article 61. As will be discussed in Chapters 4, 5, and 6 below, in all these proceedings the PTC will 'filter-in' situations and cases, ensuring that the decision to focus the Court's efforts and resources on certain situations, individuals and conduct is legitimate and has not been unlawfully influenced by political considerations.

As previously described, the Prosecutor has discretion to choose the situations and cases that he considers, in accordance with his personal judgment, should be investigated and prosecuted by the Court. Although the Prosecutor may take into account extra-legal considerations when making such decisions, these cannot be arbitrary or biased. The role of the PTC therefore is to 'guard' the Court's 'gates', avoiding abuse of discretion by the Prosecutor. However, as will be discussed in Chapter 4, there is one important legal vacuum in the Statute, which does not provide for judicial review of the Prosecutor's decision to initiate an investigation following a referral by the UNSC or a State Party. This gap raises important concerns due to the potential abuse of referrals, and the possibility that the Prosecutor may be unduly influenced by the political agenda of the referring State or the Council.

Although it will fall to the PTC to decide whether to issue a warrant or summons in relation to any case arising out of such investigations, when the Prosecutor has unduly opened an investigation following a referral, by the time the PTC is eventually allowed to scrutinise such a decision the Court's time and resources will have been already compromised as will the public perception of the Court's legitimacy. Accordingly, an amendment of the Statute is suggested in order to confer the PTC the power to assess, at the earliest opportunity, the legality of

the referrals, ensuring that the Prosecutor's decision to open an investigation is a legitimate exercise of his powers under the Statute and is not the result of undue political influences.

Another important manifestation of the PTC's gatekeeping function is its responsibility to ensure that the rights of those affected by the Court's investigations and prosecutions are respected. As will be discussed in Chapter 5, in line with the Prosecutor's obligation to extend his investigation to cover all facts and evidence in order to 'establish the truth' in accordance with Article 54(1)(a), the PTC has the power to intervene, *proprio motu*, in specific instances during the investigation stage. In particular, pursuant to Article 56(3), where the Prosecutor (unjustifiably) fails to take measures to collect and preserve evidence that may not be available subsequently for trial and the PTC considers that it would be essential for the defence, it may act on its own motion. Similarly, pursuant to Article 57(3), the PTC may act upon the request of the suspect or on its own motion when necessary for the protection and privacy of victims and witnesses, the preservation of evidence, the protection of the suspect or of national security information. Lastly, pursuant to Article 68 and Rule 93, the PTC may allow victims to participate and present their views and concerns throughout the Court's proceedings, including during the investigation, and the Chamber may seek their views on any issue.

In addition, as will be discussed in Chapter 3, the PTC decides on contested issues of jurisdiction and admissibility. Pursuant to Article 18, when the Prosecutor opens an investigation following a State referral or *proprio motu*, any State may inform the Court that it is investigating or has investigated the relevant conduct and request the Prosecutor to defer the investigation to it. In that case, the Prosecutor shall defer to the State or otherwise request the PTC to authorise the investigation. Further, pursuant to Article 19 the PTC can, on its own initiative, at the request of the Prosecutor or following a challenge from the suspect or the relevant State, rule on the jurisdiction of the Court or the admissibility of the case. Under these proceedings the PTC will review the Prosecutor's discretionary assessment of the parameters of the Court's jurisdiction and of the issues of admissibility, determining their concrete scope.

The PTC has also an important role in reviewing the Prosecutor's decisions to 'filter-out' situations and cases. First, pursuant to Article 53(3)(a), at the request of the UNSC or the State making the referral, the PTC can review the Prosecutor's decision not to proceed with an investigation or prosecution and may request that the Prosecutor reconsider his determination. Even where the PTC disagrees with the Prosecutor's determination, it may only request that he reconsider; it may not require him to begin an investigation or prosecution. The second type of review of a decision not to proceed is, however, a direct limitation on the Prosecutor's discretion. In accordance with Article 53(3)(b), the PTC may, on its own initiative, review the Prosecutor's decision not to proceed with an investigation or prosecution when that decision is based solely on the consideration that it will not serve the 'interests of justice'. In such a case the Prosecutor's decision will only be effective if confirmed by the PTC. Otherwise, pursuant to Rule 110, the Prosecutor shall proceed with the investigation or prosecution. The mandatory force of the PTC's review in this particular case is justified by the highly political nature of a decision not to proceed solely based on the 'interests of justice'.

One may wonder whether it is appropriate to place such emphasis on the role of the PTC given that its decisions can in any case be appealed. Is it not the Appeals Chamber (AC) that, in the final analysis, exercises the gatekeeping function? The answer must be in the negative. Pursuant to Article 82, of all the PTC's decisions, the only ones that can be appealed directly to the AC are those related to jurisdiction or admissibility, granting or denying release of an accused, or a decision to act on its own initiative under Article 56(3). All other decisions, including the most significant exercise of the PTC's gatekeeping function in filtering-in and filtering-out situations and cases, ie decisions under Articles 15, 53, 58 and 61, are all subject to interlocutory appeal for which leave must be granted by the PTC. Pursuant to Article 82(1)(d), the requirements for leave to be granted are highly demanding. Specifically, the decision to be appealed must involve an issue: (i) that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial; and (ii) for which in the opinion of the PTC, an immediate resolution by the AC may materially advance the proceedings.

When deciding on a leave to appeal under Article 82(1)(d), the different PTCs have consistently reiterated that they are guided by three main principles:

- a) the restrictive nature of the remedy provided in this provision; b) the need for the application to satisfy the Chamber as to the fulfilment of the requirements embodied in this provision; and c) the irrelevance of addressing arguments concerning the merits of the appeal.¹¹⁶

Further, the AC has clearly indicated that the provision does not confer a direct right to appeal PTC's decisions; the right to appeal arises only if the Chamber is of the opinion that any such decision must receive the immediate attention of the AC.¹¹⁷ Consequently, the AC stressed, the PTC's opinion 'constitutes the definitive element for the genesis of a right to appeal. In essence, the Pre-Trial (...) Chamber is vested with power to state, or more accurately still, to certify the existence of an appealable issue.'¹¹⁸ Accordingly, save for the specific exceptions provided for in Article 82 and unless the PTC is itself of the view that there is an issue that requires immediate resolution by the AC, as a general rule the PTC is the final arbiter as to the appropriateness of the exercise of discretion by the Prosecutor. The PTC, and not the AC, is the Court's gatekeeper.

1.4 Conclusions

As discussed in this Chapter, the Statute empowers the Prosecutor to exercise discretion in the selection of situations and cases to be heard before the Court, the individuals to be prosecuted and the charges to be brought against them. Such discretion, although extensive, is however not unlimited and is subject to the restrictions and safeguards provided by the Court's legal framework. The most important safeguard is that the Prosecutor's decisions are subject to the judicial control of the PTC. However, as stressed by Schabas, the nature of the

¹¹⁶ See, *inter alia*, *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, ICC-01/09-02/11-406 Decision on the Defence Applications for Leave to Appeal the Decision on the Confirmation of Charges Pre-Trial Chamber II, 9 March 2012 para. 20, referring to *Situation in Uganda*, ICC-02/04-01/05-20 Decision on Prosecutor's Application for Leave to Appeal in part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest Under Article 58 Pre-Trial Chamber II, 19 August 2005 para. 15.

¹¹⁷ *Situation in the Democratic Republic of the Congo*, ICC-01/04-168 Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal Appeals Chamber, 13 July 2006 para. 20.

¹¹⁸ *Ibid.*

PTC's judicial review of the Prosecutor's exercise of discretion 'remains a subject of some uncertainty'.¹¹⁹ Indeed, beyond the simple assumption that the PTC provides safeguards against 'politically motivated' investigations and prosecutions, the issue of how and to what extent the PTC is actually empowered to comply with that role has not been sufficiently explored.

Schabas argues that the PTC could only exercise meaningful judicial oversight over the possibilities of 'politicisation' by addressing the policy considerations upon which the Prosecutor has acted.¹²⁰ Olásolo however is of the view that the PTC and the AC, as 'jurisdictional' bodies that should be guided exclusively by legal criteria, should not have been granted the power to review 'purely political' considerations, as this turns them into 'quasi-administrative' bodies.¹²¹ These are the two poles of opinion as to the manner in which the PTC should exercise its role. Either the PTC should fully engage in an analysis of the appropriateness of the Prosecutor's policy options that lead to certain decisions or it should aim to detach itself from the Prosecutor's 'political' discretion, by assessing concrete decisions - not the policy behind them - in isolation and subject strictly to 'legal' criteria.

As discussed above, the 'legalistic' approach to the role of the PTC is deeply rooted in the general understanding of its function. The extreme manifestation of this view is the notion that the PTC acts as a 'rubber-stamping' body. From this perspective, the PTC's review is strictly 'technical' and guided by 'legal' criteria. The PTC's role is thus to determine whether the Prosecutor's decisions comply with the 'uniform' requirements proscribed by the law. This approach, some would argue, provides procedural legitimacy, legal certainty and ensures the system's stability.

It seems, however, rather artificial to approach the role of the PTC in this manner. It should also be taken into account that the idea that the Court as a whole should be strictly 'apolitical', as noted by Greenawalt, confronts the problem that public perceptions of the Court's legitimacy depend on

¹¹⁹ (n 43) Schabas 392.

¹²⁰ Ibid 396.

¹²¹ (n 24) Olásolo, 'The prosecutor of the ICC before the initiation of investigations: A quasi-judicial or political body?' 105.

determinations that are sensitive to contingent political criteria in ways not susceptible to politically neutral rules.¹²² In particular, an emphasis on formal or procedural legitimacy may come at the cost of public perceptions of legitimacy, which will focus not on the procedural neutrality of the Court's internal proceedings but on the outcome of its work for affected societies.¹²³ In effect, as argued by Shklar:

Formal justice depends for its social impact upon the total political environment in which juridical actions occur, and its functions cannot be understood in isolation. Yet isolation from politics is its first ideological demand.¹²⁴

The problem with 'formal' justice, which aims at procedural fairness taken in isolation from the political context in which it operates, is that it risks losing sight of the fact that the Court was actually created to pursue an ultimate political goal: to 'put an end to impunity for the perpetrators of crimes',¹²⁵ that threaten 'the peace, security and well-being of the world',¹²⁶ 'and thus to contribute to the prevention of those crimes'.¹²⁷ As such, in the context of the Statute, the PTC cannot afford to focus only on 'procedural perfection' or on 'formal justice' at the cost of failing to attend to the objects and purposes of the Statute.

Accordingly, when overseeing the Prosecutor's discretion the PTC should strike a balance between the need to follow procedures and the necessity to ensure that substantive justice - in the form of fairness (not only procedural fairness) and impartiality - are not sacrificed in a quest for mere formal justice. In particular, as will be discussed throughout this work, the PTC's judges should be prepared when necessary to either reject a literal reading of the Statute in favour of an interpretation consistent with its purpose or to refuse to follow the plain meaning when it would lead to an absurd or unjust result.¹²⁸ The PTC should

¹²² (n 47) Greenawalt 586.

¹²³ Ibid.

¹²⁴ (n 48) Shklar 146.

¹²⁵ Statute Preamble para. 5.

¹²⁶ Ibid Preamble para. 3.

¹²⁷ Ibid Preamble para. 5.

¹²⁸ (n 31) Bix, Law, Language and Legal Determinacy 67.

safeguard the ‘integrity’ of the Statute, deciding cases in a manner that expresses a coherent conception of justice and fairness.¹²⁹

In the following chapters these different aspects of the PTC’s gatekeeping function will be explored in order to determine whether the Statute actually gives the PTC the necessary tools to fulfil its role and whether this has been exercised to its full extent by the PTC judges.

¹²⁹ (n 38) Dworkin, *Law’s Empire* 255.

Chapter 2: The Pre-Trial Chamber within the framework of the Rome Statute

2.1 Introduction

The necessity of confronting and punishing abuses committed during armed conflicts has been acknowledged since ancient times.¹³⁰ In effect, the perceived necessity of imposing certain limits upon the recourse to force and to develop some rudimentary norms of warfare is reflected in literature from time immemorial.¹³¹ The recognition of the need to investigate and prosecute atrocities was similarly gradually developed domestically.¹³²

Only in the late 19th and early 20th centuries did such ideas begin to be conceptualised as international legal matters.¹³³ The unprecedented developments in international humanitarian law and human rights law during the 20th century provided the propitious scenario for the international community to develop a shared will to establish an independent institution responsible for the investigation and punishment of the most serious crimes of international concern.¹³⁴ For it to succeed, however, two main obstacles needed to be overcome: (i) the understanding of State Sovereignty as an absolute right providing immunity from any external interference; and (ii) the lack of

¹³⁰ For a detailed analysis of the developments in international justice concerning crimes committed during armed conflicts since ancient times see, Robert Cryer, *Prosecuting International Crimes. Selectivity and the International Criminal Law Regime* (Cambridge Studies in International and Comparative Law 2005) 11; Howard Levie, 'History of the Law of War on Land' (2000) 838 IRRC 339; Hilaire McCoubrey, 'War Crimes Jurisdiction and a Permanent International Criminal Court: Advantages and Difficulties' (1998) 3 JACL 9, 10-13.

¹³¹ Examples are to be found in the Code of Hammurabi, dating back to about 1772 BC, the 6th century BC Chinese military treaty of Sun Tzu and the 3rd century BC Code of Manu in India, see, Lionel Giles and Shawn Connors, *The Art of War* (El Paso Press 2009) and Patrick Olivelle, *The Law Code of Manu* (Oxford University Press 2004).

¹³² An interesting isolated precedent is the international trial against Peter von Hagenbach in Breisach, Germany, in 1474, see (n 130) McCoubrey 11; (n 130) Cryer 20.

¹³³ Gerhard Werle, *Principles of International Criminal Law* (Second edn, TMC Asser Press 2009) 3.

¹³⁴ For the advances that led to the establishment of the Court during the 20th century see, *inter alia*, M. Cherif Bassiouni, 'From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court' (1997) 10 Harv Hum Rts J 11; Egon Schwelb, 'Crimes Against Humanity' (1946) 23 Brit YB Int'l L 178; (n 21) Cassese and others 253-290; (n 133) Werle 1-25.

recognition of individuals as agents and possible subjects of public international law.¹³⁵

The end of the Cold War and the international outrage concerning the atrocities committed in Yugoslavia and Rwanda provided the conditions that eventually permitted the creation of the Court in 1998. The final agreement for its establishment was, however, only reached after the incorporation in the Statute of a series of safeguards and checks and balances providing for a delicate balance of power, of which the PTC is a critical element.

This Chapter analyses the reasons behind the incorporation of the PTC within the Court's system and the concrete powers assigned to it. Section 2.2 provides an overview of the drafting history of the Statute with particular emphasis on the reasons that led to the incorporation of the PTC within the Court's framework. Section 2.3 analyses in detail the Statute and the Rules of Procedure and Evidence (Rules) in relation to the specific functions assigned to the PTC within the context of its gatekeeping role. Section 2.4 provides initial conclusions as to the strengths and weaknesses of the concrete powers assigned to the PTC at the different stages of the Court's proceedings.

2.2 The path towards the establishment of the ICC's Pre-Trial Chamber

2.2.1 The work of the International Law Commission

The idea of the establishment of a permanent international body charged with responsibility for the international adjudication of heinous crimes dates back to the late 1800s.¹³⁶ A new attempt was made in 1920 when, in the draft statute for the Permanent Court of International Justice, a recommendation was included suggesting that a High Court of International Justice be created 'with jurisdiction in matters which affect international public order, such as crimes

¹³⁵ (n 133) Werle 3.

¹³⁶ Christopher K. Hall, 'The First Proposal for a Permanent International Criminal Court' (1998) 38 IRRC 57.

against the universal law of nations'.¹³⁷ The proposal was however dismissed as 'premature'.¹³⁸ A further attempt was made in 1937, but again failed with the eruption of WWII.¹³⁹

Only in the aftermath of the great wars of the 20th century, and building upon the experience gained with the IMT and the IMTFE,¹⁴⁰ were concrete steps taken towards the creation of a permanent international criminal jurisdiction. In 1947 the UN General Assembly (UNGA) directed the International Law Commission (ILC) (i) to formulate the principles of international law recognised in the Charter and judgment of the Nuremberg Tribunal (Nuremberg Principles); and (ii) to prepare a draft code of offences against the peace and security of mankind.¹⁴¹

The following year agreement was finally reached on the Genocide Convention, which included the option for genocide to be prosecuted by an 'international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction'.¹⁴² Accordingly, the UNGA invited the ILC:

to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions.¹⁴³

In December 1950, the UNGA established a Committee for the preparation of one or more preliminary draft conventions for the establishment of an

¹³⁷ James Brown Scott, *The Project of a Permanent Court of International Justice and Resolutions of the Advisory Committee of Jurists* (Carnegie Endowment for International Peace - Division of International Law 1920) 20.

¹³⁸ Timothy L.H. McCormack, 'From Sun Tzu to the Sixth Committee: The Evolution of an International Criminal Law Regime' in Timothy L.H. McCormack and Gerry J. Simpson (eds), *The Law of War Crimes: National and International Approaches* (Kluwer Law International 1997) 52.

¹³⁹ Elizabeth Chadwick, 'A tale of two courts: the "creation" of a jurisdiction?' (2004) 9 JC & S L 71, 84-89.

¹⁴⁰ For the legacy of both Tribunals, see Christian Tomuschat, 'The Legacy of Nuremberg' (2006) 4 JICJ 830; Neil Boister and Robert Cryer, *Documents on the Tokyo International Military Tribunal. Charter, Indictment and Judgments* (Oxford University Press 2008).

¹⁴¹ UNGA, UN Doc A/RES/177(II), *Formulation of the Principles Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*, 21 November 1947 (1947) a) and b).

¹⁴² UNGA, UN Doc A/RES/260 A (III), *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948 (1948) Article VI.

¹⁴³ UNGA, UN Doc A/RES/260 B (III), *Study by the International Law Commission of the question of an International Criminal Jurisdiction*, 9 December 1948 (1948).

international criminal court,¹⁴⁴ resulting in a first Draft Statute for an International Criminal Court in 1952.¹⁴⁵ Working in parallel, the ILC produced the first Draft Code of Offences in 1951 and a revised version in 1954.¹⁴⁶ The work towards the finalisation of the drafts was however interrupted on account both of the Cold War and the lack of consensus on the definition of the crime of aggression. A definition of the latter was finally reached in 1974,¹⁴⁷ following which, in 1981, the UNGA invited the ILC ‘to resume its work with a view to elaborating the draft Code of Offences against the Peace and Security of Mankind’.¹⁴⁸ However, given the sustained tensions, the work on the proposed international criminal court did not resume until the end of the Cold War.

In 1990, after the fall of the Berlin Wall, the UNGA again invited the ILC to address within its work on the draft Code ‘the question of an international criminal jurisdiction, including the possibility of establishing an international criminal court or other international criminal trial mechanism’.¹⁴⁹ The ILC worked again on both a draft Code and a draft Statute and submitted to the UNGA a final draft Statute for an International Criminal Court in 1994 (ILC 1994 draft Statute),¹⁵⁰ and a final draft Code of Crimes against the Peace and Security of Mankind in 1996 (ILC 1996 draft Code).¹⁵¹

The ILC 1994 draft Statute conceived of a Court intended to ‘exercise jurisdiction only over the most serious crimes of concern to the international community as a whole’, which was to be ‘complementary to national criminal jurisdictions’.¹⁵² The proposed Court did not include a PTC within its structure,

¹⁴⁴ UNGA, *UN Doc A/RES/489(V)*, *International criminal jurisdiction*, 12 December 1950 (1950).

¹⁴⁵ UNGA, *UN Doc A/RES/687(VII)*, *International criminal jurisdiction*, 5 December 1952 (1952).

¹⁴⁶ UNGA, *UN Doc A/RES/897(IX)*, *Draft Code of Offences against the Peace and Security of Mankind*, 4 December 1954 (1954); UNGA, *UN Doc A/RES/898(IX)*, *International criminal jurisdiction*, 14 December 1954 (1954).

¹⁴⁷ UNGA, *UN Doc A/RES/29/3314(XXIX)*, *Definition of Aggression*, 14 December 1974 (1974).

¹⁴⁸ UNGA, *UN Doc A/RES/36/106*, *Draft Code of Offences against the Peace and Security of Mankind*, 10 December 1981 (1981).

¹⁴⁹ UNGA, *UN Doc A/RES/45/41*, *Report of the International Law Commission on the work of its forty-second session*, 28 November 1990 (1990).

¹⁵⁰ ILC, *UN Doc A/49/10*, *Report of the International Law Commission on the work of its forty-sixth session*, 2 May-22 July 1994, *Official Records of the General Assembly, Forty-ninth session, Supplement No. 10* (Yearbook of the International Law Commission, 1994).

¹⁵¹ ILC, *UN Doc A/51/10*, *Report of the International Law Commission on the work of its forty-eight session*, 6 May-26 July 1996, *Official Records of the General Assembly, Fifty-first session, Supplement No. 10* (Yearbook of the International Law Commission, 1996).

¹⁵² *UN Doc A/49/10* (1994) Preamble paras 2-3.

all the judicial functions at the pre-trial phase - which were considered ‘largely of a preliminary or procedural character’ - being entrusted to the Presidency.¹⁵³ The Presidency was to bear the overall responsibility for administration of the Court and to exercise pre- and post-trial functions of a judicial character, which could be delegated to a single judge.¹⁵⁴

The draft also envisaged the Prosecutor as ‘an independent organ of the Court responsible for the investigation of complaints (...) and for the conduct of prosecutions’.¹⁵⁵ However, the project was largely characterised by a lack of meaningful independence for the Prosecutor, and for the Court as a whole, from the will of States or the Council. The proposed opting-in jurisdiction and the fact that the Court’s triggering procedures were limited to complaints from State Parties or the UNSC, envisaged a Court strictly subject to their consent.¹⁵⁶

The draft included, as a precondition to the exercise of jurisdiction by the Court in the case of States’ referrals, the need for a specific acceptance of the Court’s jurisdiction in relation to the relevant crime. Such acceptance was required not only in relation to the referring State, but also the custodial and the territorial States and, if applicable, even from the State that may have requested extradition of the suspect. The only exception was in relation to the crime of genocide - the only crime for which ‘inherent’ jurisdiction was envisaged - but for which membership of the Genocide Convention was required.¹⁵⁷ Although specific acceptance of the jurisdiction of the Court was not required in the case of a UNSC referral, no prosecution could be commenced in relation to a situation that was ‘being dealt with’ by the Council under Chapter VII of the UN Charter.¹⁵⁸

2.2.2 *The Ad Hoc Committee*

Following the ILC’s recommendation that an international conference be convened for the study of the ILC 1994 draft Statute, the UNGA established an

¹⁵³ Ibid Article 5.

¹⁵⁴ Ibid Article 8(4).

¹⁵⁵ Ibid Article 12.

¹⁵⁶ Ibid Articles 21-23.

¹⁵⁷ Ibid Articles 21, 22 and 25.

¹⁵⁸ Ibid Article 23.

Ad Hoc Committee to ‘review the major substantive and administrative issues arising out of the draft’ and to consider arrangements for the convening of an international conference of plenipotentiaries.¹⁵⁹

The *Ad Hoc* Committee submitted its report in 1995.¹⁶⁰ Commenting on the ILC 1994 draft Statute, it emphasised the essential character of the principle of complementarity.¹⁶¹ It stressed the need for the Court to be complementary to national courts and existing procedures for international judicial cooperation in criminal matters and that its jurisdiction should be limited to the most serious crimes of concern to the international community as a whole.¹⁶²

No proposal for the establishment of a PTC was discussed, although many delegations considered the powers conferred on the Presidency to be excessive and suggested further examination.¹⁶³ Notably, the procedures at the pre-trial stage were viewed as insufficient and in need of further development, including elaborating upon the role of the judicial authorities.¹⁶⁴ Of great significance for future developments and the later establishment of the PTC was the initiation of the discussions on the need to give to the Prosecutor the power to investigate and prosecute serious crimes under international law *proprio motu*, in the absence of a complaint by States or the Council.¹⁶⁵

Also highly debated was the issue of inherent as opposed to opt-in jurisdiction, with a number of delegations arguing that the future fate of the Court should not be left in the hands of and to the discretion of States, which could manipulate the functioning of the Court and set aside the interests of the international community.¹⁶⁶ By the same token, there were serious reservations - including outright opposition by some delegations - to the role of the UNSC, given its political nature and the risk of subordinating the judicial function of the Court to the action of a political body.¹⁶⁷ Invoking the gravity of the core

¹⁵⁹ UNGA, *UN Doc A/RES/49/53*, 17 February 1995 (1995).

¹⁶⁰ UN Doc A/50/22 (1995).

¹⁶¹ *Ibid* para. 29.

¹⁶² *Ibid* para. 13.

¹⁶³ *Ibid* paras 24, 133, 139, 143.

¹⁶⁴ *Ibid* para. 152.

¹⁶⁵ *Ibid* paras 25, 113-117.

¹⁶⁶ *Ibid* paras 91-93.

¹⁶⁷ *Ibid* paras 120-126.

crimes, it was suggested that crimes against humanity and war crimes, together with genocide, should be included within the sphere of the Court's inherent jurisdiction.¹⁶⁸

2.2.3 *The Preparatory Committee*

In its Report, the *Ad Hoc* Committee noted that there were still different views on major issues and recommended further discussion. The UNGA thus convened a Preparatory Committee to take over the work, with a view to preparing a widely acceptable consolidated text of a convention as the next step towards its consideration by a conference of plenipotentiaries.¹⁶⁹ In 1996, the Preparatory Committee submitted its observations and a list of proposed amendments to the ILC 1994 draft Statute.¹⁷⁰

For the first time, the need to include a 'preliminary investigations chamber',¹⁷¹ 'pre-trial chambers',¹⁷² an 'indictment chamber',¹⁷³ or an 'investigative judge',¹⁷⁴ was discussed. Delegations were concerned with the need for a judicial body to be appointed permanently and exclusively in order to carry out pre-trial procedures, including issuing warrants, deciding upon indictment and admissibility.¹⁷⁵ A judicial authority was seen as necessary to monitor the investigative activities of the Prosecutor and give judicial authority to his actions.¹⁷⁶ In particular, it appeared essential to ensure equality between the prosecution and the defence, enabling the suspect to request that certain investigations be carried out,¹⁷⁷ and providing the accused with the necessary guarantees.¹⁷⁸ Accordingly, it was suggested that the Presidency's duties 'should

¹⁶⁸ Ibid paras 97-98.

¹⁶⁹ UNGA, *UN Doc A/RES/50/46*, 11 December 1995 (1995).

¹⁷⁰ Preparatory Committee, *UN Doc A/51/22, Report of the Preparatory Committee on the Establishment of an International Criminal Court*, 13 September 1996, Volume I (General Assembly Official Records, Fifty-first Session, Supplement No 22, 1996).

¹⁷¹ Preparatory Committee, *UN Doc A/51/22, Report of the Preparatory Committee on the Establishment of an International Criminal Court*, 13 September 1996, Volume II (General Assembly Official Records, Fifty-first Session, Supplement No 22A, 1996) French Proposal, 21-22.

¹⁷² Ibid Japanese Proposal, 22-23.

¹⁷³ Ibid Austrian Proposal, 24.

¹⁷⁴ Ibid Dutch Proposal, 8.

¹⁷⁵ UN Doc A/51/22 (1996) para. 33.

¹⁷⁶ Ibid para. 228.

¹⁷⁷ Ibid.

¹⁷⁸ Ibid para. 233.

be limited to ceremonial and administrative functions over the administrative matters of the Court'.¹⁷⁹

With regard to the Court's substantive jurisdiction, there was general agreement on the importance of this being limited to the most serious crimes of concern to the international community as a whole, in order to avoid trivializing the role and functions of the Court or interfering with the jurisdiction of national courts.¹⁸⁰ There was also general agreement that the crimes should be defined with the clarity, precision and specificity required for criminal law in accordance with the principle of legality.¹⁸¹ In addition, attention was drawn to the definitions of crimes contained in the ILC 1996 draft Code and it was suggested these definitions ought to be considered for inclusion in the Statute.¹⁸²

It was suggested that the Prosecutor should be established to seek the truth rather than merely seek a conviction in a partisan manner and different views were put forward in relation to whether the Prosecutor should be allowed to initiate investigations *ex officio*,¹⁸³ or on the basis of information obtained from any source.¹⁸⁴ In order to prevent any abuse of process, it was suggested that - after satisfying himself that a *prima facie* case existed - the Prosecutor should present the matter to an indictment chamber, in order for it to decide whether or not the matter should be pursued by the Court.¹⁸⁵ Still, some delegations did not agree with the notion of an independent Prosecutor, arguing that it may lead to the politicisation of the Court, undermining its credibility, and because the Prosecutor could be overwhelmed with frivolous complaints.¹⁸⁶ More broadly, it was suggested that developments in international law had yet to reach a stage where the international community was prepared to empower the Prosecutor in such a manner.¹⁸⁷

¹⁷⁹ Ibid para. 42.

¹⁸⁰ Ibid para. 51.

¹⁸¹ Ibid para. 52.

¹⁸² Ibid para. 53.

¹⁸³ Ibid para. 46.

¹⁸⁴ Ibid para. 149.

¹⁸⁵ Ibid para. 150.

¹⁸⁶ Ibid para. 151.

¹⁸⁷ Ibid.

As to complementarity, it was stressed that achieving a proper balance between the Court and national jurisdictions was crucial for the Statute to be acceptable to a large number of States.¹⁸⁸ It was further emphasised that the Court's jurisdiction should be understood as having an exceptional character,¹⁸⁹ in order for the limited resources of the Court not to be exhausted by taking up cases that could be dealt with at the national level.¹⁹⁰

Some delegations insisted on the extension of the inherent jurisdiction of the Court to encompass all core crimes rather than genocide alone; the issue was left unsettled, however, since a number of delegations still favoured the 'opt-in' regime.¹⁹¹ Although delegations agreed that the Statute should not affect the role of the UNSC, the relationship between the Council, as a political organ, and the Court, as a judicial body, remained a source of great controversy, with a number of delegations insisting that the Council 'should not [be allowed to] undermine the judicial independence and integrity of the Court or the sovereign equality of States'.¹⁹²

The work continued and a further draft was produced in Zutphen, the Netherlands, in January 1998.¹⁹³ This Draft still left unresolved critical issues such as the crimes under the jurisdiction of the Court,¹⁹⁴ the choice between inherent or opt-in jurisdiction,¹⁹⁵ the role of the UNSC,¹⁹⁶ and the *proprio motu* powers of the Prosecutor.¹⁹⁷ It did, however, contain important developments in relation to the role of the Pre-Trial/Preliminary/Investigative Chambers.

Although the draft did not choose a clear option, presenting rather an alternative between the Presidency and a specialised Chamber, the possibility that a judicial body might be given responsibility for a series of functions

¹⁸⁸ Ibid para. 153.

¹⁸⁹ Ibid para. 154.

¹⁹⁰ Ibid para. 155.

¹⁹¹ Ibid paras 117-119.

¹⁹² Ibid paras 129-131.

¹⁹³ Preparatory Committee, *UN Doc A/AC.249/1998/L.13, Report of the inter-sessional meeting from 19 to 30 January 1998 in Zutphen, the Netherlands, 4 February 1998* (1998).

¹⁹⁴ Ibid Article 5[20], 16-36.

¹⁹⁵ Ibid Article 9[22], 38-39.

¹⁹⁶ Ibid Article 10[23], 39-41.

¹⁹⁷ Ibid Article 46[25 bis] and footnote 150, 86.

concerning the pre-trial proceedings was clearly included.¹⁹⁸ Indeed, with regard to specific functions, the draft envisioned a judicial body which could: (i) issue subpoenas and warrants at the request of the Prosecutor;¹⁹⁹ (ii) confirm the Prosecutor's decision not to prosecute based on considerations of the interests of justice;²⁰⁰ (iii) review the Prosecutor's decision not to initiate an investigation or not to file an indictment at the request of the complainant State or the Council;²⁰¹ (iv) authorise the Prosecutor to initiate an investigation in spite of the existence of national investigations or prosecutions;²⁰² (v) take measures to assure the efficiency and integrity of the proceedings in relation to a unique opportunity for an investigation;²⁰³ (vi) examine the indictment filed by the Prosecutor and decide whether to confirm it (in full or in part), order further investigation, or refuse to confirm it;²⁰⁴ and (vii) issue warrants for the pre-indictment arrest of a suspect.²⁰⁵

The final draft submitted by the Preparatory Committee,²⁰⁶ left the Conference of Plenipotentiaries to decide on the matter of which crimes would fall under the jurisdiction of the Court;²⁰⁷ the issue of inherent/opt-in jurisdiction;²⁰⁸ the role of the UNSC;²⁰⁹ the *proprio motu* powers of the Prosecutor;²¹⁰ and whether a judicial organ would be established for conducting pre-trial proceedings.²¹¹ However, it included a proposal for an authorisation procedure to be followed by the Prosecutor, before a Chamber, prior to the initiation of a *proprio motu* investigation.²¹² There were also specific articles establishing the relevant

¹⁹⁸ Ibid Article 33[9], 71-74.

¹⁹⁹ Ibid Article 47[26](3), 89.

²⁰⁰ Ibid Article 47[26](4) and (4)bis, 89.

²⁰¹ Ibid Article 47[26](5), 90.

²⁰² Ibid Article 48[26 bis](2), 92.

²⁰³ Ibid Article 50[26 quater], 93-94.

²⁰⁴ Ibid Article 51[27], 95-99.

²⁰⁵ Ibid Article 52[28], 99-101.

²⁰⁶ Preparatory Committee, *UN Doc A/CONF.183/2/Add.1, Report of the Preparatory Committee on the establishment of an International Criminal Court*, 14 April 1998 (United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 1998).

²⁰⁷ Ibid Article 5, 11-30.

²⁰⁸ Ibid Article 9, 32-34.

²⁰⁹ Ibid Article 10, 34-35.

²¹⁰ Ibid Article 12, 37.

²¹¹ Ibid Article 40, 65-66.

²¹² Ibid Article 13, 37-38.

procedures and precise thresholds for a Chamber to issue a warrant or summons²¹³ and to confirm the charges before trial.²¹⁴

2.2.4 The Rome Conference

The Rome Conference was held in Rome, Italy, from 15 June to 17 July 1998, with the participation of representatives from more than 160 States and with hundreds of International and Non-Governmental Organisations (NGOs). The discussions and negotiations lasted until the very last moment of the Conference and concluded satisfactorily, on 17 July 1998, with the adoption of the final treaty, the Statute, with the assent of 120 States.²¹⁵

Late into the Rome Conference discussions continued concerning the subject matter jurisdiction of the Court²¹⁶ but a final agreement was eventually reached to limit it to the 'core crimes': genocide, crimes against humanity, war crimes,

²¹³ Ibid Article 58, 93-94.

²¹⁴ Ibid Article 61, 96-98.

²¹⁵ For a comprehensive account of the work towards the creation of the Rome Statute see: Otto Triffterer, 'Preliminary Remarks. The Permanent International Criminal Court - Ideal and Reality' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (Second edn, C.H. Beck - Hart - Nomos 2008); Antonio Cassese, 'From Nuremberg to Rome: International Military Tribunals to the International Criminal Court' in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, vol I (Oxford University Press 2002); James Crawford, 'The Work of the International Law Commission' in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, vol I (Oxford University Press 2002); Adriaan Bos, 'From the International Law Commission to the Rome Conference (1994-1998)' in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, vol I (Oxford University Press 2002); Philippe Kirsch and Darryl Robinson, 'Reaching Agreement at the Rome Conference' in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, vol I (Oxford University Press 2002); Roy S. Lee, 'The Rome Conference and Its Contributions to International Law' in Roy S. Lee (ed), *The International Criminal Court The making of the Rome Statute Issues - Negotiations - Results* (Kluwer Law International 1999); Philippe Kirsch, 'The Development of the Rome Statute' in Roy S. Lee (ed), *The International Criminal Court The Making of the Rome Statute Issues - Negotiations - Results* (Kluwer Law International 1999); William A. Schabas, *An Introduction to the International Criminal Court* (Second edn, Cambridge University Press 2004) 13-25; (n 133) Werle 18-25.

²¹⁶ Rome Conference, *Committee of the Whole, UN Doc A/CONF.183/C.1/L.53, Discussion Paper, Part 2. Jurisdiction, Admissibility and Applicable Law, 6 July 1998* (United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 1998); Rome Conference, *Committee of the Whole, UN Doc A/CONF.183/C.1/L.59, Bureau Proposal, Part 2. Jurisdiction, Admissibility and Applicable Law, 10 July 1998* (United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 1998); Herman Von-Hebel and Darryl Robinson, 'Crimes within the Jurisdiction of the Court' in Roy S. Lee (ed), *The International Criminal Court The making of the Rome Statute Issues - Negotiations - Results* (Kluwer Law International 1999); Philippe Kirsch, 'The work of the Preparatory Commission' in Roy S. Lee (ed), *The International Criminal Court Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, Inc. 2001).

and aggression.²¹⁷ Pursuant to Article 12, the jurisdiction of the Court is restricted to crimes committed in the territory or by a national of a State Party, or of a State that has accepted the jurisdiction of the Court, except in the case of a referral by the UNSC.²¹⁸ Unlike other international tribunals, the jurisdiction of the ICC is strictly prospective. Pursuant to Article 11, the Court has jurisdiction to prosecute only crimes committed after the entry into force of the Statute, ie 1 July 2002, or the date of entry into force for the relevant State in accordance with Article 126(2).²¹⁹ As to aggression, pursuant to Articles 15 *bis* and *ter*, the Court's jurisdiction will be activated only once the related amendments enter into force,²²⁰ and a decision is taken after 1 January 2017.²²¹

Although the discussions at the Rome Conference endowed the Court with inherent jurisdiction in relation to States Parties,²²² there remains the need for a triggering procedure to operate in order to activate the Court's jurisdiction. Pursuant to Article 13, the Court may exercise its jurisdiction only if activated

²¹⁷ Articles 6, 7, 8 and 8 *bis*, specify the conduct qualifying as crimes within the jurisdiction of the Court. The definition and the Elements of the Crime of Aggression were only agreed during the review Conference of the Statute held in Kampala during the year 2010. For the discussions on the crime of aggression from before the Rome Conference to the final agreement in the Kampala Review Conference, see Giorgio Gaja, 'The Long Journey towards Repressing Aggression' in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A commentary*, vol I (Oxford University Press 2002) 427; Stefan Barriga, Wolfgang Danspeckgruber and Christian Wenaweser, *The Princeton Process on the Crime of Aggression: Materials of the Special Working Group on the Crime of Aggression, 2003-2009* (Lynne Rienner Publishers 2010); Carsten Stahn, 'The 'End', the 'Beginning of the End' or the 'End of the Beginning'? Introducing Debates and Voices on the Definition of 'Aggression'' (2010) 23 LJIL 875; Christian Wenaweser, 'Reaching the Kampala Compromise on Aggression: The Chair's Perspective' (2010) 23 LJIL 883; Niels Blokker and Claus Kress, 'A Consensus Agreement on the Crime of Aggression: Impressions from Kampala' (2010) 23 LJIL 889; David Scheffer, 'The Complex Crime of Aggression under the Rome Statute' (2010) 23 LJIL 897; Donald M. Ferencz, 'The Crime of Aggression: Some Personal Reflections on Kampala' (2010) 23 LJIL 905.

²¹⁸ Pursuant to Article 12(2)(a), when committed on board a vessel or aircraft, the State of registration of that vessel or aircraft has to be a State Party or a State that has accepted the jurisdiction of the Court.

²¹⁹ Pursuant to Article 124, a State Party may opt to defer the jurisdiction of the Court in relation to war crimes, for a period up to seven years.

²²⁰ With the ratification of at least thirty States Parties, for the ratifications see http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtldsg_no=XVIII-10-b&chapter=18&lang=en [ref. 13 November 2014].

²²¹ Which necessitates a two-thirds majority of States Parties. However, pursuant to Article 15 *bis*(4), a State Party may declare that it does not accept the Court's jurisdiction over the crime of aggression and in such a case the Court will only be able to exercise jurisdiction following a referral by the UNSC.

²²² The consent of the relevant State is therefore not necessary for the Court to act, see Elizabeth Wilmshurst, 'Jurisdiction of the Court' in Roy S. Lee (ed), *The International Criminal Court The making of the Rome Statute Issues - Negotiations - Results* (Kluwer Law International 1999) 138.

by: (i) a referral from the UNSC; (ii) a referral from a State Party; or (iii) *proprio motu* by the Prosecutor.

One of the most important agreements reached during the Rome Conference ensures that, even once the jurisdiction of the Court has been activated, there remain certain ‘barriers to the exercise of jurisdiction by the Court’.²²³ These are the issues of admissibility - complementarity, gravity, and double jeopardy or *ne bis in idem* - and the interests of justice.

As described in Chapter 1 above, Articles 42 and 54 give the Prosecutor independence and discretion to interpret and apply the provisions of the Court’s legal framework. However, in order to ensure the Court’s independence and impartiality, the PTC was included as the Court’s gatekeeper. It is meant to counterbalance the wide discretion given to the Prosecutor and to ensure that his actions are not abusive or the result of improper political pressures.²²⁴ Accordingly, Article 34 includes within the Court’s system a Pre-Trial Division, composed of no fewer than six judges predominantly with criminal trial experience, pursuant to Article 39(1). Article 39(2)(iii) stipulates that the functions of a PTC shall be carried out either by three judges or by a single judge, in accordance with the Statute and the Rules.

The PTC’s gatekeeping function is exercised throughout the pre-investigation, investigation and pre-trial stages of the proceedings before the ICC. The different functions assigned to the PTC in the Statute and the procedures through which it exercises them are described below. The concrete application of these proceedings to the situations and cases brought before the Court and the jurisprudence so far developed will be analysed in the Chapters that follow.

²²³ *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-772 Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the decision on the defence challenge to the jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006 Appeals Chamber, 14 December 2006 para. 23.

²²⁴ *Côte d’Ivoire*, ICC-02/11-15-Corr para. 8.

2.3 The role of the PTC in determining the jurisdiction of the Court and the issues of admissibility and interests of justice throughout the proceedings

As previously noted, although the Prosecutor independently interprets and applies the provisions of the Court's legal framework, the PTC has been given the last word in interpreting the issues of jurisdiction, admissibility and the interests of justice. This function is exercised by settling disputes, responding to requests from the Prosecutor or by determining the issues on its own initiative, pursuant to Articles 18(2), 19 and 53(3). Accordingly, although the Prosecutor is the driving force behind the Court's activities, the PTC has a critical gatekeeping function aimed at guaranteeing the Court's independence and impartiality.

2.3.1 PTC's authorisation to initiate an investigation following a State request for deferral

When the jurisdiction of the Court is triggered by a referral from a State Party or *proprio motu* by the Prosecutor, Article 18 and Rules 52 to 57 apply. The Prosecutor shall then notify the initiation of the investigation to all States that, taking into account the information available, will normally exercise jurisdiction over the crimes concerned.²²⁵ Within one month of notification, a State may inform the Prosecutor that it is investigating or has investigated its nationals or others within its jurisdiction with respect to the crimes that relate to the situation the Prosecutor has decided to investigate.

It should be noted that in order to maintain impartiality, the Prosecutor should initiate an investigation into a general situation of crisis, without identifying at the outset the possible alleged perpetrators. However, a State will not succeed in obtaining a deferral of an investigation from the Court only by demonstrating that it is investigating, in general terms, the same situation the Prosecutor plans

²²⁵ This suggests that the Prosecutor shall notify all States (party or non-party) that either have territorial or personal links with the crime or the suspect, or have recognised universal jurisdiction within their legislation. See Héctor Olásolo, 'The triggering procedure of the International Criminal Court, procedural treatment of the principle of complementarity, and the role of the Office of the Prosecutor' (2005) 5 IntCLR 121, 136; Mireille Delmas-Marty, 'Interactions between national and international criminal law in the preliminary phase of trial at the ICC' (2006) 4 JICJ 2, 6.

to investigate. The State will have to demonstrate that it is investigating or has investigated 'its nationals or others within its jurisdiction', being required therefore to identify alleged perpetrators. However, a State considering an application for deferral may request additional information from the Prosecutor. This possibility gives the State the opportunity to ask that the Prosecutor identify possible alleged perpetrators that he may be considering to prosecute. Although at this stage the Prosecutor cannot be expected to have already identified concrete cases involving identified suspects, he could be expected to be able to provide States with information based on the criteria of 'one or more potential cases within the context of the situation'.²²⁶ In particular, the Prosecutor should be able to identify at this stage

- (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).²²⁷

The Prosecutor may request additional information from the State, following which he may decide either to defer to the State the investigation of the relevant individuals or to require the PTC's authorisation to proceed with the investigation. If the Prosecutor opts for deferring to a State's investigation, such deferral will be open to review by the Prosecutor after six months of the date of the deferral, or at any time, if there is a significant change of circumstances based on the State's unwillingness or inability to genuinely carry out the investigation. The Prosecutor may request the State to periodically inform him about the progress of its investigations and any subsequent prosecution and to make the information on the proceedings available. Following any of these periodical reviews, the Prosecutor may apply for the PTC's authorisation to initiate an investigation.

If the Prosecutor decides to ask for the PTC's authorisation to investigate, either when a State has submitted a request for deferral or following a review after an investigation has been deferred to a State, it should inform the State concerned.

²²⁶ *Kenya, ICC-01/09-19-Corr* paras 48-52.

²²⁷ *Ibid* para. 50.

It should be noted that the PTC's review under Article 18 is limited to the examination of the Prosecutor's request in light of the factors laid out in Article 17. Consequently, the scope of the PTC's authorisation under Article 18 is to be distinguished from that under Articles 15 and 53, in as much as this review is not directed to assess the Prosecutor's determination that there is a 'reasonable basis to proceed' with an investigation considering all the requirements of Article 53(1). On the contrary, even if Rule 55(2) refers in general terms to 'consider the factors in article 17', given the context of the request for deferral under Article 18, it appears that the scope of the PTC's review under this provision is limited to the possible issues related to complementarity only and it does not even extend to a review of the assessment of gravity made by the Prosecutor.

The PTC shall decide on the procedure to be followed and may decide to hold a hearing. Although the provision has not been applied so far, it appears that, even if not specifically mandated, the PTC should give the concerned State an opportunity to be heard before deciding on the Prosecutor's application.²²⁸ The PTC's decision should be communicated to the Prosecutor and the State as soon as possible, and may be subject to an interlocutory appeal in accordance with Article 82, either by the Prosecutor or the State concerned. A State that has challenged a PTC's ruling under this Article may only later challenge the admissibility of a case on the grounds of additional significant facts or significant change of circumstances.

Pending a ruling by the PTC on this issue or at any time during the deferral, the Prosecutor may, on an exceptional basis, request authorisation from the PTC to pursue necessary investigative steps for the purpose of preserving evidence where there is a unique opportunity to obtain such evidence or there is a significant risk that it may not be subsequently available.

²²⁸ Daniel Nsereko, 'Article 18. Preliminary rulings regarding admissibility' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (Second edn, C.H.Beck - Hart - Nomos 2008) 633.

2.3.2 PTC's determination of the Court's jurisdiction and the issues of admissibility

Pursuant to Article 19(1) of the Statute, the Court shall satisfy itself that it has jurisdiction in any case brought before it and may, on its own initiative, determine the admissibility of a case in accordance with Article 17. Once a warrant or summons has been issued, pursuant to Article 19(2), the alleged suspect, the State which has jurisdiction over the case - and which is or has been investigating and prosecuting - or the State from which acceptance of jurisdiction is required, can challenge the jurisdiction of the Court or the admissibility of the case on the grounds referred to in Article 17.

Article 19 and Rules 58 and 59 regulate the proceedings related to a challenge. The PTC will decide on the procedure to follow and may take appropriate measures; it may join the challenge to the confirmation, as long as this does not cause delay, in which case it should decide on the challenge first. The Prosecutor and the person who has been surrendered or who has appeared voluntarily can submit observations. The Registrar shall inform those who have referred the situation to the Court and victims who have already communicated with the Court of the challenge. The victims will then also be able to make representations. The admissibility of the case or the jurisdiction of the Court can be challenged only once by a person or a State and the challenge shall take place prior to, or at the commencement of, the trial unless, because of exceptional circumstances, leave for a challenge to be brought more than once or at a later time is granted. Challenges brought at the commencement of the trial or subsequently with the leave of the Court may be based only on Article 17(1)(c) of the Statute.

A State shall submit a challenge at the earliest opportunity, and in this case, the Prosecutor shall suspend the investigation until a determination on the challenge has been made. With that said, pending a ruling on the challenge, the Prosecutor may request the PTC's authorisation to (i) pursue necessary investigative steps in order to preserve evidence when there is a unique opportunity or a significant risk that it may not be subsequently available; (ii) take a statement or testimony from a witness or complete the collection and

examination of evidence which had begun prior to the making of the challenge; and (iii) in cooperation with relevant States, prevent the absconding of persons in respect of whom the Prosecutor has already requested a warrant of arrest under Article 58.

Unless otherwise decided, the submission of a challenge does not affect the validity of any act performed by the Prosecutor or any order or warrant issued by the Court. If the relevant Chamber decides that a case is inadmissible, the Prosecutor may submit a request for review when new facts have arisen which negate the basis on which the case had previously been found inadmissible.

As will be analysed in more detail in the following Chapters, the grounds to challenge the jurisdiction of the Court are determined by the axes of the Court's jurisdiction, ie *ratione materiae* (Article 5 in relation to Articles 6, 7, 8 and 8 bis); *ratione temporis* (Article 11 in relation to Article 126); and *ratione loci* or *ratione personae* (Article 12). The grounds for a challenge to the admissibility of the case are determined by the issues of admissibility provided in Article 17, ie complementarity (Article 17(1)(a) and (b), in relation to 17(2) and (3)); *ne bis in idem* (Article 17(1)(c) in relation to Article 20); and gravity (Article 17(1)(d)).

2.3.3 PTC's review of a Prosecutor's decision not to proceed with an investigation or prosecution based solely on the 'interests of justice'

Pursuant to Article 53(3)(b) and Rules 104 to 106, 109 and 110, if the Prosecutor's decision not to proceed with an investigation or prosecution is solely based on the consideration that to do so would not serve the 'interests of justice', the Prosecutor is obliged to inform the PTC of such a decision, indicating the reasons for his conclusion. Within 180 days of the Prosecutor's notification, the PTC may decide on its own initiative to subject the decision to review.²²⁹ Insofar as the PTC decides to exercise this power, the Prosecutor's decision not to proceed shall be effective only if confirmed by the PTC.

²²⁹ Pursuant to Rule 109, the PTC shall inform the Prosecutor of its intention establishing a time limit within which the Prosecutor may submit observations and other material. Where the referring State or the Council have requested the PTC's intervention, they shall be informed of the PTC's intention to review and may submit observations. Rule 93 also applies and the PTC may seek the views of victims.

Remarkably, if the PTC does not confirm the Prosecutor's decision, he must proceed with the investigation or prosecution. Consequently, in the context of this particular procedure, the PTC is empowered to order the Prosecutor to initiate an investigation or prosecution, even against the Prosecutor's own will. The mandatory force of the PTC's review in this particular case acts as a safeguard in order to avoid arbitrariness and is justified by the highly political nature of a decision not to proceed solely based on the 'interests of justice'.

It should be noted that the practice so far demonstrates that it is highly unlikely that the Prosecutor would make determinations not to investigate or prosecute based on this consideration, in circumstances that the Court's legal framework imposes on him neither a timeline for the completion of the investigations nor the obligation to investigate specific individuals or even pursue prosecutions within the context of the investigations. Although the provision has not been applied so far, it appears that it may only become relevant in the unlikely scenario that the Prosecutor refuses to open an investigation following a referral from a State Party or the Council based only on the consideration that it would not serve the interests of justice. When there is no sufficient basis for an investigation *proprio motu* or for a prosecution, the Prosecutor will simply not submit an application under Article 15 or 58 and, most probably, will continue his preliminary assessment or keep the investigation open. Therefore, the PTC will, in most cases, be prevented from scrutinising the Prosecutor's decision not to investigate or prosecute.²³⁰ However, it should be noted that pursuant to Regulation 48(1),²³¹ the PTC has the power to request the Prosecutor to provide information necessary for it to exercise its functions, including those under Article 57(3)(c). As will be discussed in Chapter 3, the PTC should exercise its inherent powers and, when warranted by the circumstances, request the Prosecutor to provide updates on the progress of his preliminary examinations and investigations and give reasons for the lack either of proper investigations or

²³⁰ *Situation in the Democratic Republic of the Congo*, ICC-01/04-582 Decision on the request of the legal representative of victims VPRS 3 and VPRS 6 to review an alleged decision of the Prosecutor not to proceed Pre-Trial Chamber I, 25 October 2010.

²³¹ Regulation 48(1) provides that 'The Pre-Trial Chamber may request the Prosecutor to provide specific or additional information or documents in his or her possession, or summaries thereof, that the Pre-Trial Chamber considers necessary in order to exercise the functions and responsibilities set forth in article 53, paragraph 3 (b), article 56, paragraph 3 (a), and article 57, paragraph 3 (c).'

the failure to prosecute certain persons or groups. The assumption of a proactive role by the PTC in scrutinising whether the Prosecutor's actions constitute the legitimate exercise of his discretion will not only encourage more transparent decision-making within the OTP, but will also urge genuine investigations and prosecutions at the national level.

2.4 Role of the PTC at the pre-investigative stage of the proceedings

In accordance with Articles 53 and 15 and Rules 104 to 110, the PTC exercises a supervisory role over the Prosecutor's discretion to open investigations. The role of the PTC will differ depending on the applicable mechanism triggering the jurisdiction of the Court.

In the case of a referral from the Council or a State Party, the Prosecutor has the discretionary power to decide whether to open an investigation. If the Prosecutor is satisfied that there is a 'reasonable basis to proceed' and decides to open an investigation, the PTC has no power to review this positive conclusion.²³² The investigation in cases of referral will thus be formally opened directly by the Prosecutor without the intervention of any other organ. It has been argued that this is justified by the need to preserve the Prosecutor's functional independence pursuant to Article 42(1) and further that Article 53 provides sufficient safeguards to ensure that investigations will be opened only if warranted by the Statute.²³³ However, this particular discretionary power given to the Prosecutor has the potential to undermine the credibility and legitimacy of the Court if not subject to appropriate checks and balances. This lacuna in the Statute raises important concerns due to the potential abuse of referrals and the possibility that the Prosecutor may be unduly influenced by the political agenda of the referring State or the Council. As will be argued in Chapter 4, in order to effectively ensure the Court's independence and impartiality, an additional safeguard should be included giving the PTC the power to review the Prosecutor's positive assessment of the existence of a 'reasonable basis to

²³² As has been the case with the situations in the DRC, CAR, Uganda, Darfur, Libya and Mali.

²³³ Morten Bergsmo and Pieter Kruger, 'Article 53: Initiation of an investigation' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (Second edn, C.H. Beck - Hart - Nomos 2008) 1066.

proceed' with an investigation following a referral. As the Statute stands now, however, the role of the PTC following a referral from a State Party or the Council is restricted to the cases in which the Prosecutor decides not to open an investigation. In such cases, under certain circumstances, the PTC can review the Prosecutor's negative decision.

The situation is different in cases where the Court moves to initiate a *proprio motu* investigation, ie without the situation being referred by the Council or a State, in which scenario the Prosecutor requires to be specifically authorised by the PTC to proceed with the investigation.

2.4.1 PTC's review of a Prosecutor's determination not to initiate an investigation following a referral

Article 53(1), (3)(a) and (4) and Rules 104, 105, 107 and 108 provide for one of the most remarkable manifestations of the Prosecutor's independence and, indeed, of the Court as a whole. It ensures that a referral by a State Party or by the UNSC does not automatically activate the Court's jurisdiction. Following a referral by the Council or a State Party, the Prosecutor shall analyse the seriousness of the information made available to him and decide whether there is a 'reasonable basis to proceed' under the Statute.²³⁴ Reasonable basis to proceed is

the lowest evidentiary standard provided for in the Statute (...) thus, the information available to the Prosecutor is neither expected to be 'comprehensive' nor 'conclusive', if compared with evidence gathered during the investigation.²³⁵

The Court's jurisprudence has interpreted the threshold to be satisfied with the existence of 'a sensible or reasonable justification for a belief that a crime falling within the jurisdiction of the Court "has been or is being committed"'.²³⁶ In order to determine if the threshold is met, the Prosecutor shall consider

²³⁴ Pursuant to Rule 104(2), the prosecution may seek additional information from reliable sources and may interview witnesses.

²³⁵ *Kenya, ICC-01/09-19-Corr* para. 27; *Situation in the Republic of Côte d'Ivoire, ICC-02/11-14-Corr* Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Côte d'Ivoire Pre-Trial Chamber III, 15 November 2011 para. 24.

²³⁶ *Kenya, ICC-01/09-19-Corr* para. 35; *Côte d'Ivoire, ICC-02/11-14-Corr* para. 24.

whether: (a) the information available provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed; (b) the case is or would be admissible under Article 17; and whether (c) taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

If the Prosecutor's assessment were to lead him to conclude that there is 'no reasonable basis to proceed',²³⁷ he should promptly inform the Council or the referring State. The referring State or the UNSC may request the PTC to review the Prosecutor's decision.²³⁸ If the Prosecutor's decision is based on subparagraphs (a) and (b) of Article 53(1), once the revision is concluded, the PTC can request the Prosecutor to review, in whole or in part, his decision not to initiate an investigation. Therefore, the PTC does not have the power to 'order' the Prosecutor to proceed with an investigation as would be the case if the Prosecutor's decision had been taken pursuant to Article 53(1)(c), ie based on the interests of justice. In addition, this review process needs to be triggered by the referring party, the PTC being unable to review on its own initiative. Once the Prosecutor has taken a final decision following the request for reconsideration from the PTC, he shall notify the PTC and communicate his conclusion and the reasons that justify it to all those who participated in the proceedings. The Statute and the Rules strongly protect the independence of the Prosecutor, and therefore, no further recourse or review is provided for the Prosecutor's final decision on this matter.

2.4.2 PTC's authorisation for the Prosecutor's *proprio motu* investigation

Article 15, Rules 46 to 50 and Regulations 49 and 50 establish the procedure for the PTC's authorisation for a *proprio motu* investigation, which may be initiated by the Prosecutor on the basis of information on crimes within the jurisdiction of the Court. The Prosecutor shall analyse the information at his disposal and,

²³⁷ Pursuant to Article 53(4), the Prosecutor may, at any time, reconsider his decision not to initiate an investigation, based on new facts or information.

²³⁸ In accordance with Rules 93 and 107, the PTC can request the Prosecutor to transmit further information, may request observations from the referring State or the Council and may also seek the views of victims.

where necessary, may seek additional information and receive written or oral testimony at the seat of the Court. Even before the jurisdiction of the Court is triggered, Rule 47(2) authorises the collection of testimony that may not be subsequently available, providing for the PTC's intervention in order to ensure the efficiency and integrity of the proceedings and to protect the rights of the defence.²³⁹

The Prosecutor should analyse the seriousness of the information and determine whether or not there is a reasonable basis to proceed with an investigation, considering the factors set out in Article 53(1)(a) to (c).²⁴⁰ If the Prosecutor determines that there is no reasonable basis to proceed he shall promptly inform his determination and reasoning to those who provided information. In these proceedings, Article 53(3)(a) does not apply and the PTC has no power to review the Prosecutor's decision not to proceed with an investigation when based on Article 53(1)(a) and (b), as this review proceeding may only be triggered by a request from the referring State or Council.

If upon analysis of the seriousness of the information, the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he shall seize the PTC and request its authorisation to commence an investigation, providing any supporting material collected. The Prosecutor should then immediately inform the victims in order to allow them to make representations to the PTC. The Prosecution's request for authorisation shall provide the Chamber with clear and concise reference to the crimes allegedly committed and the reasons that

²³⁹ An effective application of Rule 47(2) - particularly in the volatile environments in which the initial steps of investigations of situations of crisis are normally carried out - will be of particular importance given the strict judicial interpretation that Articles 69(2) and 74(2) and Rule 68 have received so far in the jurisprudence of the Court. See, in particular, *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-1386 Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled 'Decision on the admission into evidence of materials contained in the prosecution's list of evidence' Appeals Chamber, 3 May 2011 paras 74-80. A testimony provided at the time of the events, or immediately in its aftermath, may be of critical importance during the trial stage of any case arising out of the particular situation. In accordance with Rule 47(2), statements collected at this stage should be admissible evidence in accordance with Article 69(4), and therefore, may be considered an exception to the requirement of *viva voce* or oral testimony provided in person at trial as pursuant to Article 69(2) and Rule 68.

²⁴⁰ Rule 48 was introduced with the aim of filling the gap for a comprehensive provision regulating all the requirements for the PTC's authorization to initiate an investigation *proprio motu*. The Rule indeed links Articles 15 and 53 stating that the former must be read in conjunction with the latter. On this, see the discussion on the preparatory works in *Kenya*, ICC-01/09-19-Corr para. 23.

provide the reasonable basis to proceed with an investigation. In deciding the procedure to be followed, the PTC may hold a hearing and/or request additional information from the Prosecutor or any of the victims.

The PTC shall review the assessment made by the Prosecutor considering the identical ‘reasonable basis to proceed’ standard,²⁴¹ confirming that the requirements of Article 53(1)(a) to (c) are fulfilled.²⁴² In case the PTC considers that there is a ‘reasonable basis to proceed with an investigation’, it shall authorize the commencement of the investigation. This is without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of the cases arising out of the situation. The refusal of the PTC to authorise the investigation shall not preclude the Prosecutor from presenting a subsequent request based on new facts or evidence.

2.5 The role of the PTC during the investigation stage of the proceedings

As mentioned above, although the PTC occupies a supervisory position with regard to pre-trial proceedings, it does not possess autonomous prosecutorial or investigative powers and is not responsible for the Prosecutor’s investigation. Its role differs therefore significantly from that classically fulfilled by an investigative judge or a *juge d’instruction* in a continental system.²⁴³ The ICC’s system - which cannot be defined as belonging either to the civil or common law traditions - recognises an independent Prosecutor in charge of conducting investigations in accordance with Articles 42(1) and 54 of the Statute. The PTC does, however, maintain its gatekeeping function and supervisory role over the Prosecutor’s actions with the aim of ensuring that they are a legitimate exercise of his powers under the Statute and for the protection of the rights of those that may be affected by the Court’s investigations and prosecutions.

²⁴¹ Ibid paras 21 and 22.

²⁴² Ibid para. 24.

²⁴³ For the differences between different legal systems in relation to Pre-Trial proceedings see (n 112) Marchesiello 1231-1235 and (n 113) Fourmy 1209-1215.

Accordingly, in addition to the possibility of acting at the request of the Prosecutor - issuing orders and warrants as may be required for the purposes of the investigation - the PTC is entitled to exercise some powers in the course of the investigation at the request of the suspect or *proprio motu*. The gatekeeping function of the PTC during the investigative stage is essentially expressed through its powers regulated in Articles 68, 56(3)(a) and 57(3)(b) and (c) to: (i) allow for the participation of victims; (ii) take measures *proprio motu* in relation to a unique investigative opportunity for the preservation of evidence that would be essential for the defence at trial; (iii) upon request of a person who has been arrested or has appeared pursuant to a summons, issue orders or seek such cooperation as may be necessary to assist the person in the preparation of his defence; and (iv) take measures, *proprio motu*, where necessary, for the protection and privacy of victims and witnesses, the preservation of evidence, the protection of suspects and the protection of national security information.

Upon investigation, the Prosecutor may either decide to initiate criminal proceedings against identified suspects or conclude that there is no 'sufficient basis for a prosecution'. If the Prosecutor finds there to be sufficient basis for a prosecution, pursuant to Article 58, the PTC will exercise its most important gatekeeping function during the investigative stage, which is to review the evidence collected by the Prosecutor in order to make its own determination of whether or not a case should be initiated against an alleged perpetrator.²⁴⁴ Further, in accordance with Article 53(3), the PTC may review a decision not to prosecute at the request of the referring State or the Council or *proprio motu*, under the same conditions as when reviewing the Prosecutor's decision not to initiate an investigation.

²⁴⁴ It is important to stress the distinction between the terms '*situation of crisis*' and '*case*'. Their relevance is limited to the ICC's system and was introduced at the Rome Conference in order to impose a limitation on the Security Council's power to refer matters to the Court, see Lionel Yee, 'The International Criminal Court and the Security Council: Articles 13(b) and 16' in Roy S. Lee (ed), *The International Criminal Court The making of the Rome Statute Issues - Negotiations - Results* (Kluwer Law International 1999) 147. A *situation of crisis* refers to events that occurred in a particular territory within a time frame more or less determined and in which one or more crimes within the jurisdiction of the Court appear to have been committed. A *case* comprises specific actions, allegedly committed by one or more persons that constitute one or more crimes under the jurisdiction of the Court. Ania Salinas and James Sloan, 'The Impact of the Distinction Between Situations and Cases on the Participation of Victims in the International Criminal Court' in Claudio Michelon and others (eds), *The Public in Law Representations of the Political in the Legal Discourse* (Ashgate Publishing Limited 2012).

2.5.1 PTC's exceptional powers during the Prosecutor's investigation

Article 68(3) of the Statute and Rule 93 of the Rules grant victims a general right to participate in the proceedings before the Court. Article 68(3) provides that, where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at various stages of the proceedings. Rule 93 gives the Court the power to seek the views of the victims on any issue. As will be discussed in Chapter 5, based on these provisions the PTC has granted victims the right to present their views and concerns in all stages of the proceedings, including the investigative stage.

Further, pursuant to Article 54(1)(a) of the Statute, the Prosecutor shall extend his investigations to cover all the facts and circumstances in order to 'establish the truth' and should investigate incriminating and exonerating circumstances equally. Therefore, the Prosecutor is much more than simply a 'party' to the proceedings and is expected rather to function as an 'impartial organ of justice', following the principle of the civil law tradition aimed at levelling potential inequalities of resources between the parties.²⁴⁵

Pursuant to Article 54(3), the Prosecutor may collect and examine a wide range of evidence at the investigative stage. However, Articles 69 and 74(2) provide, in accordance with the largely adversarial modelling of the ICC's trial proceedings, that the testimony of witnesses at trial shall in principle be given in person and that the TC shall base its judgment only on evidence submitted and discussed before it at trial. Therefore, evidence collected at the investigative stage which may not be available subsequently - in order to be 'submitted and discussed' at trial - risks being totally disregarded.

The 'unique investigative opportunity' of Article 56 is therefore that in which evidence that may not be available subsequently for the purposes of a trial may be collected. In compliance with the provisions of Article 56, evidence collected from the early stages of the investigation of a situation of crisis - when not even

²⁴⁵ Giuliano Turone, 'Powers and Duties of the Prosecutor' in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, vol II (Oxford University Press 2002) 1165.

a potential suspect has been identified - may be 'transported' to the trial stage, as if 'submitted and discussed' at trial.²⁴⁶ In effect, in accordance with Article 56(4), the admissibility of evidence preserved or collected for trial pursuant to this Article 'shall be governed at trial by article 69, and given such weight as determined by the Trial Chamber'. Article 69(2) establishes the presumption in favour of oral testimony at trial, except to the extent provided by the Statute and the Rules. Rule 68, which regulates the conditions under which prior recorded testimony may be introduced *in lieu of viva voce* testimony at trial, provides that it should be applicable 'when the Pre-Trial Chamber has not taken measures under article 56'. This exception is of particular significance, as it may allow the submission during trial of the testimony of witnesses taken even before the alleged perpetrator was identified, which may not be available at trial for cross-examination by the defence.

In accordance with Article 56 and Rule 114, the PTC may intervene in relation to a unique investigative opportunity, either upon request of the Prosecutor or on its own initiative. Where the Prosecutor considers an investigation to present a unique opportunity to take testimony or statement from a witness or to examine, collect or test evidence which may not be available subsequently for the purposes of trial, he shall so inform the PTC. In such a case, the PTC may take measures as may be necessary to ensure the efficiency and integrity of the proceedings and to protect the rights of the defence.

However, the PTC's intervention on its own initiative when the Prosecutor has not sought measures pursuant to Article 56 is limited to the implementation of measures that may be required to preserve evidence which would be essential for the defence at trial. Therefore, since the power is restricted to the protection of the interests of the defence it appears that it shall be used exclusively for the collection of exculpatory evidence. Before implementing measures on its own initiative, the PTC shall consult with the Prosecutor as to whether there is a good reason for his failure to request the measures. If the PTC concludes that the failure was unjustified it may take such measures on its

²⁴⁶ Christoph Safferling, 'The Rights and Interests of the Defence in the Pre-Trial Phase' (2011) 9 JICJ 651, 660.

own initiative. Such a decision may be subject to appeal by the Prosecutor and such appeal shall be heard on an expedited basis.

Pursuant to Article 57(3)(a), the Prosecutor may request the PTC's intervention for the issuance of warrants and orders as may be required for the purposes of the investigation.²⁴⁷ In addition, in accordance with Article 57(3)(b), upon request of a person who has been arrested or has appeared pursuant to a summons, the PTC may issue orders, including measures under Article 56, or seek cooperation of States as may be necessary to assist the person in the preparation of his defence. Pursuant to Rule 116(2), before taking a decision to issue an order or seek cooperation, the PTC may seek the views of the Prosecutor. This is the logical consequence of the obligation imposed on the Prosecutor under Article 54(1)(a) to extend investigations to cover all the facts, investigating incriminating and exonerating circumstances equally.

Lastly, Article 57(3)(c) empowers the PTC to take some *proprio motu* measures during the investigation. The provisions allow the PTC to act, where necessary, in order to provide for the protection 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.²⁴⁸ This provision is highly significant insofar as it empowers the PTC to take measures on its own initiative to protect the rights of those who may be affected the Prosecutor's investigations, ie suspects, victims, witnesses and States. In addition, this provision may allow the PTC to take measures in relation to the preservation of evidence, even if not necessarily directed at assisting the suspect in the preparation of his defence. Although not specifically required by the Statute, it may be reasonable for the PTC to seek the views of the Prosecutor before making a decision under this provision, thereby allowing the Prosecutor to act directly if necessary.

²⁴⁷ This power includes orders such as that provided in Rule 113 aimed at collecting information regarding the state of health of a suspect and those directed at allowing the undertaking of investigative steps that may infringe upon individual rights, see *ibid* 658.

²⁴⁸ Some, however, giving a narrow interpretation to the provision, argue that Article 57(3)(c) does not grant additional powers to the PTC but only serves as a cross reference with other provisions of the Statute, see *Fabrizio Guariglia, Kenneth Harris and Gudrun Hochmayr, 'Article 57: Functions and powers of the Pre-Trial Chamber' in Otto Triffterer (ed), Commentary on the Rome Statute of the International Criminal Court (Second edn, C.H.Beck - Hart - Nomos 2008) 1126.*

It should be noted that the power of the PTC to act *proprio motu* is reinforced by Regulation 48, which gives the PTC the power to request the Prosecutor to provide specific or additional information or documents that may be necessary for the Chamber to exercise its functions and responsibilities under Articles 56(3)(a) and 57(3)(c).

2.5.2 PTC's issuance of a warrant of arrest or a summons to appear

Upon investigation, the Prosecutor shall analyse the requirements of Article 53(2) and determine whether there is sufficient basis for a prosecution. The conditions for prosecution, according to that provision, are: (i) sufficient legal or factual basis to proceed according to Article 58; (ii) admissibility of the case under Article 17; and (iii) the absence of a determination against prosecution in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interest of the victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime.

If the Prosecutor concludes that there is no sufficient basis for prosecution, Article 53(3) and Rules 107 to 110 will apply and the PTC may review the Prosecutor's decision at the request of the referring State or the Council or *proprio motu* in the case of a decision based exclusively on consideration of the interests of justice.

If the Prosecutor determines that there is sufficient basis for prosecution, he will submit a request for the issuance of a warrant of arrest or a summons to appear pursuant to Article 58. As will be discussed in Chapter 5, this is one of the most important contexts for the PTC's exercise of its gatekeeping function. In accordance with Article 58, at any time after the initiation of an investigation, the Prosecutor may request the PTC to issue a warrant of arrest or a summons to appear. The PTC shall issue the request if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that there are reasonable grounds to believe that the person in question has committed a crime within the jurisdiction of the Court. Nevertheless, a warrant of arrest will only be issued by the PTC if it is satisfied that the arrest appears necessary to: (a) ensure the person's appearance at

trial; (b) to prevent the person from obstructing or endangering the investigation or the Court's proceedings; or, (c) where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances. With regard to the issuance of a summons to appear, with or without such conditions restricting liberty (other than detention) as may be provided for by national law, the PTC must be satisfied that a summons is sufficient to ensure the person's appearance.

A case against an identified alleged perpetrator will only commence once a warrant of arrest or a summons to appear is issued.²⁴⁹ Therefore, the request for it to be issued generally will be an *ex-parte* proceeding in which the PTC will only analyse the information collected by the Prosecutor and the alleged perpetrator will not normally be able to contest the Prosecutor's allegations. The role of the PTC at this stage is therefore precisely aimed at avoiding unfounded allegations, protecting the rights of the suspect, and ensuring that cases proceed only if substantiated by sufficient evidence.

In addition, although the Prosecutor has the discretion to decide what evidence and information he will provide to the PTC in order to satisfy the 'reasonable grounds to believe' threshold,²⁵⁰ it is the Chamber and not the Prosecutor that needs to be convinced that the threshold is met. Thus, the PTC may refuse the request if it considers that the evidence and information submitted is

²⁴⁹ There has been some discussion as to whether it is proper to hold that a case only starts after the issuance of the arrest warrant. PTC I in 2006 affirmed that the case 'entail[s] proceedings that take place after the issuance of a warrant of arrest or a summons to appear' *Situation in the Democratic Republic of the Congo, ICC-01/04-101-tEN-Corr* Decision on the Application for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 Pre-Trial Chamber I, 17 January 2006 para. 65. El Zeidy, while not finding such an interpretation problematic *per se*, considers that it causes difficulties within the context of examining admissibility during the arrest warrant phase, see Mohamed M. El Zeidy, *The Principle of Complementarity in International Criminal Law. Origin, Development and Practice* (Martinus Nijhoff Publishers 2008) 251.

²⁵⁰ *The Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-8-Corr* 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 Annex I: Decision on the Prosecutor's application for a warrant of arrest, Article 58, 10 February 2006 Pre-Trial Chamber I, 24 February 2006 para. 9; *The Prosecutor v. Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-3* Decision on the Prosecutor's application for a warrant of arrest against Omar Hassan Ahmad Al Bashir Pre-Trial Chamber I, 4 March 2009 para. 24.

unconvincing.²⁵¹ Moreover, the PTC is not bound by the entirety of the request nor by the legal characterisation of the facts provided by the Prosecutor,²⁵² and may alternatively issue a warrant or summons of narrower scope, focused only upon those specific crimes for which it is convinced that the requirements are met. The Chamber is not required to ‘trust’ the Prosecutor’s assessment but should satisfy itself that there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court and that either the arrest or the summons appears reasonable.²⁵³ Nonetheless, the Prosecutor’s application should be detailed enough so as to contain specific identification of the crimes for which the arrest or summons is sought.²⁵⁴

In reaching their conclusions, the different PTCs have consistently required an affirmative answer to three fundamental questions: (a) whether there are reasonable grounds to believe that at least one crime within the jurisdiction of the Court has been committed; (b) whether the alleged suspect has incurred criminal liability for such crimes in accordance with the Statute; and (c) whether an arrest appears to be necessary or rather a summons sufficient under Article 58.²⁵⁵ Pursuant to Article 21(3), the different PTCs have interpreted the ‘reasonable grounds to believe’ standard in a manner consistent with internationally recognised human rights. They have been guided by the ‘reasonable suspicion’ standard under Article 5(1)(c) of the European Convention

²⁵¹ *Lubanga*, ICC-01/04-01/06-8-Corr paras 9-10.

²⁵² *Bashir*, ICC-02/05-01/09-3 para. 31; *Lubanga*, ICC-01/04-01/06-8-Corr para. 16; *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-14-tENG Decision on the Prosecutor’s Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo Pre-Trial Chamber III, 10 June 2008 para. 25.

²⁵³ *Lubanga*, ICC-01/04-01/06-8-Corr para. 10.

²⁵⁴ PTC II has already dismissed *in limine* an application for a warrant of arrest for lack of specificity. See *Situation in the Democratic Republic of the Congo*, ICC-01/04-613 Decision on the Prosecutor’s Application under Article 58 Pre-Trial Chamber II, 31 May 2012.

²⁵⁵ *The Prosecutor v. Germain Katanga*, ICC-01/04-01/07-55 Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga Pre-Trial Chamber I, 5 November 2007 para. 24; *Lubanga*, ICC-01/04-01/06-8-Corr para. 79; *Bashir*, ICC-02/05-01/09-3 para. 28; *The Prosecutor v. Mathieu Ngudjolo Chui*, ICC-01/04-02/07-3 Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Mathieu Ngudjolo Chui Pre-Trial Chamber I, 6 July 2007 para. 25; *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, ICC-01/09-01/11-01 Decision on the Prosecutor’s Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang Pre-Trial Chamber II, 8 March 2011 para. 6; *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, ICC-01/09-02/11-01 Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali Pre-Trial Chamber II, 8 March 2011 para. 6; *The Prosecutor v. Sylvestre Mudacumura*, ICC-01/04-01/12-1-Red Decision on the Prosecutor’s Application under Article 58 Pre-Trial Chamber II, 13 July 2012 para. 8.

for the Protection of Human Rights and Fundamental Freedoms (ECHR), in the manner interpreted by the European Court of Human Rights (ECtHR) as requiring ‘the existence of some facts or information which would satisfy an objective observer that the person concerned may have committed the offence’.²⁵⁶ In addition, the different PTCs have followed the jurisprudence of the Inter-American Court of Human Rights (IACtHR) as regards the fundamental right to liberty enshrined in Article 7 of the American Convention on Human Rights (ACHR).²⁵⁷ A case against an identified alleged perpetrator would then commence once a warrant of arrest or a summons to appear is issued.

2.6 The PTC’s role in determining the factual and legal scope of the Court’s cases

Once a warrant or summons is issued, the pre-trial stage of the case against an identified alleged perpetrator will commence. The case will have then passed the first layer of control by the PTC and the Court’s ‘gate’ will have been opened for the case to enter into the Court’s domain. During this stage, the PTC will still ‘guard’ the Court’s gates, ensuring that the alleged perpetrator will only be sent to trial if and when there is sufficient evidence to establish ‘substantial grounds to believe’ that the person has committed the alleged crime. The PTC will ensure that only cases supported by sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged are committed to trial.

The confirmation proceedings are a fundamental feature of the PTC’s gatekeeping function. Judicial scrutiny of the charges is a necessary safeguard to avoid wholly unfounded prosecutions and focus the Court’s efforts and resources on cases for which there is substantial evidence going beyond mere suspicion. At the same time, the confirmation proceedings ensure respect for the rights of the suspects and victims and otherwise guarantee the fairness, effectiveness and expeditiousness of the Court’s proceedings as a whole. Through this proceeding,

²⁵⁶ *Bemba*, ICC-01/05-01/08-14-tENG para. 24; *Lubanga*, ICC-01/04-01/06-8-Corr para. 12; *Bashir*, ICC-02/05-01/09-3 para. 32.

²⁵⁷ *The Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-9-Red Decision on the Prosecutor’s Application Pursuant to Article 58 for a warrant of arrest against Laurent Koudou Gbagbo Pre-Trial Chamber III, 30 November 2011 para. 27.

the PTC exercises its gatekeeping function by filtering the cases that should go to trial from those that should not and determining the factual scope of the cases to be brought to trial.

Pursuant to Article 61(1), the confirmation of charges shall take place within a reasonable time after the person's surrender or voluntary appearance before the Court. Although the provision begins by stipulating that this rule is 'subject to the provisions of paragraph 2', the latter providing for the confirmation of charges 'in the absence of the person', commentators have argued that the initial appearance is a pre-condition for the confirmation of charges proceedings to take place.²⁵⁸ The participation of the alleged perpetrator during the confirmation of charges is a cornerstone of the system established by the Statute. In this regard, as discussed in Chapter 6, the ICC system differs radically from that of other international tribunals, eg the ICTY and ICTR, in which the proceedings against an accused commence with the indictment, which is submitted by the Prosecutor and then reviewed and approved by a pre-trial judge, who should be satisfied that a '*prima facie* case' exists.²⁵⁹ In such a procedure there is no intervention of the alleged perpetrator, against whom a warrant of arrest may be issued only after the indictment is confirmed.²⁶⁰

The Statute grants the suspect important rights allowing him to meaningfully participate in the confirmation process in accordance with Article 61 and Rule 121. In particular, the suspect must, within a reasonable time before the hearing, be provided with a copy of the Document Containing the Charges (DoCC) and be informed of the evidence on which the Prosecutor intends to rely at the hearing. At the hearing, the Prosecutor shall support each charge with sufficient evidence. However, he may rely on documentary or summary evidence and does not need to call witnesses to testify in person. The person may object to the charges, challenge the evidence presented by the Prosecutor, and present evidence in order to challenge that presented by the Prosecutor. Subject to the

²⁵⁸ (n 112) Marchesiello 1244; (n 215) Schabas, *An Introduction to the International Criminal Court* 139.

²⁵⁹ Statute of the International Criminal Tribunal for the former Yugoslavia (UNSC, 25 May 1993) Articles 18-19; Statute of the International Criminal Tribunal for Rwanda (UNSC, 8 November 1994) Articles 17-18.

²⁶⁰ (n 21) Cassese and others 368.

provisions of Articles 60 and 61, the suspect shall enjoy the rights set forth in Article 67.

The confirmation of charges shall be conducted in accordance with Rule 122 or 126, depending on whether the person is present at the hearing. On the basis of the hearing, the PTC shall determine whether there is sufficient evidence to establish 'substantial grounds to believe' that the person committed each of the crimes charged. Pursuant to Article 61(7), based on its determination the PTC may: (a) confirm those charges in relation to which it has determined that there is sufficient evidence and commit the person for trial on the charges confirmed; (b) decline to confirm those charges in relation to which it has determined that there is insufficient evidence; or (c) adjourn the hearing and request the Prosecutor to consider - within a time limit if required by the PTC - either providing further evidence, conducting further investigation with respect to a particular charge or amending the charges insofar as the evidence submitted appears to establish a different crime within the jurisdiction of the Court. The Decision on the Confirmation of Charges (DeCC) shall be notified in accordance with Rule 129.

If the PTC declines to confirm a charge, the Prosecutor is not precluded from subsequently repeating his request with the inclusion of additional evidence. Any warrant previously issued will cease to have effect with respect to any charges that have not been confirmed by the PTC, or have been withdrawn by the Prosecutor. If the PTC is ready to confirm some of the charges but adjourns the hearing in relation to others, it may decide that the committal of the person to trial shall be deferred pending the continuation of the hearing. After the charges are confirmed and before the trial begins, the Prosecutor may amend the charges, with the permission of the PTC and after notice to the accused. If the Prosecutor seeks to add additional charges, or to substitute more serious ones, a new hearing under Article 61 must be held. After the commencement of the trial the Prosecutor may, with the permission of the Trial Chamber, withdraw the charges in accordance with Article 61(9) and Rule 128.

Once the charges have been confirmed, the Presidency shall constitute a Trial Chamber, which shall be responsible for the conduct of the subsequent

proceedings. Once the Trial Chamber is constituted, in accordance with Rule 130, the Presidency shall transmit to it the decision on the confirmation of charges and the record of proceedings created and maintained by the Registry pursuant to Rule 121(10).

2.7 Conclusions

As described in this Chapter, the aspiration of a permanent international institution empowered to investigate and prosecute heinous crimes was finally realised with the adoption of the Statute that created the ICC. The drafters were also successful in creating a Court that is as independent from the political will of States and the Council as possible, with an independent Prosecutor able to intervene in most cases in which crimes deserving the Court's attention remain unpursued at the national level. Nevertheless, an institution established in order to deal with the consequences of war and conflict must always walk a treacherous path at constant risk of becoming politicised. Accordingly, in order to provide an additional safeguard and to prevent, as far as possible, the Court becoming an instrument of political bargain and manoeuvre, the drafters conceived of the PTC as a judicial organ charged with the responsibility of scrutinising the exercise of discretion by the Prosecutor: a collegial body of judges in charge of guarding the Court's gate.

The powers given to the PTC are indeed extensive and constitute a considerable limitation upon the exercise of discretion by the Prosecutor. The PTC is the gatekeeper in charge of ensuring that the Prosecutor can only go ahead with investigations and prosecutions that are strictly warranted by the Court's legal framework. The PTC guards the Court's gates, filtering-in situations to be investigated *proprio motu* and cases to be prosecuted. In addition, it scrutinises decisions to filter-out situations and cases, overseeing with particular mandatory powers those Prosecutorial decisions which are based solely on the highly political consideration of the 'interests of justice'. The PTC is further tasked with protecting the rights of those who may be affected by the Court's investigations and prosecutions, wielding exceptional powers to intervene during the investigations conducted by the Prosecutor and rule on issues of jurisdiction

and admissibility. There are however, as described, some important lacunae in the Statute, which does not establish PTC supervision over the initiation of investigations following referrals, thereby threatening the delicate balance of power achieved generally in the Statute.

In the following Chapters, this thesis will develop an analysis of the manner in which the PTC's gatekeeping function has been interpreted and applied at each different stage of the proceedings during the first decade of the Court's existence. Particular attention will be placed on analysing whether the different PTCs have used the full extent of their powers to scrutinise the policies applied by the Prosecutor.

Chapter 3: The role of the PTC in determining the scope of the notions of complementarity, gravity and the interests of justice

3.1 Introduction

The issues of admissibility, also described as the ‘barriers to the exercise of jurisdiction by the Court’,²⁶¹ are: the principle of complementarity,²⁶² double jeopardy or *ne bis in idem*,²⁶³ and the gravity threshold.²⁶⁴ An additional basis upon which the Court may decide against exercising jurisdiction in relation to a concrete case or situation of crisis is the consideration of the ‘interests of justice’.²⁶⁵ These notions are at the core of the Court’s ‘political’ discretion. They are critical in managing the tension between the legal goal of ensuring the prosecution of international crimes and the political aim of pursuing peace and preventing the commission of atrocities. They provide the necessary flexibility allowing the Court to adapt to different scenarios and achieve its goal of putting an end to impunity while contributing to the prevention of crimes of concern to the international community as a whole.²⁶⁶

Due to the impossibility of achieving consensus, the drafters of the Statute outlined the general framework of the issues but left the details to be determined on a case-by-case basis.²⁶⁷ In relation to the principle of complementarity, for example, they specified the general criteria as objectively as possible, but left politically sensitive issues undecided. In particular, as regards domestic proceedings, the concepts of ‘investigation’ and ‘prosecution’ were not clearly defined, and the question of whether an ‘investigation’ should be ‘criminal’ or ‘judicial’ in nature, or whether a truth commission or non-punitive traditional mechanism would suffice, remained undetermined. Further, although the drafters provided some clarification as to the extent of the notions of ‘unwillingness’ and ‘inability’, subjective elements were included, such as the

²⁶¹ *Lubanga*, ICC-01/04-01/06-772 para. 23.

²⁶² Statute Article 17(1)(a)-(b), (2), (3).

²⁶³ *Ibid* Articles 17(1)(c) and 20. The principle of *ne bis in idem*, as a corollary to the principle of complementarity, will be analysed and discussed together with the latter.

²⁶⁴ *Ibid* Article 17(1)(d).

²⁶⁵ *Ibid* Article 53(1)(c), (2)(c).

²⁶⁶ *Ibid* Preamble, para. 5.

²⁶⁷ *See, inter alia*, (n 99) Holmes 74; Michael P. Scharf, ‘The Amnesty Exception to the Jurisdiction of the International Criminal Court’ (1999) 32 *Cornell Int’l LJ* 507, 521-522.

terms ‘unjustified delay’, ‘independently and impartially’, ‘total or substantial collapse’ and ‘otherwise unable’. Similarly, the ‘gravity’ threshold and the concept of the ‘interests of justice’, included in the Statute as issues that may, under certain circumstances, prevent the Court from exercising jurisdiction, are nowhere defined.

As noted in Section 1.1.2 above, the drafters could not foresee *ab initio* all the possible combinations of circumstances that might arise in the future.²⁶⁸ Nevertheless, considering the wide range of alternative mechanisms of criminal justice in operation at the time the Statute was discussed and the extent of the debate about the existence of scenarios in which it might be appropriate to sacrifice criminal punitive mechanisms for the sake of peace and reconciliation,²⁶⁹ the drafters might have been expected to provide more concrete definitions or canons of interpretation to aid in the application of the contested issues of admissibility. This is not to suggest that the drafters should have created, to borrow Hart’s words, such a ‘formalist’s heaven’ or ‘heaven of concepts’,²⁷⁰ as to render in advance answers to every question that may have arisen, leaving no room for manoeuvre in application. However, the drafters could have provided at least a core understanding of these notions, minimising the universe of choices at the Prosecutor’s disposal, particularly in relation to concepts for which there is no common general understanding. This would not have prevented the drafters from leaving open for later settlement issues that could only be properly appreciated and determined in the context of a concrete situation or case. Rather, as they were unable to reach a compromise on these politically sensitive issues, the drafters opted for ‘open texture’ or ‘creative ambiguity’.²⁷¹ Accordingly, the Prosecutor, as the person initially called upon to apply the concepts of complementarity, gravity and the interests of justice, has wide discretion when interpreting the terms used in the Statute. His conclusions are in effect a choice from an ample universe of alternatives where he will have

²⁶⁸ (n 30) Hart 128, 133.

²⁶⁹ For the general debate on transitional justice mechanisms and alternatives to criminal justice see, *inter alia*, (n 19) Teitel; (n 19) Minow; (n 19) Mallinder.

²⁷⁰ (n 30) Hart 130, 139.

²⁷¹ (n 33) Hunt 67.

to strike a balance, in light of the circumstances, between competing interests that may vary in weight from case-to-case.²⁷²

When determining the scope of the concepts of complementarity, gravity and the interests of justice in relation to concrete situations or cases deserving the Court's attention, the Prosecutor's independence and impartiality are under permanent scrutiny. Depending on how these notions are interpreted, the Prosecutor - and indeed the Court as a whole - is always at risk of being perceived as taking sides in a conflict, being influenced or manipulated by political actors or becoming an instrument of victor's justice. Indeed, the Prosecutor's decisions on these matters have been readily exposed to criticism as patently partisan or unjust, it being commonly asserted for instance that the Court has unduly focused on African States, targeted only the rebels in Uganda and the DRC and afforded greater weight to the killing of a dozen peacekeeping personnel by rebels in Darfur than to the killing by British forces of four to a dozen detainees and civilians in Iraq.

In principle, the Statute gives the Prosecutor independence and discretion to interpret and apply the provisions of the Court's legal framework. However, in order to ensure the latter's objectivity and independence from political pressures - these being essential to its credibility and legitimacy - the Prosecutor's actions are subject to judicial control and oversight. In effect, under certain circumstances the judges - mostly, although not exclusively, those sitting on the PTC - can examine the Prosecutor's choices in order to ensure that they are not the result of improper political influence, but a legitimate exercise of his powers under the Statute. As such, although the PTC has not been afforded a general right to scrutinise the Prosecutor's policy or actions, in order to avoid arbitrariness, the judges have been given the last word in interpreting the issues of admissibility - complementarity, double jeopardy and gravity - and determining the interests of justice. As mentioned in Section 2.3, the PTC exercises this function by settling disputes, responding to requests from the Prosecutor and by determining certain issues on its own initiative, pursuant to Articles 53(3), 15(4), 18(2) and 19. Consequently, although the Prosecutor is the

²⁷² (n 30) Hart 135.

driving force behind the Court's activities, the PTC has a critical gatekeeping function aimed at guaranteeing the Court's independence and impartiality.

This Chapter analyses the manner in which the notions of complementarity, gravity and the interests of justice have been interpreted and applied by the Court's jurisprudence. The discussion does not represent an exhaustive analysis of the notions, focusing rather on the PTC's gatekeeping role in determining the scope of the issues. The Chapter is divided into three main sections, each dedicated to the analysis of the PTC's scrutiny of the Prosecutor's choices as to the issues of complementarity (Section 3.2), gravity (Section 3.3), and the interests of justice (Section 3.4). Each section will start by providing a general description of the concepts and the interpretative issues they raise, before turning to focus on the Prosecutor's approach to the issues and, where applicable, the relevant case law. The Chapter finishes with conclusions arguing for the PTC to adopt a firmer and more proactive role in scrutinising the Prosecutor's exercise of discretion and, in particular, for the Chambers to be ready to take politically unfavourable decisions where necessary to ensure the Court's independence and impartiality (Section 3.5).

3.2 The Principle of Complementarity

3.2.1 General Remarks

The principle of complementarity is the cornerstone of the Statute.²⁷³ It regulates the balance of competence between the Court and national

²⁷³ Given the limited reference to the principle of complementarity in this work, there will be no detailed analysis of the negotiation process or the discussions regarding the many - plenty still unresolved - issues arising therefrom. Complementarity in itself has been the sole subject matter of many doctoral theses and has been addressed by numerous scholars. Among the most relevant, see, *inter alia*, (n 249) El Zeidy; John T. Holmes, 'Complementarity: National Courts versus the ICC' in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, vol I (Oxford University Press 2002) 667-686; (n 99) Holmes, 'The Principle of Complementarity' 41-78; Sharon A. Williams and William A. Schabas, 'Article 17: Issues of Admissibility' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (Second edn, C.H. Beck - Hart - Nomos 2008) 605-625; Emanuela Fronza, 'Principio di complementarità, esercizio della giurisdizione e adeguamento a livello interno' in Enrico Amati and others (eds), *Introduzione al diritto penale internazionale quaderni di diritto penale comparato, internazionale ed europeo* (Second edn, Giuffrè Editore 2010) 39-75; Flavia Lattanzi, 'Il principio di complementarità' in Giorgio Lattanzi and Vitto Monetti (eds), *La Corte Penale Internazionale, organi - competenza - reati - processo* (Giuffrè Editore 2006) 179-214; Claudia Cárdenas Aravena, 'The admissibility test before the

jurisdictions, aimed at ensuring an integrated system respectful of national sovereignty, based upon the primary exercise of national criminal jurisdiction complemented by a permanent international court. As such, complementarity strikes a balance between the two competing interests of: (i) the need to safeguard the States' sovereign right to exercise domestic jurisdiction; and (ii) the aim of putting an end to impunity for the perpetrators of the most serious crimes of international concern.

Complementarity has been defined by PTC II as 'the principle reconciling the States' persisting duty to exercise jurisdiction over international crimes with the establishment of a permanent international criminal court having competence over the same crimes'.²⁷⁴ The Court is therefore expected to reinforce the States' primary obligation to prevent and prosecute international crimes imposed by conventional and customary law.²⁷⁵ The Court should bridge the impunity gap that emerges when States do not investigate or prosecute or are unable or unwilling to fulfil their obligations to do so. Consequently, States - and not the Court - are expected to be the main actors in the prosecution of international crimes. The Court was not created in order to replace national jurisdictions: it is meant to act only in the exceptional circumstances in which no State has investigated or prosecuted serious crimes of concern to the international community as a whole.

International Criminal Court under special consideration of amnesties and truth commissions' in Jann K. Kleffner and Gerben Kor (eds), *Complementary views on complementarity Proceedings of the international roundtable on the complementarity nature of the International Criminal Court Amsterdam, 25/26 June 2004* (Asser Press 2006); (n 225) Olásolo, 'The triggering procedure of the International Criminal Court, procedural treatment of the principle of complementarity, and the role of the Office of the Prosecutor'; Florian Razesberger, *The International Criminal Court. The Principle of Complementarity* (Peter Lang GmbH Europäischer Verlag der Wissenschaften 2006); and Jann K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (Oxford University Press 2008). See also, Ania Salinas, 'Principio de Complementariedad en la política persecutoria del Fiscal de la Corte Penal Internacional' in *Rule of Law and Fundamental Rights of Citizens: The European and American Conventions on Human Rights*, vol European Public Law Series, Volume XCIII (Esperia 2009) 271-317; Sylvia Steiner and Ania Salinas Cerda, 'Os desafios do princípio da complementaridade. Um balanço dos 10 anos da entrada em vigor do Estatuto de Roma do Tribunal Penal Internacional' (2012) 8 Revista Anistia Política e Justiça de Transição 212.

²⁷⁴ *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, ICC-02/04-01/05-377 Decision on the admissibility of the case under Article 19(1) of the Statute Pre-Trial Chamber II, 10 March 2009 para. 34.

²⁷⁵ The obligation that derives from the *aut dedere aut judicare* requirement is included, *inter alia*, in the four Geneva Conventions of 1949 and their Additional Protocols of 1977 and the Genocide Convention.

According to Article 17(1)(a) and (b), the Court shall determine that a case is inadmissible where (i) the case is being investigated or prosecuted by a State which has jurisdiction over it; or (ii) the case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned. In both instances, however, the case will be admissible if the State is actually unwilling or unable to genuinely carry out the investigation or prosecution. Article 17(2) and (3) provide for the parameters that the Court should take into account when deciding on the unwillingness or inability of a State genuinely to investigate or prosecute.²⁷⁶

As will be discussed in detail below, although questioned by some commentators as contradicting the drafters' intention,²⁷⁷ and supported by others as unambiguously provided for by Article 17,²⁷⁸ the Court's jurisprudence has now conclusively determined that inaction makes a case admissible before the Court, subject only to the assessment of gravity. In such a scenario, there is no need for the Court to make any determination as to the principle of complementarity in accordance with Article 17. When no State has initiated an investigation or prosecution, the Court can exercise jurisdiction without the need for determining whether the competent State(s) are willing or able to investigate and prosecute.²⁷⁹ In other words, the Court can intervene not only in cases of

²⁷⁶ According to Article 17(2) 'In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable: (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5; (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice; (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.'. Pursuant to Article 17(3) 'In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.'

²⁷⁷ See, *inter alia*, (n 273) Williams and Schabas 615; Nidal Nabil Jurdi, 'The Prosecutorial Interpretation of the Complementarity Principle: Does It Really Contribute to Ending Impunity on the National Level?' (2010) 10 IntCLR 73, 74; Mahnoush H. Arsanjani and W. Michael Reiseman, 'The Law-in-Action of the International Criminal Court' (2005) 99 AJIL 385, 396; Manisuli Ssenyonjo, 'The International Criminal Court and the Lord's Resistance Army Leaders: Prosecution or Amnesty?' (2007) 7 IntCLR 361, 368.

²⁷⁸ Darryl Robinson, 'The Mysterious Mysteriousness of Complementarity' (2010) 21 Crim LF 67, 68; see also (n 273) Holmes, 'Complementarity: National Courts *versus* the ICC' 673.

²⁷⁹ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-1497 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 Appeals Chamber, 25 September 2009 para. 78;

the ‘unwillingness’ or ‘inability’ of States to investigate or prosecute but also – and indeed primarily – in cases of ‘inaction’.

In effect, where a case is or has been investigated or prosecuted by a State with jurisdiction over it, there will be a rebuttable presumption that the case is inadmissible before the Court. However, as noted in Section 3.1, the issue of ‘inactivity’ is not clear cut. The paradigmatic case will be an investigation or prosecution related to exactly the same conduct being considered by the Court, carried out under the regular system of justice of the State in question – ie police, public prosecutor, judiciary. Such proceedings will represent, in principle, ‘activity’ on the part of the State, such that only a determination that the State is in effect unwilling or unable to genuinely carry out the investigation or prosecution will enable the Court to retain jurisdiction over the case. However, outside of this archetypal scenario, a wide range of procedures may be adopted by a given State – particularly one recovering from or experiencing war and political conflicts – which may or may not amount to ‘activity’ in accordance with the Court’s jurisprudence. Indeed, the indeterminacy of the terms of the Statute problematises the ready submission of the binary action/inaction of a State to clear legal criteria. What about investigations conducted within the context of a truth and reconciliation commission or an amnesty applied after a full investigation?²⁸⁰ What about non-prosecutorial traditional mechanisms of justice?²⁸¹ What about domestic proceedings within the regular justice system of a State addressing the same crime but under a different legal characterisation?

The Prosecutor v. Francis Kirihi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ICC-01/09-02/11-274 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’ Appeals Chamber, 30 August 2011 para. 43 and *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, ICC-01/09-01/11-307 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’ Appeals Chamber, 30 August 2011 para. 44.

²⁸⁰ For the argument that investigations by truth and reconciliation commissions and amnesties may, under certain circumstances, make a case inadmissible before the Court under the terms of Article 17, see, *inter alia*, (n 267) Scharf; Darryl Robinson, ‘Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court’ (2003) 14 EJIL 481; (n 273) Cárdenas Aravena 127-139.

²⁸¹ For discussion of the operation of the complementarity provisions in relation to African dispute resolution mechanisms see, *inter alia*, Ifeonu Eberachi, ‘Who will save these endangered

These are the type of questions the Prosecutor will have to deal with when determining whether the State is inactive or is indeed conducting investigations and prosecutions. However, given the uncertainty of the notion of ‘national proceedings’, it may well be that, notwithstanding certain activity by the State, the Prosecutor decides to proceed with his own investigations or prosecutions. In such a case, the relevant State can still challenge the Court’s actions, either by requesting a deferral of the investigation, pursuant to Article 18, or by challenging the admissibility of the case, pursuant to Article 19(4). It should be noted however that, as stressed by PTC II:

once the jurisdiction of the Court is triggered, it is for the latter and not for any national judicial authorities to interpret and apply the provisions governing the complementarity regime and to make a binding determination on the admissibility of a given case.²⁸²

In case of disagreement, States are not permitted to unilaterally disregard the Court’s orders, being able only to challenge the admissibility of the relevant case, thereby triggering the PTC review procedure.²⁸³ As such, although the Prosecutor will initially assess within the scope of his discretion whether, in application of the principle of complementarity, due to the State’s action or inaction the Court should or should not act, in case of disagreement, the PTC will make the final determination as to whether the State’s activity actually prevents the Court from intervening.

Notably, the Court was conceived of as part of a universal system of international criminal justice, as opposed to a closed system only relevant and applicable to the Contracting Parties, as with regional systems of human rights protection. Consequently, the investigation or prosecution of crimes under the jurisdiction of the Court by any State, whether or not party to the Statute, will constitute a bar to the exercise of that jurisdiction. Further, and following naturally from the above, any State may request a deferral or submit a challenge to the Court in relation to any case over which it has jurisdiction. Non-

species? Evaluating the implications of the principle of complementarity on the traditional African conflict resolution mechanism’ (2012) 20 AJICL 22.

²⁸² *Kony et al.*, ICC-02/04-01/05-377 para. 45.

²⁸³ *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-163 Decision on the postponement of the execution of the request for surrender of Saif Al-Islam Gaddafi pursuant to Article 95 of the Rome Statute Pre-Trial Chamber I, 1 June 2012 para. 37.

party States enjoy the same procedural rights and are bound by the same requirements when challenging the jurisdiction of the Court or the admissibility of a case as any State Party.²⁸⁴ However, although they can invoke complementarity, non-party States can do so without becoming subject to obligations to cooperate with the Court. Indeed, the Statute does not include any obligation for non-party States seeking to prevent the Court's intervention.²⁸⁵

The second prong of the admissibility test is double jeopardy or *ne bis in idem*. Pursuant to Articles 17(c) and 20(3), *ne bis in idem* functions as in most systems of criminal justice: a case will be inadmissible before the Court where the same person has already been tried elsewhere for the same conduct which forms the basis of the case before the Court. However, Article 20 provides that the case will still be admissible if the previous proceedings were conducted for the purpose of shielding the person or otherwise were not conducted independently or impartially.²⁸⁶ Therefore, *ne bis in idem* acts as a corollary to the principle of complementarity: complementarity applies to investigations and prosecution and *ne bis in idem* to cases that have been already tried.²⁸⁷ Both complementarity and *ne bis in idem* have been considered by the jurisprudence of the Court as forming the first part of the admissibility test related to national proceedings.²⁸⁸ As such, the analysis on complementarity in this Chapter shall be understood to apply, *mutatis mutandis*, to *ne bis in idem*.

²⁸⁴ (n 99) Holmes, 'The Principle of Complementarity' 75.

²⁸⁵ Robert Cryer, 'The International Criminal Court and its relationship to Non-Party States' in Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff Publishers 2009) 119.

²⁸⁶ Article 20(3) stipulates that 'No person who has been tried by another court for conduct also proscribed under article 6, 7, 8 or 8 bis shall be tried by the Court with respect to the same conduct unless the proceedings in the other court: (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.'

²⁸⁷ For a detailed analysis of the negotiation process and the terms of the adoption of the principle of *ne bis in idem* in the Statute see (n 249) El Zeidy 283-298; Immi Tallgren and Astrid Reisinger Coracini, 'Article 20: *Ne bis in idem*' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (Second edn, C.H.Beck - Hart - Nomos 2008) 669-699; (n 99) Holmes, 'The Principle of Complementarity' 56-60; Christine Van den Wyngaert and Tom Ongena, '*Ne bis in idem* Principle, Including the Issue of Amnesty' in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, vol I (Oxford University Press 2002) 705-729.

²⁸⁸ Lubanga, ICC-01/04-01/06-8-Corr para. 29.

The way in which the Prosecutor and the PTC has interpreted and applied the principle of complementarity is discussed below, with particular attention being paid to the PTC's power, in scrutinising the Prosecutor's decisions, to determine the concrete scope of the issues.

3.2.2 *The Prosecutor's approach to complementarity*

On the day of his appointment as the first Chief Prosecutor of the ICC, Luis Moreno Ocampo set out the ground rules of his approach to complementarity. This shaped not only the work of his office during his entire mandate but also that of the Court as a whole. His motto for success was based on the premise that:

as a consequence of complementarity, the number of cases that reach the Court should not be a measure [sic] its efficiency. On the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success.²⁸⁹

As such, rather than focusing on conducting as many investigations and prosecutions as possible - as might be expected from any domestic prosecutor - the OTP anticipated concentrating its efforts on promoting and encouraging national proceedings.

This understanding was supported by a report compiled by a group of experts²⁹⁰ and outlined in a policy paper, both issued in 2003.²⁹¹ These documents added to the idea of promoting national proceedings the notion that the Court was accessible to States and not competing for cases with them. On the contrary, the OTP was eager to reach agreements with States in order to share the 'common burden' of putting an end to impunity. In a rather contradictory statement, arguably encouraging inaction more than the pursuit of domestic proceedings, the policy paper explained that there was 'no impediment to the admissibility of a case before the Court where no State has initiated any

²⁸⁹ Luis Moreno Ocampo, 'Statement made at the ceremony for the solemn undertaking of the Chief Prosecutor of the ICC' (Monday 16 June 2003) 2 <<http://www.iccnw.org/documents/MorenoOcampo16June03.pdf>> accessed 18.12.2014.

²⁹⁰ OTP, *Informal Expert Paper: The principle of complementarity in practice* (International Criminal Court, 2003).

²⁹¹ OTP, Policy Paper September 2003.

investigation’, as ‘there may be cases where inaction by States is the appropriate course of action’.²⁹² In such cases, the Court and the State could ‘agree that a consensual division of labour is the most logical and effective approach’, and that the Court is ‘the more effective forum’.²⁹³ Apparently giving some assurances to States concerned with the possibility that such agreements could trigger the OTP’s scrutiny of national systems, the paper stressed that, in such scenarios, ‘there will be no question of “unwillingness” or “inability” under article 17’.²⁹⁴

In a subsequent Report on Prosecutorial Strategy issued in 2006,²⁹⁵ the OTP’s understanding was labelled ‘positive complementarity’ and was described as one of the pillars of the OTP’s strategy. Complementarity was originally devised to protect State sovereignty by preventing the Court from overriding genuine and legitimate national efforts to achieve accountability. The Court was seen as a potential threat to States’ sovereignty that needed to be contained. ‘Positive complementarity’ represented a break from that approach, emphasising instead the role of the complementarity principle in ensuring the international rule of law by creating an ‘interdependent and mutually reinforcing international system of justice’.²⁹⁶ The Court is no longer to be seen as a threat to States but as a partner holding the same shared burden: that of bringing about an end to impunity. In pursuit of this common goal, the Court will seek to negotiate with States in order to agree on a consensual division of labour.²⁹⁷ This ‘positive’ approach was further described by the OTP as one that ‘encourages genuine national proceedings where possible, relies on national and international networks; and participates in a system of international cooperation’.²⁹⁸ The Court should be then ‘no longer viewed as an institution of last resort, but as an entity that acts in conjunction with and in support of domestic jurisdictions

²⁹² Ibid 5.

²⁹³ Ibid.

²⁹⁴ Ibid.

²⁹⁵ OTP, Prosecutorial Strategy 2006.

²⁹⁶ Ibid 5.

²⁹⁷ For a detailed analysis of the policy and its implications see Carsten Stahn, ‘Complementarity: A Tale of Two Notions’ (2008) 19 Crim LF 87; William W. Burke-White, ‘Implementing a Policy of Positive Complementarity in the Rome System of Justice’ (2008) 19 Crim LF 59; (n 249) El Zeidy 214-222.

²⁹⁸ OTP, Prosecutorial Strategy 2006 5.

through “dialogue” and “assistance””.²⁹⁹ In that way, the Court should ‘contribute to the effective functioning of national judiciaries’.³⁰⁰

The same idea was reiterated in the OTP’s Report on Prosecutorial Strategy of 2010,³⁰¹ which further developed the notion, explaining that complementarity has two dimensions: (i) the admissibility test, related to the assessment of the existence of national proceedings and their genuineness, ‘which is a judicial issue’; and (ii) the concept of positive complementarity, which is ‘a proactive policy of cooperation aimed at promoting national proceedings’.³⁰² The paper also tasked the OTP, in developing this ‘positive’ approach to complementarity, with: (i) sharing information with national judiciaries; (ii) allowing nationals from the relevant States to participate in the OTP’s investigative and prosecutorial activities; and (iii) outreach activities.³⁰³

Although not expressly provided for in the Statute, in theory the positive approach to complementarity does not appear to directly contradict its plain reading.³⁰⁴ It has been argued that its implementation further stems from the Prosecutor’s inherent powers.³⁰⁵ No doubt, a policy of encouraging national proceedings is in line with the letter and spirit of the Statute. However, the approach has become double-edged in its application, as it appears to have actually encouraged inactivity. As a matter of fact, after almost 10 years of application, the record of this prosecutorial approach may be recognised more in the practice of self-referrals and waivers of complementarity by States than in

²⁹⁹ (n 297) Stahn, ‘Complementarity: A Tale of Two Notions’ 102.

³⁰⁰ (n 297) Burke-White 61.

³⁰¹ OTP, *Prosecutorial Strategy 2009 - 2012* (International Criminal Court, 2010).

³⁰² Ibid 5.

³⁰³ Ibid. Such cooperation should not involve the Office ‘directly in capacity building or financial or technical assistance’, but may include: (i) providing information to national judiciaries, where there exists a ‘credible local system of protection for judges or witnesses and other security-related caveats’; (ii) calling upon officials, expert and lawyers to, *inter alia*, ‘participate in OTP investigative and prosecutorial activities’; (iii) providing information about the judicial work of the Office to those involved in political mediation; and (iv) acting as a catalyst with development organisations and donors’ conferences to promote support for accountability efforts, see paragraph 17.

³⁰⁴ It could find its basis in paragraphs 4, 5, 6, 10 and 11 of the Preamble and Articles 1, 15, 17, 18, 19, 53, 54, 59, 86, 88, 89 and 93(10).

³⁰⁵ (n 297) Burke-White 68-70.

the encouragement of genuine national proceedings, raising serious concerns about States' adherence to the spirit of the Statute.³⁰⁶

The practice of self-referrals will be discussed in more detail in Chapter 4. It will be argued that the opening of an investigation following a self-referral is perfectly compatible with the letter and spirit of the Statute. Indeed, the problem is not presented by the self-referral itself, but by the concessions the Prosecutor may potentially make in order to obtain cooperation from the referring State. It is of great concern in fact that, so far, in all cases arising out of investigations triggered by self-referrals, the only targets have been members of rebel groups or non-governmental parties to armed conflicts.³⁰⁷

It might have been expected that governments would not readily agree to refer a situation to the Court insofar as it would result in their being placed under the Court's magnifying glass. But a real 'division of labour' necessarily implies that the Court should refrain from pursuing the investigation or prosecution of certain groups or individuals only if and when States assume that task domestically. The problem is presented when, in the absence of national proceedings against a group allegedly involved in the commission of crimes, the Prosecutor dares not initiate an investigation or prosecution that may not be welcomed by a 'cooperative' self-referring State. Self-referrals indeed involve the risk of benefiting those in power, with the Court prosecuting only their political opponents. In effect, the great risk of a consensual managerial division of labour with States is the politicisation of the Court.

The potential for States to manipulate a consensual division of labour with the Court is a concrete risk posed by the 'positive' approach to complementarity. There are a number of foreseeable dilemmas. What should be the approach, for instance, in relation to States which, despite having the capacity to conduct national proceedings, prefer instead to cooperate with the Court, yet only in

³⁰⁶ See, *inter alia*, William A. Schabas, 'Complementarity in Practice: Some Uncomplimentary Thoughts' (2008) 19 Crim LF 5; (n 277) Jurdi; Gilbert Bitti and Mohamed M. El Zeidy, 'The Katanga Trial Chamber Decision: Selected Issues' (2010) 23 LJIL 319, 329; Justine Tillier, 'The ICC Prosecutor and Positive Complementarity: Strengthening the Rule of Law?' (2013) 13 IntCLR 507.

³⁰⁷ Such were the situations in Uganda, the DRC and the CAR. In relation to the situation in Mali, no case had been initiated at the time of writing.

relation to the prosecution of certain ('convenient') cases? How can the Prosecutor ensure his independence and impartiality in relation to States with whom he has agreed on a consensual division of labour? Can it be realistically expected that States will cooperate with the prosecution of those in power? Is it reasonable to expect that a previously unwilling State will undertake genuine domestic prosecutions in response to the threat of prosecution by the Court? Can such a 'positive' approach to complementarity reasonably be applied to non-party States that are in clear opposition to the Court?³⁰⁸

The experience of the first situations and cases initiated pursuant to this 'positive' approach demonstrates that a policy based on partnership and dialogue could only work in an ideal scenario of States acting in good faith and where those in power (or pro-government forces) have no involvement whatsoever in the commission of crimes under the jurisdiction of the Court. Whenever there is any link between those in power and individuals or groups involved in the commission of crimes, the 'positive' approach to complementarity is likely to fail.³⁰⁹ Indeed, in those scenarios the 'positive' approach bears the risk of undercutting the logic of complementarity itself, undermining the key goals of the Statute by perpetuating the cycle of impunity.

A more proactive involvement by the PTC could safeguard the independence and impartiality of the Court. Of course, the PTC cannot dictate the prosecutorial policies to be followed by the OTP, nor can it force the Prosecutor to prosecute certain individuals unless, pursuant to Article 53(3), the decision not to prosecute is based solely on the interests of justice. Nonetheless, pursuant to Article 54(1)(a) the Prosecutor, as an independent agent of justice, shall 'in order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under the Statute'. Accordingly, and as ensured by Regulation 48(1), the PTC could exercise its inherent powers and, when warranted by the circumstances,

³⁰⁸ It should be noted that the Prosecutor has applied the same policy when dealing with the situations of non-party States (Sudan and Libya), referred to the Court by the UNSC.

³⁰⁹ In the Kenya situation, for example, commentators refer to the failure of positive complementarity 'in the face of perverse complementarity machinations', see Chandra Lekha Sriram and Stephen Brown, 'Kenya in the Shadow of the ICC: Complementarity, Gravity and Impact' (2012) 12 *IntCLR* 219, 243.

request from the Prosecutor an update on the advances of his investigations and the reasons for the lack of prosecution of certain persons or groups. A proactive role by the PTC in scrutinising whether the Prosecutor's actions are a legitimate exercise of his discretion will not only encourage more transparent decision-making within the OTP, but it will also urge genuine investigations and prosecutions at the national level.

Possibly taking into account some of the criticisms of the 'positive' approach to complementarity, under the auspices of the new Chief Prosecutor Fatou Bensouda there has been a clear change of rhetoric within the OTP. In the Strategic Plan 2012-2015 issued in October 2013, the focus has clearly shifted towards the quality and efficiency of the investigations and prosecutions undertaken by the Court.³¹⁰ Although not directly declaring a departure from the 'positive' approach to complementarity, the plan only mentions it once, and then only in reference to the prosecutorial strategy followed so far.³¹¹ Notably, it states that the OTP has to evaluate whether past strategies are 'adapted to future challenges',³¹² and stresses that in relation to 'close monitoring and frequent interaction with countries where situations are under preliminary examination' the OTP 'is presently not able to sustain such high intensity efforts due to lack of resources'.³¹³ Notably, it emphasises the importance of the assistance by 'States and other partners' in enabling States to genuinely investigate and prosecute and places the OTP in the secondary role of '[assisting] in such efforts where appropriate'.³¹⁴ Further, it reframes the OTP's objective as:

Increased complementarity by encouraging genuine national proceedings where States show willingness and an ability to conduct genuine investigations and prosecutions, and by encouraging efforts of other States and partners to provide assistance.³¹⁵

It remains to be seen whether this new approach will actually encourage national proceedings and avoid negative public perceptions concerning the

³¹⁰ OTP, Strategic Plan 2012-2015.

³¹¹ Ibid para. 21.

³¹² Ibid para. 16.

³¹³ Ibid para. 17.

³¹⁴ Ibid para. 66.

³¹⁵ Ibid para. 69.

Court's partiality and lack of independence. The next section examines the manner in which the Court's jurisprudence, particularly that of the different PTCs, has dealt with complementarity and responded to the Prosecutor's approach.

3.2.3 Complementarity in the Court's jurisprudence

The Chambers of the Court have already produced an impressive body of jurisprudence on issues related to complementarity. Given the ever-increasing amount of case law on the matter, the analysis below focuses only on aspects relevant to the PTC's gatekeeping role.

3.2.3.1 The same person - same conduct test

The starting point for the two first prongs of the admissibility test to operate as an impediment to the Court's action is the existence of ongoing national proceedings, ie investigations or prosecutions, pursuant to Article 17(1)(a) and (b), or a previous trial, pursuant to Article 17(c).

In determining the scope of this requirement, PTC I developed in 2006 in the *Lubanga* case the test known as 'same person-same conduct', which established '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 the subject of the case before the Court'.³¹⁶ As such, although the language in Article 17(1)(a) and (b) ('case') is slightly different than that of Articles 17(c) and 20 ('conduct') they were equated, requiring that 'case' always relate to an 'incident-specific conduct'.³¹⁷ This approach was followed by the Court's subsequent jurisprudence,³¹⁸ particularly before the AC ruled on the validity of the test.³¹⁹

³¹⁶ *Lubanga*, ICC-01/04-01/06-8-Corr para. 31.

³¹⁷ Rod Rastan, 'What is a "case" for the purpose of the Rome Statute?' (2008) 19 Crim LF 435, 438.

³¹⁸ See, *inter alia*, *The Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman*, ICC-02/05-01/07-1-Corr Decision on the Prosecution application under article 58(7) of the Statute Pre-Trial Chamber I, 27 April 2007 para. 24; *Ngudjolo*, ICC-01/04-02/07-3 para. 21; *Katanga*, ICC-01/04-01/07-55 para. 20; *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, ICC-01/09-02/11-96 Decision on the Application by the

This interpretation allowed the Court to take over cases and start judicial work during the first years of its functioning. However, it permitted the initiation of cases against individuals who were already being prosecuted at the national level, provided such prosecutions did not cover the specific conduct underlying the Court's proceedings. As such, it endorsed the Prosecutor's 'positive' approach to complementarity. In the *Lubanga* case, at the time the Court's warrant was issued, Thomas Lubanga was already under arrest in the DRC for charges of genocide, crimes against humanity, murder, illegal detention and torture.³²⁰ Since the domestic proceedings did not include enlisting and conscripting children under the age of fifteen and using them to participate in the hostilities (the only conduct for which Lubanga was charged before the Court) the case was considered admissible.³²¹ By the same token, when the arrest of Germain Katanga was requested, he had already been in detention in the DRC for more than 2 years under charges of, *inter alia*, crimes against humanity.³²² Since the Prosecutor informed PTC I that the charges at the national level did not include the attack to the village of Bogoro on 24 February 2003,³²³ (the only incident for which Katanga was charged before the ICC) the case was also considered admissible.³²⁴ These cases triggered considerable criticism of the 'same person-same conduct' test.³²⁵ In particular, commentators

Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute Pre-Trial Chamber II, 30 May 2011 para. 51; *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, ICC-01/09-01/11-101 Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute Pre-Trial Chamber II, 30 May 2011 para. 55.

³¹⁹ In 2009, ruling upon a challenge in the Katanga case the AC stated that it did 'not have to address in the present appeal the correctness of the "same-conduct test" used by the Pre-Trial Chambers to determine whether the same "case" is the object of the domestic proceedings', see *Katanga and Ngudjolo*, ICC-01/04-01/07-1497 para. 81.

³²⁰ *Lubanga*, ICC-01/04-01/06-8-Corr para. 33.

³²¹ *Ibid* paras 37-40.

³²² *Katanga*, ICC-01/04-01/07-55 para. 18.

³²³ Later in the trial proceedings it was established that Bogoro was mentioned at least in an application to extend Katanga's provisional detention before the Supreme Military Court of Kinshasa, which the Prosecutor did not submit before PTC I. The document was however found by TC II not to provide 'decisive information', as it did not specify the date of the acts allegedly committed in Bogoro (a village that was attacked on several occasions) and was not conclusive as to whether the acts were attributed to Katanga or other individuals. See *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-1213-tENG Reasons for the oral decision on the motion challenging the admissibility of the case (Article 19 of the Statute) Trial Chamber II, 16 June 2009 paras 68-73.

³²⁴ *Katanga*, ICC-01/04-01/07-55 paras 20-21.

³²⁵ See, *inter alia*, (n 306) Schabas, 'Complementarity in Practice: Some Uncomplimentary Thoughts' 22-27, stressing that this practice did not actually encourage national justice systems to assume their duties under international law; (n 317) Rastan 439 who, although suggesting that the interpretation follows the plain reading of the Statute, stresses that in situations under the

argued that the DRC's justice system was actually working and the State was thereby meeting its national obligations in terms of addressing impunity.³²⁶ It appears at least questionable whether in these particular cases the test developed by PTC I actually encouraged national proceedings within the DRC,³²⁷ as the proceedings that were being conducted domestically concluded in order to allow the Court's intervention.

One could agree that in these particular cases the Court was the most effective forum to prosecute Lubanga and Katanga due to, for example, legal or factual impediments within the DRC. However it is regrettable that, although aware of the existence of domestic prosecutions, PTC I did not even enquire about the impact of the Court's proceedings on domestic prosecutions. What was going to happen once the suspects were transferred to the Court? Were there going to be subsequent trials, or were the charges at the national level going to be dropped? And if so, was the Prosecutor, within the context of his 'positive' cooperation agreement with the DRC, to be provided with the evidence and information relating to the national proceedings in order to determine whether proceedings akin to those at the national level could be initiated before the Court should the charges in the DRC be dropped? None of these questions were asked and, as a result, the individuals were prosecuted by the Court for only some very specific conduct and incidents that were far from representative of the full extent of the criminality alleged against them at the national level.

As such, after a few years of its application to the concrete cases brought before the Court, the test developed by PTC I proved insufficient and raised additional doubts as to the exact meaning of the word 'case'. In particular, it was not clear whether 'case' required identical charges before the ICC and domestically in order to inhibit the Court from exercising jurisdiction. Were the domestic cases required to include the same underlying offense(s) and the same legal characterisation of the facts as that of the cases before the Court? A

Court's jurisdiction the expectation that every single act of criminality be investigated and prosecuted appears both unrealistic and implausible; (n 277) Jurdi 90, although noting that it does not contravene Article 17, argues that the test is a pragmatic stance that supports positive cooperation between the Court and States.

³²⁶ (n 306) Schabas, 'Complementarity in Practice: Some Uncomplimentary Thoughts' 25.

³²⁷ (n 277) Jurdi 91.

clarification on these questions was of particular importance given that the recognition and incorporation of the crimes under the Statute at the national level has neither been uniform nor mandatory.

A further difficulty relates to ascertaining, at the pre-investigative stage of a situation where cases have not yet been properly identified but the Court is nevertheless called to make assessments of admissibility pursuant to Articles 15, 18 and 53, whether - and which - national proceedings operate as a bar to the exercise of the Court's jurisdiction. When authorising the opening of the investigation in Kenya in March 2010, PTC II stated that the relevant provisions required contextual interpretation. Accordingly, 'an assessment of admissibility during the article 53(1) stage should in principle be related to a "situation"'.³²⁸ Considering that before the initiation of the investigation it was 'not possible to have a concrete case involving an identified suspect (...) the admissibility assessment at this stage actually refers to the admissibility of one or more *potential cases* within the context of a situation'.³²⁹ The notion of 'potential cases' had to be constructed against the preliminary criteria of the group of persons and crimes 'likely to be the focus of an investigation'.³³⁰ In relation to Kenya, since there was evidence of some domestic proceedings for minor offences against persons falling outside the category of those who bear the greatest responsibility,³³¹ the latter being the likely focus of the Prosecutor's investigations,³³² the Chamber found the situation to be admissible given the 'lack of national proceedings (...) with respect to the main elements which may shape the Court's potential case(s)'.³³³

When authorising the investigation in Côte d'Ivoire in October 2011, PTC III followed the same approach to 'potential cases' when assessing the admissibility of the 'situation'.³³⁴ In spite of the fact that there existed national proceedings

³²⁸ *Kenya, ICC-01/09-19-Corr* para. 45.

³²⁹ *Ibid* para. 48 [emphasis added].

³³⁰ *Ibid* para. 50.

³³¹ *Ibid* paras 183-185.

³³² *Ibid* para. 184.

³³³ *Ibid* para. 185.

³³⁴ *Côte d'Ivoire, ICC-02/11-14-Corr* para. 191.

in Côte d'Ivoire and in France for a wide range of crimes and perpetrators,³³⁵ PTC III found the situation to be admissible 'due to the absence of national proceedings against those appearing to be most responsible for the crimes committed during the post-election violence'.³³⁶ However, PTC III clarified the reasons behind the lack of national proceedings against those individuals, noting that it was 'the understanding of the Daola Prosecutor that the individuals with greatest responsibility for the most serious crimes will be prosecuted before the ICC'.³³⁷ This reveals that, even in relation to Article 15 investigations, the Prosecutor may have reached agreements establishing a division of labour with States, which again disincentivises States from using the full extent of their capacities to meet their obligations to investigate and prosecute international crimes.

A key opportunity to revise the 'same person-same conduct' test was presented in 2011 to PTC II in the cases arising out of the situation in Kenya.³³⁸ For the first time in the history of the Court a State challenged the admissibility of cases based on the principle of complementarity. The challenge submitted by the Kenyan government referred to the abovementioned notion of 'potential cases'. In its challenge, Kenya contested the 'same person-same conduct' test, arguing that it should be possible to challenge the admissibility of cases for as long as 'national investigations (...) encompass the same conduct in respect of *persons at the same level of hierarchy*'.³³⁹ Accordingly, Kenya substantiated its challenge by relying on judicial reform and the promise of future investigations,³⁴⁰ arguing that national proceedings were devised with the intention of starting with the 'investigation and prosecution of lower level perpetrators to reach up to those at the highest levels who may have been responsible'.³⁴¹ In its decision PTC II however upheld the 'same person-same

³³⁵ There were pending proceedings before the Abidjan Prosecutor, the Military Prosecutor in Côte d'Ivoire, the Daola Prosecutor, and in France, see *ibid* paras 197-200.

³³⁶ *Ibid* para. 206.

³³⁷ *Ibid* para. 199.

³³⁸ These are the cases against William Ruto, Henry Kosgey and Joshua Sang (case ICC-01/09-01/11); and against Francis Muthaura, Uhuru Kenyatta and Mohammed Ali (case ICC-01/09-02/11).

³³⁹ *Kenyatta et al.*, ICC-01/09-02/11-96 para. 55 [emphasis added]; *Ruto et al.*, ICC-01/09-01/11-101 para. 59 [emphasis added].

³⁴⁰ *Kenyatta et al.*, ICC-01/09-02/11-96 para. 60; *Ruto et al.*, ICC-01/09-01/11-101 para. 64.

³⁴¹ *Kenyatta et al.*, ICC-01/09-02/11-96 para. 57; *Ruto et al.*, ICC-01/09-01/11-101 para. 61.

conduct’ test rejecting the challenges based on the absence of information ‘that there are *ongoing* investigations against the (...) suspects’.³⁴²

Of great relevance to the development of the test are the AC judgments on the appeals submitted by Kenya against PTC II’s decisions.³⁴³ In their judgments, the AC clarified that in its prior decisions it had not yet ruled on the correctness of the ‘same person’ component of the test.³⁴⁴ The AC recalled that Article 17 does not only apply to admissibility determinations of concrete cases but also to preliminary rulings on admissibility pursuant to Articles 15, 18 and 53. Therefore, the AC stressed, the meaning of the term ‘case is being investigated’ in Article 17(1)(a), should be understood in the context to which it is applied.³⁴⁵ For the purpose of proceedings related to Articles 15, 18 and 53, the AC specified, ‘the contours of the likely cases will often be relatively vague (...) [since] no individual suspects will have been identified at this stage, nor will the exact conduct nor its legal classification be clear’.³⁴⁶ In contrast, the AC specified, Article 19 relates to the admissibility of concrete cases, defined by the warrant or summons issued under Article 58, or the charges brought by the Prosecutor and confirmed by the PTC under Article 61.³⁴⁷ Consequently, the AC held that:

the defining elements of a concrete case before the Court are *the individual* and the *alleged conduct*. It follows that for such a case to be inadmissible under article 17(1)(a) of the Statute, the national investigation must cover the *same individual and substantially the same conduct* as alleged in the proceedings before the Court.³⁴⁸

Accordingly, the AC held in relation to Kenya that the cases would only be inadmissible before the Court ‘if the same suspects are being investigated by Kenya for *substantially* the same conduct’.³⁴⁹ The AC judgments are thus

³⁴² *Kenyatta et al.*, ICC-01/09-02/11-96 para. 59 [emphasis added]; *Ruto et al.*, ICC-01/09-01/11-101 para. 70 [emphasis added].

³⁴³ *Kenyatta et al.*, ICC-01/09-02/11-274; *Ruto et al.*, ICC-01/09-01/11-307.

³⁴⁴ *Kenyatta et al.*, ICC-01/09-02/11-274 para. 34; *Ruto et al.*, ICC-01/09-01/11-307 para. 35.

³⁴⁵ *Ruto et al.*, ICC-01/09-01/11-307 paras 38-39; *Kenyatta et al.*, ICC-01/09-02/11-274 paras 37-38.

³⁴⁶ *Ruto et al.*, ICC-01/09-01/11-307 para. 39; *Kenyatta et al.*, ICC-01/09-02/11-274 para. 38.

³⁴⁷ *Ruto et al.*, ICC-01/09-01/11-307 para. 40; *Kenyatta et al.*, ICC-01/09-02/11-274 para. 39.

³⁴⁸ *Ruto et al.*, ICC-01/09-01/11-307 para. 40 [emphasis added]; *Kenyatta et al.*, ICC-01/09-02/11-274 para. 39 [emphasis added].

³⁴⁹ *Ruto et al.*, ICC-01/09-01/11-307 para. 41 [emphasis added]; *Kenyatta et al.*, ICC-01/09-02/11-274 para. 40 [emphasis added].

relevant to both aspects of the test. As to the ‘same person’ component, it will depend on the stage of the proceedings at which the admissibility determination is made. Although not explicitly stated, the AC judgments appear to uphold the notion of ‘potential cases’ developed by the Article 15 authorisations of the investigations in Kenya and Côte d’Ivoire.³⁵⁰ Accordingly, before the proceedings progress to the stage in which specific subjects have been identified, the question would be that of ‘whether suspects at the same hierarchical level are being investigated’.³⁵¹ As to the ‘same conduct’ component of the test, the AC made a subtle but significant clarification when stating that, for a case to be inadmissible, the investigation at the national level had to cover *substantially* the same conduct.³⁵² This interpretation gives the test additional flexibility, arguably leaving aside the need for ‘identical’ charges and widening the scope of the PTC’s discretion in ruling on the admissibility of the cases brought before it.

A new scenario was presented to PTC I in the case arising out of the situation in Libya, which is of particular significance for a number of reasons. Although the situation was referred to the Court by the UNSC,³⁵³ the subsequent fall of the regime and the establishment of a new interim government presented a completely new scenario. The State was no longer inactive nor did it claim to be unwilling or unable to prosecute. Quite the contrary, the State was perhaps too eager to prosecute the members of the former regime.³⁵⁴ For the first time the Court was presented with a true conflict of jurisdiction in which both the Court and the State invoked their right to investigate and prosecute the same individuals.

Further, the Court’s struggle to reconcile different conceptions of complementarity became apparent.³⁵⁵ As soon as the interim government informed the Court of its will to investigate and prosecute Saif al-Islam Gaddafi, the Prosecutor declared to the media that Libya had the right to put the suspect

³⁵⁰ *Kenya*, ICC-01/09-19-Corr paras 50 and 182; *Côte d’Ivoire*, ICC-02/11-14-Corr para. 191.

³⁵¹ *Ruto et al.*, ICC-01/09-01/11-307 para. 42; *Kenyatta et al.*, ICC-01/09-02/11-274 para. 41.

³⁵² *Ruto et al.*, ICC-01/09-01/11-307 para. 40; *Kenyatta et al.*, ICC-01/09-02/11-274 para. 39.

³⁵³ UNSC, *UN Doc S/RES/1970*, Adopted by the Security Council at its 6491st meeting, 26 February 2011 (2011).

³⁵⁴ Frédéric Mégret and Marika Giles Samson, ‘Holding the Line on Complementarity in Libya: The Case for Tolerating Flawed Domestic Trials’ (2013) 11 JICJ 571, 572.

³⁵⁵ Carsten Stahn, ‘Libya, the International Criminal Court and Complementarity: A Test for ‘Shared Responsibility’’ (2012) 10 JICJ 325, 334-336.

on trial in Libya and not transfer him to the Court.³⁵⁶ Although in a more moderate filing before PTC I the Prosecutor recalled that it was for the judges to decide on the admissibility of the case, he advanced different options for a negotiated coordination of the proceedings.³⁵⁷ PTC I, however, insisted that the suspect had to be surrendered to the Court.³⁵⁸ It later stressed that even if a challenge to the admissibility of the case had been submitted, it was for the Chamber to determine whether the State could postpone the person's surrender.³⁵⁹

In 2013, PTC I ruled on the challenges to the admissibility of the cases against Gaddafi and Al-Senussi which had eventually been submitted by Libya. In these decisions PTC I applied the greater flexibility given to the test by the AC judgments in the Kenya cases. Interpreting the AC judgments, PTC I noted that although the validity of the test had been confirmed, rather than referring to 'incidents', the AC referred to the 'conduct "as alleged in the proceedings before the Court"'.³⁶⁰ In the view of PTC I, the determination of what would constitute 'substantially the same conduct' would vary according to the concrete facts and circumstances of a given case, requiring a case-by-case analysis.³⁶¹ Therefore, PTC I held that the parameters of the conduct allegedly under domestic investigation had to be compared to the conduct attributed to the subjects in the pending warrants of arrest issued by the Chamber.³⁶²

In particular, PTC I noted that the events expressly mentioned in the warrant did not represent unique manifestations of the form of criminality alleged against

³⁵⁶ BBC, 'Gaddafi's son right to be tried in Libya, says ICC prosecutor' (2011) <<http://www.bbc.co.uk/news/world-africa-15865811>> accessed 8 June 2014.

³⁵⁷ *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-31 Prosecution's Submissions on the Prosecutor's recent trip to Libya Office of the Prosecutor, 25 November 2011.

³⁵⁸ *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-39-Red Public Redacted Version of Decision Requesting Libya to file Observations Regarding the Arrest of Saif Al-Islam Gaddafi Pre-Trial Chamber I, 6 December 2011.

³⁵⁹ *Gaddafi and Al-Senussi*, ICC-01/11-01/11-163 para. 37.

³⁶⁰ *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-344-Red Decision on the admissibility of the case against Saif Al-Islam Gaddafi Pre-Trial Chamber I, 31 May 2013 para. 76.

³⁶¹ *Ibid* para. 77; *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-466-Red Decision on the admissibility of the case against Abdullah Al-Senussi Pre-Trial Chamber I, 11 October 2013 para. 66(iii).

³⁶² *Gaddafi and Al-Senussi*, ICC-01/11-01/11-466-Red para. 66(iii); *Gaddafi and Al-Senussi*, ICC-01/11-01/11-344-Red para. 78.

Gaddafi in the proceedings before the Court.³⁶³ Rather, they constituted ‘samples of a course of conduct (...) which resulted in an unspecified number of [crimes]’.³⁶⁴ As such, in line with the purpose of complementarity, PTC I found it inappropriate to expect Libya’s investigation to cover exactly the same acts mentioned in the warrant as constituting instances of Gaddafi’s alleged course of conduct.³⁶⁵ Instead, it was considered necessary to assess the evidence in order to determine whether the domestic investigation related to the ‘same conduct underlying the warrant’, namely the course of conduct in the context of which the crimes were committed.³⁶⁶

Addressing one of the main concerns raised by commentators,³⁶⁷ PTC I found that the assessment of domestic proceedings should focus on the alleged conduct and not its legal characterisation, emphasising that it is not determinative for an admissibility challenge whether the domestic proceedings were carried out with a view to prosecuting international crimes.³⁶⁸ Specifically, the Chamber held that ‘a domestic investigation or prosecution for “ordinary crimes”, to the extent that the case covers the same conduct, shall be considered sufficient’.³⁶⁹

Although the Chamber found that the ordinary crimes under which Libya was investigating Gaddafi did not ‘cover all aspects of the offences to be brought under the Rome Statute’,³⁷⁰ given that certain provisions of the Libyan Criminal Code considered persecutory intent an aggravating factor to the offences, although not an element of any of the crimes,³⁷¹ the Chamber was satisfied that they would ‘sufficiently capture’ Gaddafi’s conduct as alleged in the warrant of arrest.³⁷² However, in a rather contradictory finding, after analysing the evidence submitted, PTC I stated that it was not persuaded that Libya was

³⁶³ *Gaddafi and Al-Senussi*, ICC-01/11-01/11-344-Red paras 79-82.

³⁶⁴ *Ibid* para. 82.

³⁶⁵ *Ibid* para. 83.

³⁶⁶ *Ibid*.

³⁶⁷ See, *inter alia*, (n 249) El Zeidy 205; (n 273) Williams and Schabas 616; (n 355) Stahn, ‘Libya, the International Criminal Court and Complementarity: A Test for ‘Shared Responsibility’’ 339.

³⁶⁸ *Gaddafi and Al-Senussi*, ICC-01/11-01/11-344-Red para. 85.

³⁶⁹ *Ibid* para. 88.

³⁷⁰ *Ibid* para. 113.

³⁷¹ *Ibid* para. 111.

³⁷² *Ibid* para. 113.

investigating the same case as that before the Court,³⁷³ since the evidence as a whole did not allow it to discern the actual contours of the national case against Gaddafi.³⁷⁴

As to Al-Senussi, PTC I further developed the test, in particular in relation to the definition of ‘conduct’. It stated that what is required at every phase of the proceedings before the Court is that the alleged criminal conduct be sufficiently described with reference to precise temporal, geographic and material parameters, but not that such conduct should invariably be composed of one or more incidents.³⁷⁵ PTC I further held that the ‘incidents’ or ‘events’ mentioned in the warrant were only ‘illustrative’ and ‘non-exhaustive’ examples of discrete criminal acts constituting the ‘conduct’ alleged against Al-Senussi.³⁷⁶ Accordingly, the Chamber found that it was not required that the domestic proceedings concern each of those ‘events’ in order for it to be satisfied that Libya was investigating or prosecuting Al-Senussi for ‘substantially’ the same conduct as alleged before this Court.³⁷⁷ In applying this approach, PTC I was satisfied that the facts under investigation in Libya comprised ‘the relevant factual aspects of Mr Al-Senussi’s conduct as alleged in the proceedings before the Court’,³⁷⁸ including, at a minimum, the events described in the warrant.³⁷⁹ Therefore, PTC I found that ‘Libya has demonstrated that it is undertaking domestic proceedings covering the “same case” as that before the Court within the meaning of article 17(1)(a) of the Statute’.³⁸⁰

The appeals submitted by Libya against PTC I’s decisions were decided in May and July 2014 in divided AC judgments.³⁸¹ The AC reiterated that ‘the

³⁷³ Ibid para. 134.

³⁷⁴ Ibid para. 135.

³⁷⁵ *Gaddafi and Al-Senussi*, ICC-01/11-01/11-466-Red para. 75.

³⁷⁶ Ibid paras 76-77.

³⁷⁷ Ibid para. 79.

³⁷⁸ Ibid para. 164.

³⁷⁹ Ibid para. 165.

³⁸⁰ Ibid para. 168.

³⁸¹ *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-547-Red Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled ‘Decision on the admissibility of the case against Saif Al-Islam Gaddafi’ Appeals Chamber, 21 May 2014; *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-565 Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled ‘Decision on the admissibility of the case against Abdullah Al-Senussi’ Appeals Chamber, 24 July 2014. In the Gaddafi judgment Judge Anita Ušacka dissented and Judge Sang-Hyun Song appended a separate opinion, while both judges appended separate

parameters of a “case” are defined by the suspect under investigation and the conduct that gives rise to criminal liability under the Statute’.³⁸² Further, the ‘conduct’ that defines the ‘case’ is both that of the suspect *and* that described in the incidents under investigation.³⁸³ Providing for some additional flexibility to the test, the AC stressed that, ultimately, what constitutes the same case and the extent to which there must be overlap will depend upon the facts of the specific case.³⁸⁴ If the underlying incidents are identical, the case will be straightforwardly inadmissible before the Court, subject to any finding of unwillingness or inability.³⁸⁵ At the other end of the scale, it will be hard to argue that the State and the Court are investigating the same ‘case’ when none of the incidents are the same, but the required degree of overlap could vary from case to case depending upon the precise facts.³⁸⁶ In any event, however, the incidents must always play a central role in the comparison.³⁸⁷ In the view of the AC, a judicial assessment would therefore be necessary to determine whether the cases mirror each other sufficiently. Such an assessment would include a consideration of the interests of victims and the impact on them by any decision that a case is inadmissible at the Court, despite not all of the incidents being investigated domestically.³⁸⁸

opinions to the Al-Senussi judgment. See *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-547-Anx1 Separate Opinion of Judge Sang-Hyun Song to the Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled ‘Decision on the admissibility of the case against Saif Al-Islam Gaddafi’ Appeals Chamber, 24 May 2014; *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-547-Anx2 Dissenting Opinion of Judge Anita Ušacka to the Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled ‘Decision on the admissibility of the case against Saif Al-Islam Gaddafi’ Appeals Chamber, 21 May 2014; *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-565-Anx1 Separate Opinion of Judge Sang-Hyun Song to the Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled ‘Decision on the admissibility of the case against Abdullah Al-Senussi’ Appeals Chamber, 24 July 2014; *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-565-Anx2 Separate Opinion of Judge Anita Ušacka to the Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled ‘Decision on the admissibility of the case against Abdullah Al-Senussi’ Appeals Chamber, 24 July 2014.

³⁸² *Gaddafi and Al-Senussi*, ICC-01/11-01/11-547-Red para. 61; *Gaddafi and Al-Senussi*, ICC-01/11-01/11-565 para. 99.

³⁸³ *Gaddafi and Al-Senussi*, ICC-01/11-01/11-547-Red para. 62; *Gaddafi and Al-Senussi*, ICC-01/11-01/11-565 para. 99.

³⁸⁴ *Gaddafi and Al-Senussi*, ICC-01/11-01/11-547-Red para. 71.

³⁸⁵ *Ibid* para. 72.

³⁸⁶ *Ibid*.

³⁸⁷ *Gaddafi and Al-Senussi*, ICC-01/11-01/11-565 para. 101.

³⁸⁸ *Gaddafi and Al-Senussi*, ICC-01/11-01/11-547-Red paras 73-74.

In her dissenting and separate opinion, Judge Ušacka argued for more flexibility, stressing that the ‘same person-same conduct’ test had been developed in the Court’s jurisprudence in the abstract, in relation to cases arising out of self-referrals and on the basis of cases in which the State did not challenge admissibility and did not claim to have undertaken any steps for the investigation or prosecution of the alleged crimes.³⁸⁹ In her view, that interpretation disregards the principle of complementarity laid out in paragraph 10 of the Preamble and Article 1.³⁹⁰ A rigid application of the test to situations in which States are actually dealing with the investigation and prosecution of crimes, she argued, could potentially preclude a State from focusing on a wider scope of criminality having ‘the perverse effect of encouraging that State to investigate only the narrower case selected by the Prosecutor’.³⁹¹ Going even further, she suggested that domestic investigations and prosecutions in a process of transitional justice could better and more directly address the interests of the victims.³⁹² Judge Ušacka further stressed,

the task imposed on the Court is to find the appropriate balance between respecting the sovereignty of States and ensuring an effective Court, within the framework of the overarching common goal of the Court and the States, which is to fight against impunity.³⁹³

This recent disagreement in the AC demonstrates that the issue of the validity of the ‘same person-same conduct’ test clearly remains unsettled and that further developments are probably still to come. The PTC should be aware of the necessity to be responsive to the concrete situations of each case and the need to adapt their responses to changing scenarios, avoiding rigidity in the application of theoretical solutions that do not necessarily respond to the concrete demands of unfolding events.

³⁸⁹ *Gaddafi and Al-Senussi*, ICC-01/11-01/11-547-Anx2 paras 47-48; *Gaddafi and Al-Senussi*, ICC-01/11-01/11-565-Anx2 paras 4-5.

³⁹⁰ *Gaddafi and Al-Senussi*, ICC-01/11-01/11-547-Anx2 para. 47.

³⁹¹ *Ibid* para. 55.

³⁹² *Ibid*.

³⁹³ *Ibid* para. 57.

3.2.3.2 When should admissibility be determined?

Of great relevance to the gatekeeping function of the PTC is the timing of the determination of the admissibility of cases. Initially, the different PTCs followed a literal interpretation of Article 19(1) - which states that '[t]he Court shall satisfy itself that it has jurisdiction in any case brought before it' - and considered that an initial determination of jurisdiction and admissibility had to be made when deciding on a request for a warrant of arrest or a summons to appear. In particular, in July 2005, when issuing warrants of arrest against suspects of the Uganda situation, PTC II made initial findings that the cases fell within the jurisdiction of the Court and appeared to be admissible.³⁹⁴ When deciding on the request for a warrant against Lubanga and Bosco Ntaganda in February 2006, PTC I went even further and stated that, 'an initial determination on whether the case (...) falls within the jurisdiction of the Court and is admissible is a prerequisite to the issuance of a warrant of arrest'.³⁹⁵

However, the AC initially rejected this approach, stating in July 2006 that the issuance of an arrest warrant is not conditional upon an initial determination of the cases' admissibility. In addition, it specified that, although the PTC has discretion to assess admissibility pursuant to Article 19(1), when deciding on *ex parte* prosecution only applications it shall 'exercise such discretion only when it is appropriate in the circumstances of the case, bearing in mind the interests of the suspect'.³⁹⁶

³⁹⁴ *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, ICC-02/04-01/05-53 Warrant of arrest for Joseph Kony issued on 8 July 2005 as amended on 27 September 2005 Pre-Trial Chamber II, 27 September 2005 paras 29-38; *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, ICC-02/04-01/05-54 Warrant of arrest for Vincent Otti Pre-Trial Chamber II, 8 July 2005 paras 29-38; *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, ICC-02/04-01/05-56 Warrant of arrest for Okot Odhiambo Pre-Trial Chamber II, 8 July 2005 paras 19-28; *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, ICC-02/04-01/05-57 Warrant of arrest for Dominic Ongwen Pre-Trial Chamber II, 8 July 2005 paras 17-26; and *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, ICC-02/04-01/05-55 Warrant of arrest for Raska Lukwiya Pre-Trial Chamber II, 8 July 2005 paras 17-26.

³⁹⁵ *Lubanga*, ICC-01/04-01/06-8-Corr para. 18.

³⁹⁶ *Situation in the Democratic Republic of the Congo*, ICC-01/04-169 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' Appeals Chamber, 13 July 2006 para. 52.

Since the July 2006 AC Judgment, the different PTCs have made provisional findings on admissibility only when manifestly warranted by the circumstances of the case, ie when the Prosecutor has brought sufficient information to allow a finding, and stressing that the findings are, ‘without prejudice to any challenge to the admissibility of the case (...) [or] any subsequent determination’.³⁹⁷ Otherwise, noting that the applications still remain *ex parte* and that no ostensible cause impelling the exercise of discretion exists, they have declined to use their discretionary *proprio motu* power to determine the admissibility of the cases at the stage of the issuance of the arrest or summons.³⁹⁸

This restrictive interpretation considerably limits the PTC’s exercise of its gatekeeping functions. Delaying admissibility determinations until the time the person is brought before the Court appears inconsistent with both the overarching principle of complementarity and with the interests of the suspects. An early determination by the PTC of whether the Court is indeed allowed to exercise jurisdiction in a given case would appear more in line with the object and purpose of the Statute.³⁹⁹ In order to ensure both compliance with the principle of complementarity and the Court’s independence and impartiality, the PTC should demand from the Prosecutor a detailed assessment of any national proceedings against the person he seeks to prosecute. In addition, particularly taking into account the evolving interpretation of the ‘same person-same conduct’ test, it appears that a change of approach is now necessary. In order to avoid engaging in cases that are likely to be challenged and potentially found inadmissible, the PTC should engage in determining whether the target individual is being or has been prosecuted domestically for ‘substantially’ the

³⁹⁷ See, *inter alia*, *Harun and Kushayb*, ICC-02/05-01/07-1-Corr para. 18-25; *Katanga*, ICC-01/04-01/07-55 paras 17-21; *Ngudjolo*, ICC-01/04-02/07-3 paras 20-22; *Bemba*, ICC-01/05-01/08-14-tENG paras 20-22.

³⁹⁸ See, *inter alia*, *Bashir*, ICC-02/05-01/09-3 paras 46-51; *The Prosecutor v. Bahr Idriss Abu Garda*, ICC-02/05-02/09-15-AnxA Decision on the Prosecutor’s Application under Article 58 Pre-Trial Chamber I, 7 May 2009 para. 4; *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09-1 Second Decision on the Prosecutor’s Application under Article 58 Pre-Trial Chamber I, 27 August 2009 para. 4; *Ruto et al.*, ICC-01/09-01/11-01 para. 12; *Kenyatta et al.*, ICC-01/09-02/11-01 para. 12; *The Prosecutor v. Muammar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-1 Decision on the ‘Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi’ Pre-Trial Chamber I, 27 June 2011 paras 11-12; *Gbagbo*, ICC-02/11-01/11-9-Red paras 23-24; *Mudacumura*, ICC-01/04-01/12-1-Red para. 18.

³⁹⁹ For additional criticism on the lack of legal foundation of this AC Judgement, see (n 306) Bitti and El Zeidy 323.

same conduct that the Prosecutor wants to bring before the Court, at the early stages of the proceedings.

A positive jurisprudential development came in March 2009, when the AC appeared to partially reconsider its initial position. In deciding on the appeal against a *proprio motu* determination of admissibility made by PTC II in the *Kony* case, the AC stated that holding admissibility proceedings in the absence of the suspects does not necessarily impair their rights. In particular, the assessment would be appropriate when proceedings are not conducted *in camera* and the admissibility assessment is not aimed at determining gravity, being focused rather on whether domestic proceedings may render a case inadmissible.⁴⁰⁰

Proprio motu determinations by the PTC, however, still remain the exception rather than the rule. It is then up to the affected party, ie the suspected individual or the relevant State, to challenge the jurisdiction of the Court pursuant to Article 19. Pursuant to Article 19(4), the person or State can only submit a challenge once, prior to or at the commencement of the trial and only under exceptional circumstances may the Court grant leave for a challenge to be brought more than once or at a later time. Challenges at the commencement of the trial, or subsequently, may only be based on Article 17(1)(c).

In the *Katanga* case, TC II initially defined the term ‘commencement of the trial’ for the purposes of Article 19. It stated that what marked the commencement of the trial was the filing of the decision confirming the charges, which triggers the constitution of a TC.⁴⁰¹ It follows from this interpretation that challenges could regularly be brought only before a PTC and, only in exceptional circumstances -

⁴⁰⁰ *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen, ICC-02/04-01/05-408* Judgment on the appeal of the Defence against the ‘Decision on the admissibility of the case under article 19(1) of the Statute’ of 10 March 2009 Appeals Chamber, 16 September 2009 para. 85.

⁴⁰¹ As such, TC II found that ‘the Statute provides a three-phase approach in respect of challenges to admissibility. During the first phase, which runs until the decision on the confirmation of charges is filed with the Registry, all types of challenges to admissibility are permissible, subject to the requirement, for States, to make them at the “earliest opportunity”. In the second phase, which is fairly short, running from the filing of the decision on the confirmation of charges to the constitution of the Trial Chamber, challenges may still be made if based on the *ne bis in idem* principle. In the third phase, in other words as soon as the chamber is constituted, challenges to admissibility (based only on the *ne bis in idem* principle) are permissible only in exceptional circumstances and with leave of the Trial Chamber’, see *Katanga and Ngudjolo, ICC-01/04-01/07-1213-tENG* para. 49.

and solely based on *ne bis in idem* - before a TC. TC II's decision on this point has been harshly criticised as having 'flawed legal reasoning',⁴⁰² and being based on 'practicality, namely to determine at the earliest possible opportunity the *forum conveniens* which is better suited to deal with the case'.⁴⁰³ When ruling on the appeal to that decision, although apparently in disagreement with TC II's approach, the AC refrained from pronouncing itself on which was the correct interpretation.⁴⁰⁴ A contextual interpretation of the Statute, particularly considering Article 64(8)(a),⁴⁰⁵ supports the conclusion that the trial commences with the hearing of the merits, ie when the TC reads to the accused the charges confirmed by the PTC. Accordingly, although the PTC should exercise its *proprio motu* powers and assess admissibility at the earliest opportunity, the States and the suspect can challenge the admissibility of a case on any ground at any time before the commencement of the hearing of the merits either before the PTC or the TC.

The need to determine admissibility at the earliest opportunity is indeed of critical relevance to the suspects. As a matter of fact, suspects are in a precarious situation when challenging the admissibility of a case arising out of self-referrals and within the context of a consensual division of labour between the State and the Prosecutor. In such scenarios, it is highly unlikely that a suspect will succeed in a challenge based on Article 17(1)(a) and (b). This again calls into question the restrictive approach to the PTC's discretion to determine *proprio motu* the admissibility of cases pursuant to Article 19(1) at the earliest opportunity.

The *Katanga* case is a prime example of the need to assess admissibility at the earliest opportunity. Katanga was the first accused to ever challenge the admissibility of a case pursuant to Article 19. Only after the decision on the confirmation of charges was issued, and when the case was already before TC II, could his defence substantiate the allegation that the case was inadmissible at

⁴⁰² Dov Jacobs, 'The Importance of Being Earnest: The Timeliness of the Challenge to Admissibility in Katanga' (2010) 23 LJIL 331, 340.

⁴⁰³ (n 306) Bitti and El Zeidy 325.

⁴⁰⁴ *Katanga and Ngudjolo*, ICC-01/04-01/07-1497 para. 38.

⁴⁰⁵ The provision reads: 'At the commencement of the trial, the Trial Chamber shall have read to the accused the charges previously confirmed by the Pre-Trial Chamber'.

the time of the issuance of the arrest warrant. Katanga's defence argued that, in determining the admissibility of a case, account should be taken of the facts as they were at the time of the issuance of the warrant of arrest.⁴⁰⁶ This was of particular importance in that case because, the defence argued, when requesting Katanga's arrest the Prosecutor concealed from PTC I crucial information demonstrating that he was being prosecuted in the DRC for the commission of crimes against humanity in the context of the attack on Bogoro.⁴⁰⁷ The only incident for which Katanga was eventually tried and convicted by the Court was indeed the attack on the village of Bogoro on 24 February 2003.⁴⁰⁸

In its observations, the DRC submitted that, at the time of the challenge, there were no pending investigations against Katanga because any investigation previously conducted was terminated when the suspect was transferred to the Court in October 2007.⁴⁰⁹ Further, the DRC's Minister of Justice clearly indicated that the DRC was not willing to reinstitute proceedings against Katanga and that the problem of admissibility should have been raised at the beginning of the proceedings.⁴¹⁰ Even more, and reflecting the understanding within the DRC of the nature of its relationship with the Court, the Minister stated:

When we implement a warrant of arrest and surrender, we as a government, we do this pursuant to our commitments under cooperation with the ICC. And if later on the same court tells it us, 'You have to take this gentleman and judge him back in the Congo,' then I think there's a problem with that, and I think that this is going to call into question our cooperation with the International Criminal Court, and of course this will lead us to try to renegotiate or review our cooperation with the court.⁴¹¹

This statement is worrying not only in respect of the DRC's rather crude threat to review the terms of cooperation with the Court, but also insofar as it shows - once again - that a consensual division of labour with States entails a great risk of jeopardising the Court's independence and impartiality. However, in a

⁴⁰⁶ *Katanga and Ngudjolo*, ICC-01/04-01/07-1213-tENG para. 9.

⁴⁰⁷ *Ibid* para. 16.

⁴⁰⁸ *The Prosecutor v. Germain Katanga*, ICC-01/04-01/07-3436 *Jugement rendu en application de l'article 74 du Statut* Trial Chamber II, 7 March 2014 para. 1.

⁴⁰⁹ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-T-65-ENG CT WT Transcript of hearing on Procedural Matters Trial Chamber II, 1 June 2009 96:3-97:17; see also *Katanga and Ngudjolo*, ICC-01/04-01/07-1497 paras 80-82.

⁴¹⁰ *Katanga and Ngudjolo*, ICC-01/04-01/07-T-65-ENG CT WT 89:20-90:7.

⁴¹¹ *Ibid* 90:7-14.

decision characterised by its restraint and pragmatism,⁴¹² the AC held that ‘the admissibility of a case must be determined on the basis of the facts as they exist at the time of the proceedings concerning the admissibility challenge’.⁴¹³ This is because the admissibility of a case depends primarily on the investigative and prosecutorial activities of States, which may change over time, and Article 17(1) requires the Court to determine whether ‘the case *is* inadmissible, and not whether it *was* inadmissible’.⁴¹⁴

The consistent approach subsequently followed by the Court is that admissibility is determined on the basis of the facts at the time of the challenge. The sole fact that proceedings existed in the past, or may exist in the future, does not impact on the admissibility determinations.⁴¹⁵ Admissibility determinations are thus seen as an ‘ongoing process throughout the pre-trial phase’, with a plurality of parties being vested with the power to raise challenges in addition to the Court’s *proprio motu* powers.⁴¹⁶ The admissibility of cases is not static, but ‘subject to change as a consequence of a change in circumstances’.⁴¹⁷

The AC in the *Katanga* case further rejected the argument of the defence that States should not be allowed to relinquish domestic jurisdiction in favour of the Court.⁴¹⁸ It held that the complementarity principle ‘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 hand’.⁴¹⁹ Consequently, ‘there may be merit in the argument that the sovereign decision 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”’.⁴²⁰ Since the Court has no power to order States to investigate or prosecute domestically, the AC was of the view that, ‘the *general*

⁴¹² Ben Batros, ‘The Judgment on the Katanga Admissibility Appeal: Judicial Restraint at the ICC’ (2010) 23 LJIL 343.

⁴¹³ *Katanga and Ngudjolo*, ICC-01/04-01/07-1497 para. 56.

⁴¹⁴ *Ibid.*

⁴¹⁵ See, *inter alia*, *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-802 Decision on the Admissibility and Abuse of Process Challenges Trial Chamber III, 24 June 2010 para. 217; *Ruto et al.*, ICC-01/09-01/11-101 para. 70; *Kenyatta et al.*, ICC-01/09-02/11-96 para. 66.

⁴¹⁶ *Kony et al.*, ICC-02/04-01/05-377 paras 25-29.

⁴¹⁷ *Ibid.* para. 27.

⁴¹⁸ *Katanga and Ngudjolo*, ICC-01/04-01/07-1497 para. 85.

⁴¹⁹ *Ibid.*

⁴²⁰ *Ibid.*

prohibition of a relinquishment of jurisdiction in favour of the Court is not a suitable tool for fostering compliance by States with the duty to exercise criminal jurisdiction'.⁴²¹ This reasoning, although defensible under a plain reading of the Statute and coincident with the *status quo* at the time the decision was taken, involves the risks of politicising the Court.⁴²² Indeed, unless the Prosecutor actually 'act[s] even-handedly when deciding on what incidents to focus investigations and who to indict',⁴²³ allowing States to relinquish jurisdiction in favour of the Court presents the great risk of the Court being used as an instrument of victor's justice or by one of the warring factions in an internal conflict to tip the balance in its favour. It also contradicts the 'positive' approach to complementarity by discouraging genuine national proceedings and running contrary to the idea that the Court should act as a court of the last resort.⁴²⁴

3.3.2.3 Burden and standard of proof

In the *Bemba* case, TC III first ruled on the burden of proof in the case of admissibility challenges. It held that the burden rests with the one bringing the challenge as 'it falls to him to establish the facts and other relevant matters that are said to support the argument'.⁴²⁵ When ruling on the appeals against the challenges in the Kenya cases, the AC followed the same approach, stating that, 'a State that challenges the admissibility of a case bears the burden of proof to show that the case is inadmissible'.⁴²⁶ In addition, PTC I stressed in the *Gaddafi* case that, 'although [the one challenging] carries the burden of proof, any factual allegation raised by any party or participant must be sufficiently substantiated in order to be considered properly raised'.⁴²⁷

Commentators have criticised this approach, with Claire Brighton arguing, for example, that '[t]he imposition of a legal burden on parties submitting challenges (...) conflict[s] with the object and purpose of upholding the primary

⁴²¹ Ibid para. 86.

⁴²² Carsten Stahn, 'Perspectives on Katanga: An Introduction' (2010) 23 LJIL 311, 317.

⁴²³ Daniel Nsereko, 'The ICC and Complementarity in Practice' (2013) 26 LJIL 427, 446.

⁴²⁴ Susana Sacouto and Katherine Cleary, 'The Katanga Complementarity Decisions: Sound Law but Flawed Policy' (2010) 23 LJIL 363.

⁴²⁵ *Bemba*, ICC-01/05-01/08-802 para. 201.

⁴²⁶ *Kenyatta et al.*, ICC-01/09-02/11-274 para. 61; *Ruto et al.*, ICC-01/09-01/11-307 para. 62.

⁴²⁷ *Gaddafi and Al-Senussi*, ICC-01/11-01/11-466-Red para. 208.

right of states to prosecute international crimes, and to encourage domestic proceedings'.⁴²⁸ Brighton added that Articles 17 and 19 are designed to protect States' sovereign right to prosecute and that this protection is reduced by the imposition of a legal burden on the challenging party.⁴²⁹ The burden on States would therefore 'conflict with the presumption that states will, and ought to, prosecute in their domestic courts'.⁴³⁰

However, it appears necessary to make a fundamental distinction depending on who submits the challenge. When a State is the one challenging the admissibility of cases, it seems unfair and contrary to the overarching goal of putting an end to impunity, to impose on the Prosecutor the burden to prove that the case is admissible. If that were the approach, non-cooperative States would consistently undermine any of the Court's attempts to prosecute alleged perpetrators of crimes under the jurisdiction of the Court. The Prosecutor would, most probably, be unable to demonstrate that the cases are indeed admissible, as he will not have access to the records of the domestic proceedings. The fight against impunity would be easily frustrated.

It is however similarly unfair to impose such a burden on suspects. As was apparent in the *Katanga* case, suspects may not have the necessary information or resources to demonstrate that the Court's case is in fact inadmissible pursuant to Article 17(1). It appears more reasonable to take into consideration that, even if an admissibility determination is not a pre-requisite for the issuance of a warrant or summon in accordance with Article 58(1), admissibility is one of the elements to be considered by the Prosecutor when determining whether there is a sufficient basis for prosecution pursuant to Article 53(2). The Prosecutor should therefore, in any case, always assess the admissibility of the cases he seeks to prosecute before submitting any request to the PTC for the issuance of a warrant or summons. As a logical consequence, when the Chamber decides to determine admissibility pursuant to Article 19(1) or when a suspect challenges admissibility pursuant to Article 19(2)(a), the Prosecutor should bear the onus of demonstrating that the cases he seeks to prosecute are admissible.

⁴²⁸ Claire Brighton, 'Avoiding Unwillingness: Addressing the Political Pitfalls Inherent in the Complementarity Regime of the International Criminal Court' (2012) 12 IntCLR 629, 651.

⁴²⁹ Ibid 652.

⁴³⁰ Ibid 653.

Indeed, it could be argued that to require a suspect or accused to demonstrate that the case is inadmissible constitutes a reversal of the burden of proof. Such a reversal is not generally allowed in criminal proceedings because it contravenes the presumption of innocence, recognised by Article 67(1)(i) of the Statute, which the suspect enjoys as from the moment of his arrest or surrender pursuant to Rule 121(1).

Taking into account the AC's approach to States' relinquishment of jurisdiction in favour of the Court,⁴³¹ and the allocation of the burden of proof to the one bringing the challenge, it becomes essential for the protection of the rights of suspects that the PTC determine admissibility pursuant to Article 19(1) at the earliest opportunity and preferably before issuing a warrant or summons. This is crucial for the protection of the rights of suspects and to ensure respect of the principle of complementarity, particularly when the Prosecutor acts within the context of a cooperation agreement with the relevant State(s). This would constitute a meaningful exercise of the PTC's gatekeeping function, which is essential to guarantee the Court's independence and impartiality.

As to the standard of proof, TC III in the *Bemba* case was of the view that, when the burden lies upon the defence in criminal proceedings, the standard to apply is the 'civil standard' or balance of probabilities.⁴³² However, when confronted with a challenge brought by the State in the Kenya cases, the AC held that, 'the State must provide the Court with evidence of sufficient degree of specificity and probative value that demonstrates that it is indeed investigating the case. It is not sufficient merely to assert that investigations are ongoing'.⁴³³ As such, in order for a State to substantiate a challenge based on the allegation that a case 'is being investigated', it shall demonstrate that it is investigating the same person and substantially the same conduct by:

taking steps directed at ascertaining whether *those suspects* are responsible for that conduct, for instance by interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic

⁴³¹ *Katanga and Ngudjolo*, ICC-01/04-01/07-1497 para. 85.

⁴³² *Bemba*, ICC-01/05-01/08-802 para. 203.

⁴³³ *Kenyatta et al.*, ICC-01/09-02/11-274 para. 61; *Ruto et al.*, ICC-01/09-01/11-307 para. 62.

analyses. The mere preparedness to take such steps or the investigation of *other* suspects is not sufficient.⁴³⁴

Following this approach, PTC I held in the cases arising out of the situation in Libya that the State must provide the Court with ‘evidence [that] shall *demonstrate* that [the State] is taking concrete and progressive steps towards ascertaining [the individual]’s responsibility’.⁴³⁵ In particular, the Chamber requested Libya to provide ‘concrete, tangible and pertinent evidence that proper investigations are currently ongoing’.⁴³⁶ When applying this standard to the case against Gaddafi, PTC I found that, ‘Libya has fallen short of substantiating, by means of evidence of a sufficient degree of specificity and probative value, the submission that the domestic investigation covers the same case that is before the Court’.⁴³⁷

Although pursuant to Article 19(5) States are obliged to make a challenge ‘at the earliest opportunity’, given the demanding standard of proof imposed, the AC has stated that the obligation to submit the challenge will only arise, ‘once [the State] is in a position to actually assert a conflict of jurisdictions. The provision does not require a State to challenge admissibility just because the Court has issued a [warrant or] summons to appear.’⁴³⁸ Consequently, a challenge should be submitted only when a State can present it ‘in such a way that it can [actually] show a conflict of jurisdictions’.⁴³⁹

The demanding standard of proof imposed on States has been criticised for requiring States to, in effect, demonstrate that investigations are almost completed or significantly advanced, in circumstances in which the context, object and purpose of Article 19 appears to support a less demanding

⁴³⁴ *Kenyatta et al.*, ICC-01/09-02/11-274 para. 40; *Ruto et al.*, ICC-01/09-01/11-307 para. 41.

⁴³⁵ *Gaddafi and Al-Senussi*, ICC-01/11-01/11-344-Red para. 54; *Gaddafi and Al-Senussi*, ICC-01/11-01/11-466-Red para. 66(ii).

⁴³⁶ *Gaddafi and Al-Senussi*, ICC-01/11-01/11-344-Red para. 55, referring to ‘all material capable of proving that an investigation is ongoing and that appropriate measures are being envisaged to carry out the proceedings (...) [which] may also include, depending on the circumstances, directions, orders and decisions issued by authorities in charge of the investigation as well as internal reports, updates, notifications or submissions contained in the file arising from the Libyan investigation of the case, to the extent that they demonstrate that Libyan authorities are taking concrete and progressive steps to ascertain whether Mr Gaddafi is responsible for the conduct underlying the warrant of arrest issued by the Court’.

⁴³⁷ *Ibid* para. 135.

⁴³⁸ *Kenyatta et al.*, ICC-01/09-02/11-274 para. 45; *Ruto et al.*, ICC-01/09-01/11-307 para. 46.

⁴³⁹ *Gaddafi and Al-Senussi*, ICC-01/11-01/11-547-Red para. 84.

threshold.⁴⁴⁰ Brighton argues that the stringent threshold imposed in the Kenya cases was aimed at dismissing the admissibility challenge on a procedural ground, instead of entering into the real issue of mistrust as to the genuineness of the Kenyan investigations.⁴⁴¹ According to this view, the Kenya decisions had been influenced by political considerations directed at avoiding the fallout that would have arisen out of a determination of unwillingness on the part of Kenya. Such decisions, commentators argue, are undesirable precedents. In order to ensure its legitimacy, the Court should be prepared to make determinations even when politically unfavourable, demonstrating that it is effectively, transparently and independently fulfilling its role.⁴⁴²

3.2.3.4 The concepts of ‘unwillingness’ and ‘inability’

The first attempt to define unwillingness was made by TC II in the *Katanga* case in July 2009. TC II was guided by the (false)⁴⁴³ premise that the Court should only act in cases of States’ unwillingness and inability, omitting mention of the need for the Court to act first and foremost in cases of States’ inaction. TC II stated that, according to the Statute, ‘the Court may only exercise its jurisdiction when a State which has jurisdiction over an international crime is either unwilling or unable genuinely to complete an investigation and, if warranted, to prosecute its perpetrators’.⁴⁴⁴ As such, TC II found it necessary to first determine whether the DRC was unwilling or unable to prosecute Katanga, in order to decide on the admissibility challenge. It then found that there were two forms of unwillingness: the first, recognised in the Statute, being ‘motivated by the desire to obstruct the course of justice’; while the second, not expressly provided for in the Statute, ‘aims to see the person brought to justice, but not before national courts’.⁴⁴⁵ TC II however found that this ‘second form of unwillingness’, was in line with the object and purpose of the Statute, as it would respect the drafter’s intention to put an end to impunity while

⁴⁴⁰ (n 428) Brighton 653-654.

⁴⁴¹ Ibid 654-661.

⁴⁴² Ibid 661-664.

⁴⁴³ See (n 278) Robinson, ‘The Mysterious Mysteriousness of Complementarity’ 79-80, explaining how even TC II fell into the ‘slogan’ understanding that complementarity is a one-step test focused on ‘unwillingness’ and ‘inability’ only.

⁴⁴⁴ *Katanga and Ngudjolo*, ICC-01/04-01/07-1213-tENG para. 74.

⁴⁴⁵ Ibid para. 77.

adhering to the principle of complementarity.⁴⁴⁶ In addition, it found that the State would not infringe its duty to prosecute ‘if it surrenders the suspect to the Court in good time and cooperates fully with the Court’.⁴⁴⁷

In a decision of great significance for the future understanding and development of the principle of complementarity,⁴⁴⁸ the AC set out a clear structure for the admissibility determination by ruling that ‘the question of unwillingness or inability (...) becomes relevant only where, due to ongoing or past investigations or prosecutions in that State, the case appears inadmissible’.⁴⁴⁹ Therefore, ‘the question of unwillingness or inability is [only] linked to the activities of the State having jurisdiction’.⁴⁵⁰ As such, ‘in case of inaction, the question of unwillingness or inability does not arise; inaction on the part of a State having jurisdiction (...) renders a case admissible before the Court, subject to article 17(1)(d) of the Statute’.⁴⁵¹ Since then, this has been the Court’s consistent jurisprudence: in case of inaction there is no need to delve into an examination of the unwillingness or inability of the State, which only become relevant in the scenarios provided by Article 17(1)(a) and (b).⁴⁵² Consequently, even if inaction is the result of unwillingness and inability of a State to investigate or prosecute, the sole fact that the State is inactive allows the Court to act, without the need of assessing or determining the motivating factors of the State’s inaction.

In addition, the AC stressed that the decision to surrender Katanga to the Court and to close domestic investigations against him as a result of his surrender did not amount to a ‘decision not to prosecute’ in the terms of Article 17(1)(b); rather, it was a decision that ‘he *should* be prosecuted, albeit before the International Criminal Court’.⁴⁵³ TC III and the AC followed this approach in the *Bemba* case,⁴⁵⁴ stating that the decision that the case should be referred to the

⁴⁴⁶ Ibid para. 78.

⁴⁴⁷ Ibid para. 79.

⁴⁴⁸ (n 422) Stahn, ‘Perspectives on Katanga: An Introduction’ 316.

⁴⁴⁹ *Katanga and Ngudjolo*, ICC-01/04-01/07-1497 para.75.

⁴⁵⁰ Ibid para. 76.

⁴⁵¹ Ibid para. 78.

⁴⁵² *Kony et al.*, ICC-02/04-01/05-377 para. 52; *Kenyatta et al.*, ICC-01/09-02/11-96 para. 66; *Ruto et al.*, ICC-01/09-01/11-101 para. 70.

⁴⁵³ *Katanga and Ngudjolo*, ICC-01/04-01/07-1497 para. 82.

⁴⁵⁴ *Bemba*, ICC-01/05-01/08-802 para. 242; *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-962 Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision

Court was not a ‘decision not to prosecute’. However, in the same *Bemba* case, contrary to what was argued by TC II in the *Katanga* case, TC III stated that the fact that CAR sought Bemba’s prosecution at the Court was not a manifestation of ‘unwillingness’ for the purposes of Article 17(1)(b). On the contrary, TC III stated ‘for the purposes of this provision the State is “willing” because it positively seeks the accused’s trial at the ICC’.⁴⁵⁵

In the *Bemba* case, TC III further stressed that the relevant unwillingness or inability is that of the State, as opposed to that of the national judges or courts.⁴⁵⁶ Although the State can take into account observations made by the judiciary, they do not bind it, the relevant factor being therefore the State’s unwillingness or inability.⁴⁵⁷ TC III considered that the CAR had ‘neither the investigative resources to handle these offences adequately (notwithstanding the various witness statements taken by the investigating judge) nor the judicial capacity to try them’.⁴⁵⁸ Therefore, it accepted that ‘the prosecuting authorities and the national courts in the CAR would be unable to handle the case against this accused nationally’, which ‘leads inevitably to the conclusion that for the purposes of Article 17(3) of the Statute, the national judicial system of the CAR is “unavailable”, because it does not have the capacity to handle these proceedings’.⁴⁵⁹

On appeal, the AC stressed that it is not the role of a TC to review decisions of domestic courts to decide whether they have correctly applied national law, since ‘when a Trial Chamber must determine the status of domestic judicial proceedings, it should accept *prima facie* the validity and effect of the decisions of domestic courts, unless presented with compelling evidence indicating otherwise’.⁴⁶⁰

of Trial Chamber III of 24 June 2010 entitled ‘Decision on the Admissibility and Abuse of Process Challenges’ Appeals Chamber, 19 October 2010 para. 74.

⁴⁵⁵ *Bemba*, ICC-01/05-01/08-802 para. 243.

⁴⁵⁶ *Ibid* para. 246.

⁴⁵⁷ *Ibid* para. 247.

⁴⁵⁸ *Ibid* para. 246.

⁴⁵⁹ *Ibid*.

⁴⁶⁰ *Bemba*, ICC-01/05-01/08-962 para. 66.

The issues of ‘unwillingness’ and ‘inability’ of a State to genuinely investigate or prosecute was again touched upon by PTC I when ruling on the challenges submitted by Libya. PTC I held that the willingness and ability of a State genuinely to carry out an investigation or prosecution ‘must be assessed in the context of the relevant national system and procedures’, ie in accordance with the substantive and procedural law applicable in the relevant State.⁴⁶¹ After analysing the different stages of the proceedings and the rights that the accused should enjoy under domestic legislation,⁴⁶² the Chamber entered into the assessment of the facts and evidence of the cases in order to determine the ability and/or willingness of the State to carry out the proceedings.

In the case against Gaddafi, although PTC I was not satisfied that the evidence presented by Libya demonstrated that it was investigating the same case, it found it necessary to continue its analysis to the second part of the test given the serious concerns existing about ‘Libya’s ability genuinely to carry out the investigation or prosecution’ against Gaddafi.⁴⁶³ After analysing the evidence submitted, the Chamber found that, despite the efforts deployed by Libya, ‘multiple challenges remain and (...) Libya continues to face substantial difficulties in exercising its judicial powers across the entire territory’.⁴⁶⁴ In particular, it found that ‘although the authorities for the administration of justice may exist and function’,⁴⁶⁵ Libya (i) was unable to secure the transfer of Gaddafi from his place of detention under the custody of the Zintan militia into the State authority;⁴⁶⁶ (ii) lacked the capacity to obtain the necessary testimony due to the inability of judicial and governmental authorities to ascertain control over detention facilities and provide adequate witness protection;⁴⁶⁷ and (iii) was otherwise unable to carry out its proceedings, as it had not been able to

⁴⁶¹ *Gaddafi and Al-Senussi*, ICC-01/11-01/11-344-Red para. 200; *Gaddafi and Al-Senussi*, ICC-01/11-01/11-466-Red para. 203.

⁴⁶² *Gaddafi and Al-Senussi*, ICC-01/11-01/11-344-Red paras 201-203; and *Gaddafi and Al-Senussi*, ICC-01/11-01/11-466-Red paras 203-206.

⁴⁶³ *Gaddafi and Al-Senussi*, ICC-01/11-01/11-344-Red para. 137.

⁴⁶⁴ *Ibid* para. 205.

⁴⁶⁵ *Ibid* para. 215.

⁴⁶⁶ *Ibid* paras 206-208.

⁴⁶⁷ *Ibid* paras 209-211.

secure legal representation for the accused, which created a practical impediment to the progress of the domestic proceedings against him.⁴⁶⁸

As such, PTC I found that Libya was unable genuinely to carry out the investigation or prosecution.⁴⁶⁹ In a surprising turn, however, and in spite of its finding that Libya was not investigating the same case, the Chamber went on to analyse Libya's ability to prosecute, but not its willingness - thereby notoriously circumventing ruling on the highly sensitive matter of the allegations of serious human rights violations against Gaddafi. PTC I instead avoided the issue by simply stating that it was not necessary 'to address the implications of the alleged impossibility of a fair trial for Mr Gaddafi on Libya's willingness genuinely to carry out the investigation or prosecution'.⁴⁷⁰

When ruling on the appeal in the *Gaddafi* case, the AC recalled its prior jurisprudence to the effect that the question of unwillingness or inability only arises when there is a positive determination as to whether the Court and the State are investigating the same case.⁴⁷¹ Accordingly, as the AC found that Libya was not investigating the same case, it did not assess the findings of inability made by PTC I.⁴⁷² In his separate opinion Judge Song, who would have concluded that Libya was investigating the same case,⁴⁷³ addressed PTC I's findings on inability. Although agreeing with PTC I's findings, he stressed that the concept of 'unavailability' is distinct from that of 'collapse' and that, in order to determine 'inability', the Court is required to find either 'a total or substantial collapse' or the 'unavailability' of the national judicial system.⁴⁷⁴ In addition, in light of the purpose of the Statute to put an end to impunity of the most serious crimes of international concern, Judge Song was of the view that it was 'sufficient for the system to be unavailable *in respect of a particular case*'.⁴⁷⁵ Notably, neither the Majority nor the dissenting or separate opinions made any

⁴⁶⁸ Ibid paras 212-214.

⁴⁶⁹ Ibid paras 215-218.

⁴⁷⁰ Ibid para. 218.

⁴⁷¹ *Gaddafi and Al-Senussi*, ICC-01/11-01/11-547-Red para. 213.

⁴⁷² Ibid para. 214.

⁴⁷³ *Gaddafi and Al-Senussi*, ICC-01/11-01/11-547-Anx1 para. 8.

⁴⁷⁴ Ibid para. 26.

⁴⁷⁵ Ibid.

reference to the impact on the domestic proceedings of the widely reported allegations of violations of Gaddafi's fundamental human rights.⁴⁷⁶

In the case against Al-Senussi, in October 2013 PTC I noted that the same factual circumstances could serve to support findings of either unwillingness or inability and therefore decided to assess them as a whole in order to make an overall determination.⁴⁷⁷ PTC I further stressed that willingness and ability must be assessed in relation to the specific domestic proceedings concerning the same case for which the Chamber was satisfied that there was not a situation of inactivity.⁴⁷⁸ Further, the Chamber took into account only the allegations that could constitute one or more of the scenarios described in Article 17(2) and (3) and only when sufficiently substantiated by the evidence and information at the Chamber's disposal.⁴⁷⁹

In relation to the critical issue of alleged serious violations of the defendant's rights to due process and a fair trial, PTC I stressed that 'alleged violations of the accused's procedural rights'⁴⁸⁰ would 'not *per se* [be] grounds for a finding of unwillingness or inability' since '[i]n order to have a bearing on the Chamber's determination, any such alleged violation must be linked to one of the scenarios provided for in article 17(2) or (3) of the Statute'.⁴⁸¹ PTC I stressed that certain violations of the 'procedural rights of the accused' would be relevant to the assessment of the independence and impartiality of the national proceedings. However, it recalled that Article 17(2)(c) identifies two cumulative requirements and that a finding of unwillingness will proceed 'only when the manner in which the proceedings are being conducted, together with indicating a lack of independence and impartiality, is to be considered, in the circumstances, inconsistent with the intent to bring the person to justice'.⁴⁸² As

⁴⁷⁶ See, *inter alia*, UNGA, UN Doc A/HRC/WGAD/2013, Human Rights Council Working Group on Arbitrary Detention Opinions adopted by the Working Group on Arbitrary Detention at its sixty-eighth session, 13-22 November 2013 No. 41/2013 (Libya), November 2013 (2013).

⁴⁷⁷ Gaddafi and Al-Senussi, ICC-01/11-01/11-466-Red paras 170-171.

⁴⁷⁸ Ibid para. 202.

⁴⁷⁹ Ibid para. 221.

⁴⁸⁰ Ibid para. 235. While this paragraph indeed refers to 'procedural rights', the context is one of a more general discussion of 'fundamental rights', since the following paragraphs address allegations of unlawful rendition, violations of human rights, torture and inhuman or degrading treatment, etc.

⁴⁸¹ Ibid.

⁴⁸² Ibid.

such, a lack of independence and/or impartiality during the national proceedings was not considered sufficient in itself to justify a finding of unwillingness.

As to the defence's allegations of possible violations of Al-Senussi's human rights in the course of the domestic proceedings - which the defence was further unable to verify or substantiate due to Libya's refusal to arrange for a legal visit - the Chamber qualified them as 'generic assertions without any tangible proof' and did not consider them to be 'issues properly raised before the Chamber'.⁴⁸³ PTC I further held that, although the burden of proof as regards the cases' inadmissibility lay with Libya, this could not 'be interpreted as an obligation to disprove any possible "doubts" raised by the opposing participants' and the fact that 'the defence did not have access to Mr Al-Senussi cannot *per se* lead to the positive conclusion that certain fundamental rights of Mr Al-Senussi have been violated (...) or be in itself sufficient to cast doubts on Libya's counter-assertions'.⁴⁸⁴

As to the defence's allegation that the security situation in Libya would affect the functioning of the judiciary and, in turn, directly impact on the national proceedings, the Chamber was of the view that the existence of 'certain constraints under which a national system may be acting does not *per se* render the State unwilling or unable genuinely to carry out proceedings with respect to a specific suspect'.⁴⁸⁵ More specifically, the Chamber made it clear that 'not simply any "security challenge" would amount to the unavailability or a total or substantial collapse of the national judicial system rendering a State unable'.⁴⁸⁶ Further, PTC I found that the fact that certain incidents of threats or violence against judicial authorities may have occurred across the country 'does not necessarily entail "collapse" or "unavailability" of the (...) judicial system such that would impede [its] (...) ability to carry out the proceedings'.⁴⁸⁷

Its analysis of the evidence led PTC I to conclude that there was no indication that the proceedings against Al-Senussi were being undertaken for the purpose

⁴⁸³ Ibid para. 239.

⁴⁸⁴ Ibid para. 239 and footnote 551.

⁴⁸⁵ Ibid para. 261.

⁴⁸⁶ Ibid.

⁴⁸⁷ Ibid para. 281.

of shielding him from criminal responsibility,⁴⁸⁸ nor that the national proceedings were tainted by an unjustified delay that would be inconsistent with the intent to bring him to justice.⁴⁸⁹ Stressing the ‘two cumulative requirements that may ground a finding of unwillingness under article 17(2)(c) of the Statute’ - and without indicating whether it considered the proceedings to have been conducted independently or impartially - PTC I held that Libya had ‘provided persuasive information’ demonstrating that the investigations into Al-Senussi were ‘not being conducted in a manner that is inconsistent with the intent to bring [him] to justice’.⁴⁹⁰ Accordingly, PTC I found that Libya was not unwilling to genuinely carry out the proceedings within the meaning of Article 17(1)(a) and (2).⁴⁹¹

As to Libya’s ability, PTC I found that, given that Al-Senussi was already in the custody of the Libyan authorities, Libya was not unable to obtain the accused.⁴⁹² Further, the Chamber found that some of the evidence and testimony necessary to carry out the proceedings against the suspect were already collected and that there was ‘no indication that collection of evidence and testimony has ceased or will cease because of unaddressed security concerns for witnesses’ or ‘due to the absence of governmental control over certain detention facilities’.⁴⁹³ As such, ‘while reiterating its concerns about the lack of appropriate witness protection programmes (...) in the context of the country’s precarious security situation’, it found that Libya was not unable to obtain the evidence and testimony that were necessary for the proceedings against Al-Senussi.⁴⁹⁴

As to the possible residual form of inability on the part of Libya to ‘otherwise carry out proceedings’, the Chamber was of the view that ‘Libya’s capacity to carry out the proceedings against Mr Al-Senussi is not affected *per se* by the

⁴⁸⁸ Ibid para. 290.

⁴⁸⁹ Ibid para. 291.

⁴⁹⁰ Ibid para. 292. It should be noted that the Chamber made this finding in spite of ‘the fact that Mr Al-Senussi’s right to benefit from legal assistance at the investigation stage is yet to be implemented’ holding that such a deficiency ‘does not justify a finding of unwillingness under article 17(2)(c) of the Statute, in the absence of any indication that this is inconsistent with Libya’s intent to bring Mr Al-Senussi to justice. Rather, from the evidence and submissions before the Chamber, it appears that Mr Al-Senussi’s right to legal representation has been primarily prejudiced so far by the security situation in the country’.

⁴⁹¹ Ibid para. 293.

⁴⁹² Ibid para. 294.

⁴⁹³ Ibid para. 298.

⁴⁹⁴ Ibid para. 301.

ongoing security concerns across the country'.⁴⁹⁵ Further, although noting that Al-Senussi 'has not been provided with *any form of legal representation* for the purposes of the national proceedings against him up until now',⁴⁹⁶ it found that the problem was not compelling at that time, although it had the 'potential to become a fatal obstacle to the progress of the case'.⁴⁹⁷ However, since admissibility must be determined in light of the circumstances at the time of the admissibility proceedings and given Libya's assurance of its ability moving forward to address security concerns and ensure adequate legal representation for Al-Senussi, the Chamber found that Libya was not unable to genuinely carry out the proceedings within the meaning of Article 17(3).⁴⁹⁸ Accordingly, PTC I found that Libya was not unwilling or unable genuinely to carry out its proceedings in relation to the case against Al-Senussi and found the case inadmissible before the Court pursuant to Article 17(1)(a).⁴⁹⁹

The literal interpretation of Article 17(2)(c) followed by PTC I, although arguably based upon its plain reading,⁵⁰⁰ left aside the due process thesis advanced by commentators who argue that national proceedings should, at minimum, guarantee basic fair trial rights to suspects.⁵⁰¹ PTC I followed Heller's approach that a literal interpretation of Article 17 appears to support the view that the Court may find the State unwilling or unable only if its proceedings are designed to make the suspect more difficult to convict and not when they make it 'easier'

⁴⁹⁵ Ibid para. 303.

⁴⁹⁶ Ibid para. 304 [emphasis added].

⁴⁹⁷ Ibid para. 307.

⁴⁹⁸ Ibid paras 308-310.

⁴⁹⁹ Ibid para. 311.

⁵⁰⁰ Kevin Jon Heller, 'The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process' (2006) 17 Crim LF 255, 257, 260; (n 273) El Zeidy 197; (n 99) Holmes, 'The Principle of Complementarity' 75; Enrique Carnero Rojo, 'The Role of Fair Trial Considerations in the Complementarity Regime of the International Criminal Court: From 'No Peace without Justice' to 'No Peace with Victor's Justice'?' (2005) 18 LJIL 829, 835.

⁵⁰¹ See, *inter alia*, Mark S. Ellis, 'International Criminal Court and Its Implication for Domestic Law and National Capacity Building' (2002-2003) 15 FlaJInt'l L 215, 241; Darryl Robinson, 'The Rome Statute and its impact on national law' in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, vol II (Oxford University Press 2002) 1866; Jann K. Kleffner, 'The Impact of Complementarity on National Implementation of Substantive International Criminal Law' (2003) 1 JICJ 86, 112; Carsten Stahn, 'Complementarity, amnesties and alternative forms of justice: some interpretative guidelines for the International Criminal Court' (2005) 3 JICJ 695, 713; (n 297) Stahn, 'Complementarity: A Tale of Two Notions' 97; Federica Gioia, 'State Sovereignty, Jurisdiction, and 'Modern' International Law: The Principle of Complementarity in the International Criminal Court' (2006) 19 LJIL 1095, 1111-1113.

to convict, no matter how unfair the proceedings may be.⁵⁰² Supporting this approach, others have added that the Court is a purely complementary institution concerned with putting an end to impunity rather than with fair trial violations and should not behave as a human rights court.⁵⁰³

One could also argue however that the context and purpose of the Statute and the very reason for the creation of the Court leave room for a teleological interpretation of Article 17(2)(c), requiring a moderate form of due process applicable in cases of flagrant violation of fair trial rights.⁵⁰⁴ A strong case is presented by some who argue that, when domestic trials are flawed to the point that one cannot realistically say that there has been a trial at all, the idea of justice encompassed by Article 17(2)(c) has not actually been realised.⁵⁰⁵ A Kafkaesque political abuse of the judicial process for persecution rather than justice cannot be compatible with ‘an intent to bring the person concerned to justice’.

PTC I could have applied a more constructive interpretation of what should be properly understood as ‘an intent to bring the person to justice’. The issue touches upon the very concept of ‘justice’ and ‘trial’ in the Statute - a substantive question that has not been directly addressed by the Court’s jurisprudence so far. The matter may be seen to be of critical importance. Might it be the case, for instance, that any trial - no matter how unfair - displays an ‘intent to bring the person to justice’ within the context of the Statute? When the violations of the due process rights of defendants are of such magnitude that the trial has been, in fact, deprived of its essential character, can that properly be considered ‘justice’? When the trial proceedings are used to orchestrate what is, in fact, a show trial, or what merely represents vengeance or victor’s justice,

⁵⁰² (n 500) Heller 257

⁵⁰³ (n 354) Mégret and Giles Samson 573-581

⁵⁰⁴ Elinor Fry, ‘Between Show Trials and Sham Prosecutions: The Rome Statute’s Potential Effect on Domestic Due Process Protections’ (2012) 23 Crim LF 35; Harmen Van der Wilt and Sandra Lyngdorf, ‘Procedural obligations under the European Convention on Human Rights: Useful guidelines for the assessment of ‘unwillingness’ and ‘inability’ in the context of the complementarity principle’ (2009) 9 IntCLR 39, 68-69.

⁵⁰⁵ (n 354) Mégret and Giles Samson 584-587, applying to the admissibility test the test elaborated by Radbruch for positive law, see Gustav Radbruch, Bonnie Litschewski Paulson and Stanley L. Paulson, ‘Statutory Lawlessness and Supra-Statutory Law (1946)’ (2006) 26 OJLS 1. See also, (n 34) Fuller 660, arguing that ‘a dictatorship which clothes itself with a tinsel of legal form can so far depart from the morality of order, from the inner morality of law itself, that it ceases to be a legal system’.

can that be considered compatible with the ‘intent to bring the person to justice’?

It has been argued that the ‘intent to bring the person to justice’ can only be reconciled with that person’s submission to ‘a lawful judicial procedure with legal guarantees for determining the truth and arriving at a just decision’.⁵⁰⁶ This interpretation is in line with a contextual and purposive interpretation of the Statute. Notably, paragraph 11 of the Preamble recalls that the Court was created ‘to guarantee lasting respect for and the enforcement of international justice’. Article 17(1)(a) and (b) add a requirement for national proceedings to be carried out ‘genuinely’.⁵⁰⁷ The principles and norms of due process ‘recognised by international law’ are mentioned twice, in Articles 17(2) and 20(3), as guidance for the interpretation of the complementarity regime. Further, Article 21(3) rules that the application and interpretation of the law ‘must be consistent with internationally recognised human rights’. Of even greater significance is the fact that, within the crimes under the jurisdiction of the Court, the Statute includes as war crimes, in Article 8(2)(b)(xiv) and (c)(iv),⁵⁰⁸ certain conduct amounting to depriving suspects of their basic judicial guarantees. A coherent interpretation of the Statute cannot lead to the absurd conclusion that the very same conduct that would qualify as a crime under the jurisdiction of the Court - depriving suspects of their basic judicial guarantees - would nevertheless be insufficient to amount to an unwillingness of the State to investigate or prosecute for the purposes of an admissibility determination.

Trials where suspects are deprived of the most basic due process rights recognised by international law - such as, among others, the right to legal representation, the right to be informed of the charges, the right to attend trial,

⁵⁰⁶ (n 505) Radbruch, Paulson and Paulson 2.

⁵⁰⁷ See (n 278) Robinson, ‘The Mysterious Mysteriousness of Complementarity’ 87, explaining that the adverb ‘genuinely’ was added in order to qualify ‘to carry out’, ‘with the result that not just any ostensible investigation will displace Court action. The requirement that the State be carrying out the proceedings genuinely was felt to connote that the proceedings were “real”, “not a sham” and met at least some rudimentary standard of objective quality.’

⁵⁰⁸ Article 8(2)(b)(xiv) includes as a war crime in international armed conflicts ‘Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the national of the hostile party’; article 8(2)(c)(iv) considers a war crime in non-international armed conflicts, ‘The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.’

the right to defend oneself and to remain silent - are show trials and incompatible with an 'intent to bring the person to justice'. In such cases, the PTC should be prepared to make politically difficult decisions and rise above the possible political bargaining in which the Prosecutor may have become involved in to secure cooperation. Although national action is, in principle, the preferred response to international crimes and States have the right to investigate and prosecute, such sovereign prerogative is not unrestricted. States can only retain jurisdiction to try the crimes under the Statute when they guarantee defendants, at a minimum, the most basic rights of due process recognised by international law.

In July 2014, the AC confirmed PTC I's decision holding that the concept of 'unwillingness' is primarily concerned with a situation in which proceedings are conducted in a manner that would lead to a suspect evading justice.⁵⁰⁹ It confirmed the position that a State will be unwilling pursuant to Article 17(2)(c) only when there is a failure to conduct proceedings independently or impartially *and* such proceedings are inconsistent with an intent to bring the persons concerned to justice.⁵¹⁰ The AC stressed that the Court 'was not established to be an international court of human rights, sitting in judgment over domestic legal systems to ensure that they are compliant with international standards of human rights'.⁵¹¹

However, the AC did address, to a certain extent, the abovementioned concerns by stating that, although admissibility is not an inquiry into the fairness of national proceedings, this does not mean *per se* that the Court must turn a blind eye to conclusive evidence that national proceedings completely lack fairness.⁵¹² It stressed rather that, in the extreme, proceedings that are in reality 'little more than a predetermined prelude to an execution', which are contrary to the most basic understanding of justice, will not be sufficient to render a case inadmissible.⁵¹³ Accordingly, the AC conceded that there may be circumstances:

⁵⁰⁹ *Gaddafi and Al-Senussi*, ICC-01/11-01/11-565 para. 218.

⁵¹⁰ *Ibid* para. 230(1).

⁵¹¹ *Ibid* para. 219.

⁵¹² *Ibid* para. 229.

⁵¹³ *Ibid* para. 230.

whereby violations of the rights of the suspect are so egregious that the proceedings can no longer be regarded as being capable of providing any genuine form of justice to the suspect so that they should be deemed, in those circumstances, to be ‘inconsistent with an intent to bring that person to justice’.⁵¹⁴

However, the AC found that, in the Al-Senussi case, PTC I’s findings were not unreasonable and that Libya was not unwilling or unable to conduct the proceedings.⁵¹⁵

3.3 The Gravity Threshold

3.3.1 General Remarks

The third prong of the admissibility test is the gravity threshold. Pursuant to Article 17(1)(d), the Court may declare a case to be inadmissible when it is ‘not of sufficient gravity to justify further action by the Court’. The standard of gravity is not elaborated upon in the Statute, although it was clearly included by the drafters as an additional layer, filtering out the type of situations and cases that do not require the Court’s attention.⁵¹⁶ All crimes falling under the jurisdiction of the Court are certainly sufficiently serious, but the provision was included in order to prevent the Court from being swamped by peripheral complaints.⁵¹⁷ Pursuant to Articles 17(1) and 53(1) and (2), the assessment of gravity – as that of complementarity – is a mandatory requirement for the selection of situations and cases to be investigated and prosecuted by the Court.

It should be noted, however, that the issue of gravity, while being initially virtually ignored by commentators,⁵¹⁸ has, since being applied by the Prosecutor and PTC I, been the source of great debate. As will be discussed below, the Prosecutor and PTC have relied on the gravity test to justify both a focus on

⁵¹⁴ Ibid para. 230(3).

⁵¹⁵ Ibid paras 232, 297-298.

⁵¹⁶ For the drafting history and the reasons that lead to the inclusion of the gravity threshold as an issue of admissibility, see Mohamed M. El Zeidy, ‘The Gravity Threshold under the Statute of the International Criminal Court’ (2008) 19 Crim LF 35, 35-39; (n 273) Williams and Schabas 619-622.

⁵¹⁷ El Zeidy, ‘The Gravity Threshold under the Statute of the International Criminal Court’ 37.

⁵¹⁸ William A. Schabas, ‘Prosecutorial Discretion v. Judicial Activism at the International Criminal Court’ (2008) 6 JICJ 731, 736.

senior leaders and qualitative and quantitative approaches to the prosecution of crimes.

3.3.2 *The Prosecutor's Approach to Gravity*

Under Moreno Ocampo, the OTP's understanding was that gravity 'should not be exclusively attached to the act that constituted the crime but also to the degree of participation in its commission'.⁵¹⁹ Consequently, the stated policy was that:

*as a general rule, the Office of the Prosecutor should focus its investigations and prosecutorial efforts and resources on those who bear the greatest responsibility, such as the leaders of the State or organisation allegedly responsible for those crimes.*⁵²⁰

Although recognising that this strategy 'will leave an impunity gap unless national authorities, the international community and the Court work together to ensure that all appropriate means for bringing other perpetrators to justice are used', no concrete action was proposed apart from stating that in some cases the focus 'may go wider than high-ranking officers' and that for other offenders 'alternative means for resolving the situation may be necessary'.⁵²¹

The 2006 Report of Prosecutorial Strategy also mentioned the idea of 'focused investigations', reinforcing the understanding of gravity as the need to focus the OTP's efforts 'on the most serious crimes and on those who bear the greatest responsibility for these crimes'.⁵²² Developing further the scenario of impunity that may result from such an approach to gravity, it stressed the need to encourage 'national measures against other offenders'.⁵²³ It further explained that the OTP had adopted a 'sequenced' approach to the selection of cases within a situation, in accordance with which cases were selected on account of their gravity. It clarified that the factors relevant in assessing gravity are the scale, nature, manner of commission, and impact of the crimes.⁵²⁴ The OTP, moreover, explained that the policy of 'focused investigations' also entails the

⁵¹⁹ OTP, Policy Paper September 2003 7.

⁵²⁰ Ibid [emphasis in the original].

⁵²¹ Ibid.

⁵²² OTP, Prosecutorial Strategy 2006 5.

⁵²³ Ibid.

⁵²⁴ Ibid.

selection of a limited number of incidents with a small number of witnesses called to testify, in order to carry out 'short investigations and propose expeditious trials while aiming to represent the entire range of criminality'.⁵²⁵ Incidents were to be selected which were 'reflective of the gravest incidents and the main types of victimization'.⁵²⁶ The same approach was repeated in the Report published in 2010.⁵²⁷

The approach to gravity adopted by the first Chief Prosecutor has been strongly criticised as being 'invoked not so much as a justification for the selection of cases on which to proceed [but] as a justification for refusing to undertake other cases'.⁵²⁸ Indeed, the first Prosecutor originally used gravity to justify not opening an investigation into the crimes allegedly committed by British troops in Iraq.⁵²⁹ However, the strictly numerical argument used by him appears flawed when compared with other situations or cases that were undertaken by the OTP. The approach to gravity under Moreno Ocampo has also been criticised in the context of the lack of meaningful control by the PTC, particularly in relation to the refusal to investigate in Iraq and the lack of investigation beyond the child soldiers charge in the *Lubanga* case.⁵³⁰

Under Fatou Bensouda, in a clear departure from the policy of her predecessor, the OTP completely transformed its approach to gravity. In its Strategic Plan published in 2013, it recognised the need for a change of approach in light of the

⁵²⁵ Ibid.

⁵²⁶ Ibid 5-6.

⁵²⁷ OTP, Prosecutorial Strategy 2009 - 2012 paras 18-21.

⁵²⁸ (n 518) Schabas, 'Prosecutorial Discretion v. Judicial Activism at the International Criminal Court' 740.

⁵²⁹ OTP, 'Response to Communications Received Concerning Iraq' (*International Criminal Court*, 9 February 2006) <http://www.icc-cpi.int/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDEBEF7/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf> accessed 24 June 2014. It should be noted, however, that the new Prosecutor has recently reopened the preliminary examination of the situation in Iraq, see OTP, 'Prosecutor of the International Criminal Court, Fatou Bensouda, re-opens the preliminary examination of the situation in Iraq' (*International Criminal Court*, 13 May 2014) <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-statement-iraq-13-05-2014.aspx> accessed 24 June 2014. It will be interesting to see how the new Prosecutor deals with the situation now.

⁵³⁰ See, *inter alia*, (n 518) Schabas, 'Prosecutorial Discretion v. Judicial Activism at the International Criminal Court' 741-745; William A. Schabas, 'Prosecutorial discretion and gravity' in Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff Publishers 2009); Ignaz Stegmiller, 'The Gravity Threshold under the ICC Statute: Gravity Back and Forth in *Lubanga* and *Ntaganda*' (2009) 9 IntCLR 547; (n 516) El Zeidy, 'The Gravity Threshold under the Statute of the International Criminal Court' 40-41.

required evidentiary standards to prove the criminal responsibility of the ‘most responsible perpetrators’ and due to limitations in investigative possibilities and/or lack of cooperation.⁵³¹ It further stated the OTP’s decision to abandon the notion of ‘focused investigations’, replacing it with the ‘principle of in-depth, open ended investigations’.⁵³² In its new approach, the OTP acknowledges that a different strategy ‘of gradually building upwards’ might be needed, in the sense of ‘first investigate and prosecute a limited number of mid- and high-level perpetrators in order to ultimately have a reasonable chance to convict the most responsible’.⁵³³ In addition, the new policy also includes ‘prosecuting lower level perpetrators where their conduct has been particularly grave and has acquired extensive notoriety’.⁵³⁴

Apparently addressing some of the abovementioned criticism, in the Policy Paper issued in November 2013, the OTP explained its approach to gravity in its preliminary examinations.⁵³⁵ It stated that impartiality in the selection of cases, which depends crucially on the gravity assessment, ‘does not mean an “equivalence of blame” between different persons and groups within a situation or that the Office must necessarily prosecute all sides’.⁵³⁶ It further argued that the OTP would focus its efforts ‘objectively on those most responsible for the most serious crimes within a situation (...) irrespective of the States or parties involved’.⁵³⁷

3.4.2 Gravity in the Court’s jurisprudence

When deciding on the initial request for a warrant of arrest against Bosco Ntaganda in February 2006, PTC I noted that the gravity threshold was an additional requirement to ‘the drafters’ careful selection of the crimes included in articles 6 to 8 of the Statute’.⁵³⁸ Therefore, it held that ‘the fact that a case

⁵³¹ OTP, Strategic Plan 2012-2015 para. 22.

⁵³² Ibid para. 23.

⁵³³ Ibid para. 22.

⁵³⁴ Ibid.

⁵³⁵ OTP, *Policy Paper on Preliminary Examinations* (International Criminal Court, 2013) paras 59-66.

⁵³⁶ Ibid para. 66.

⁵³⁷ Ibid.

⁵³⁸ *The Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-20-Anx2 Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58 Pre-Trial Chamber I, 10 February 2006 para. 42.

addresses one of the most serious crimes for the international community as a whole is not sufficient for it to be admissible before the Court'.⁵³⁹ Dwelling at length on literal, contextual and teleological interpretations of the Statute and resorting to the applicable rules of international law, PTC I held that a case would meet the gravity threshold only if: (i) the alleged conduct was either systematic or large-scale, giving due consideration to the social alarm that such conduct may have caused in the international community; and (ii) the person sought to be prosecuted would fall under the category of the 'most senior leaders' in the situation under investigation. The latter criterion was to be assessed on the basis of: (a) the organisational position of the person; (b) the role played by that person through acts or omissions when the organisation committed the crimes; and (c) the role played by the organisation in the overall commission of crimes within the situation under investigation.⁵⁴⁰

PTC I held that the additional gravity threshold was a 'key tool provided by the drafters to maximise the Court's deterrent effect',⁵⁴¹ something which could be achieved, in the view of the Chamber, by concentrating the Court's activities on the most senior leaders.⁵⁴² Considering that Ntaganda occupied (only) the third level of the command structure of the military wing of a broader UPC/FPLC movement, the Chamber found that he did not fall within the category of the most senior leaders in the DRC situation and, therefore, that the case against him did not meet the gravity threshold provided for in Article 17(1)(d) of the Statute and was inadmissible.⁵⁴³ According to the PTC's decision, the gravity assessment was a twofold exercise that required positive compliance with two requirements: the gravity of the conduct, or, as it will be called below, 'material gravity', and the high rank of the individuals involved, or 'personal gravity'.

As noted in Section 3.2.3.2, in July 2006 the AC reversed PTC I's decision on the grounds that the determination of the admissibility of a case was not a

⁵³⁹ Ibid.

⁵⁴⁰ Ibid paras 43-64.

⁵⁴¹ Ibid para. 49.

⁵⁴² Ibid para. 55.

⁵⁴³ Ibid paras 77-89.

prerequisite for the issuance of a warrant of arrest.⁵⁴⁴ Although, as a general rule, the practice of the AC is not to provide guidance on issues other than those strictly necessary for the disposition of an appeal, the AC found it necessary to address the matter of the interpretation of Article 17(1)(d), as it ‘could have an impact on the Court as a whole’.⁵⁴⁵ In the view of the AC, PTC I ‘erred in law in its interpretation of “sufficient gravity” under article 17(1)(d) of the Statute’.⁵⁴⁶ In particular, the AC found that, in requiring that the conduct should be either systematic or large-scale, PTC I introduced an additional criteria that would effectively blur the distinction between war crimes and crimes against humanity established in Articles 7 and 8 of the Statute.⁵⁴⁷ Indeed, the requirement under the Statute that war crimes be committed on a ‘large scale’ is an alternative to the requirement that they be committed as ‘part of a policy’, while the requirement of ‘systematic’ is only relevant for crimes against humanity.⁵⁴⁸ Further, the AC found that the subjective criterion of social alarm ‘is not a consideration that is necessarily appropriate for the determination of admissibility pursuant to Article 17(1)(d) of the Statute’.⁵⁴⁹

As to PTC I’s call for a focus on senior leaders as a means of maximising the Court’s deterrent effect, the AC argued that it was difficult to understand how the deterrent effect would be higher if not all perpetrators could be brought before the Court. Indeed, it argued that it would be ‘more logical to assume that the deterrent effect of the Court is highest if no category of perpetrators is *per se* excluded from potentially being brought before the Court’.⁵⁵⁰ The AC further stressed that ‘the imposition of rigid standards primarily based on top seniority may result in neither retribution nor prevention being achieved’.⁵⁵¹ In effect, ‘the predictable exclusion of many perpetrators (...) could severely hamper the preventive, or deterrent, role of the Court which is a cornerstone of the creation of the (...) Court’.⁵⁵² Further, in the AC’s view the teleological interpretation of Article 17(1)(d) proposed by PTC I conflicts with a contextual

⁵⁴⁴ *Congo, ICC-01/04-169* paras 42-53.

⁵⁴⁵ *Ibid* para. 54.

⁵⁴⁶ *Ibid* para. 3.

⁵⁴⁷ *Ibid* para. 70.

⁵⁴⁸ *Ibid*.

⁵⁴⁹ *Ibid* para. 72.

⁵⁵⁰ *Ibid* para. 73.

⁵⁵¹ *Ibid* para. 74.

⁵⁵² *Ibid* para. 75.

interpretation of the Statute, since various provisions do apply to persons other than the most senior leaders and the drafters did not include such a limitation.⁵⁵³ As such, the AC found the test devised by PTC I to be flawed and reversed the decision.⁵⁵⁴ Consequently, the AC eliminated from the gravity equation the individual requirement of personal gravity imposed by PTC I. Gravity in the AC's tests only relates to the conduct - it is a single test focused only on material gravity. Indeed, the personal gravity criterion could only subsist as a prosecutorial policy choice,⁵⁵⁵ allowing prosecutorial discretion and management of the (likely) unlimited number of cases and situations that may qualify as crimes under the Statute. A contextual reading of the Statute supports the AC's conclusion that personal gravity cannot be constructed as a legal requirement banning the Court from dealing with cases involving individuals who are not necessarily at the top of the line of command.⁵⁵⁶ While it is the argument of this thesis that the PTC has a supervisory role in relation to the Prosecutor's discretion, this should be exercised in a balanced manner,⁵⁵⁷ ensuring the independence and impartiality of the Court without hampering the Prosecutor's exercise of his functions in the selection of situations and cases.

In February 2010, in deciding on the confirmation of charges in the case against Bahar Abu Garda, PTC I - although with a slightly different composition than it had in *Ntaganda* - analysed anew the issue of gravity. This time however it focused only on the conduct charged, the material gravity, and held that 'several factors may be taken into account in the assessment of the gravity of a case', such as the 'nature, manner and impact' of the alleged crime.⁵⁵⁸ Further, the Chamber held that the gravity of a given case should not be assessed solely

⁵⁵³ Ibid paras 78-79.

⁵⁵⁴ Ibid paras 82-92.

⁵⁵⁵ For a similar approach see (n 530) Stegmiller 557; Fabricio Guariglia, 'The Selection of Cases by the Office of the Prosecutor of the International Criminal Court' in Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff Publishers 2009) 215.

⁵⁵⁶ (n 516) El Zeidy, 'The Gravity Threshold under the Statute of the International Criminal Court' 49; for a well substantiated argument as to the need for the Prosecutor to adapt his policy in order to allow the prosecution of peacekeepers of any rank for crimes under the Statute, see also Melanie O'Brien, 'Prosecutorial Discretion as an Obstacle to Prosecution of United Nations Peacekeepers by the International Criminal Court: The Big Fish/Small Fish Debate and the Gravity Threshold' (2012) 10 JICJ 525.

⁵⁵⁷ (n 516) El Zeidy, 'The Gravity Threshold under the Statute of the International Criminal Court' 57.

⁵⁵⁸ *The Prosecutor v. Bahar Idriss Abu Garda*, ICC-02/05-02/09-243-Red Decision on the Confirmation of Charges Pre-Trial Chamber I, 8 February 2010 para. 31.

from a quantitative perspective, ie in relation to the number of victims, but that the ‘qualitative dimension of the crime’ should be a consideration.⁵⁵⁹ In addition, the Chamber found that other factors, such as those relevant for sentencing listed in Rule 145(1)(c), ie the extent of the damage caused, the harm caused to victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime, could also serve as useful guidelines for the evaluation to the gravity threshold in Article 17(1)(d).⁵⁶⁰

In March 2010, when deciding on the request to open an investigation into the situation in Kenya, PTC II did not focus only on the gravity of the conduct or material gravity. Instead it brought back into the gravity test a consideration related to the individuals involved in the commission of such crimes or personal gravity. However, rather than invoking the ‘most senior leaders’, PTC II changed slightly the language and referred to the ‘most responsible perpetrators’, although it is not clear whether it actually distinguished the notions. The Chamber stated that when determining gravity within the context of a situation, it was necessary to examine:

(i) whether the persons or group of persons that are likely to be the object of an investigation include those who may bear the greatest responsibility for the alleged crimes committed; and (ii) the gravity of the crimes allegedly committed within the incidents, which are likely to be the object of an investigation.⁵⁶¹

As such, PTC II found it necessary to make a generic assessment as to ‘whether such groups of persons that are likely to form the object of investigation capture those who may bear the greatest responsibility for the alleged crimes committed’.⁵⁶² After analysing the supporting material submitted by the Prosecutor, the Chamber found that it referred to the role of persons in ‘high-ranking positions’, and held the requirement to be satisfied.⁵⁶³ As such, it appears that if the individuals had not held high-ranking positions, the Chamber might have decided that the potential cases were not of sufficient gravity and may not have authorised the commencement of the investigation. PTC II may be

⁵⁵⁹ Ibid.

⁵⁶⁰ Ibid para. 32.

⁵⁶¹ *Kenya, ICC-01/09-19-Corr* para. 188.

⁵⁶² Ibid para. 60.

⁵⁶³ Ibid para. 198.

seen then to have reinstated a twofold test requiring both material gravity and personal gravity.

The approach followed by PTC II appears to disregard the clear position of the AC in the *Ntaganda* case that ‘the imposition of rigid standards primarily based on top seniority may result in neither retribution nor prevention being achieved’.⁵⁶⁴ Arguably, it should be possible to distinguish between the ‘most responsible perpetrators’ and the ‘most senior leaders’. A person may indeed exercise a key position in the commission of a crime, and be among its most responsible perpetrators, without necessarily being one of the most senior leaders of an organisation. Regrettably however, PTC II did not explain the rationale behind its position of reintroducing to the test the idea of personal gravity. As such, the move appears to be something of a backwards step insofar as it insists on including in the gravity test elements not provided by the Court’s legal framework.

As to the gravity of the crimes, PTC II found it necessary to assess them ‘in the context of their *modus operandi*’.⁵⁶⁵ It held that gravity could be examined following a qualitative as well as a quantitative approach involving, in addition to the consideration of the number of victims, an inquiry as to the ‘existence of some aggravating or qualitative factors attached to the commission of crimes’.⁵⁶⁶ Following the approach of PTC I in the *Abu Garda* case, PTC II stated that factors related to sentencing could provide useful guidance on the issue of gravity.⁵⁶⁷

When authorising the opening of an investigation into the situation in Côte d’Ivoire in October 2011, PTC III followed PTC II’s twofold approach, finding that the potential cases likely to be the object of the investigation must be of sufficient material gravity and personal gravity.⁵⁶⁸ As to the personal gravity requirement, PTC III was satisfied of its fulfilment in light of the Prosecutor’s submission as to the individuals likely to be the focus of the investigations, who

⁵⁶⁴ *Congo*, ICC-01/04-169 para. 74.

⁵⁶⁵ *Kenya*, ICC-01/09-19-Corr para. 61.

⁵⁶⁶ *Ibid* para. 62.

⁵⁶⁷ *Ibid*.

⁵⁶⁸ *Côte d’Ivoire*, ICC-02/11-14-Corr para. 204.

included ‘high-ranking political and military figures’.⁵⁶⁹ Once again, it appears that the investigation would not have been authorised if it had failed to include as potential targets high-ranking figures, which - in practice - returns to the test the personal gravity requirement and the concept of the ‘most senior leaders’ rejected by the AC.

In January 2012, PTC II decided on the admissibility challenge submitted by Mohammed Ali based on Article 17(1)(d). Ali supported his challenge with reference to the decision of PTC I in the *Ntaganda* case, arguing that the case against him was not of sufficient gravity, as he was neither one of the most senior leaders nor one of the most responsible perpetrators of the crimes under investigation in Kenya.⁵⁷⁰ Possibly trying to amend its prior lapse when authorising the opening of the investigation in Kenya, PTC II stressed that the PTC I test in *Ntaganda* was, ‘explicitly found to be “flawed” by the Appeals Chamber’.⁵⁷¹ Returning the test to a one stage analysis of material gravity only, leaving aside any reference to the need for personal gravity, PTC II held that, in determining the gravity of the case, factors such as the scale, nature and manner of commission of the alleged crimes, their impact on victims, and the existence of any aggravating circumstances, together with others listed in Rule 145(1)(c) were of particular relevance.⁵⁷² Consequently, it found that in the *Ali* case ‘the *alleged crimes* meet the gravity threshold of article 17(1)(d) of the Statute’.⁵⁷³

3.4 Interests of Justice

3.4.1 General Remarks

The concept of the ‘interests of justice’, although not an issue of admissibility, is also a consideration that may relieve the Court from exercising jurisdiction in relation to a concrete situation of crisis or case. Pursuant to Article 53(1)(c) and

⁵⁶⁹ Ibid para. 205.

⁵⁷⁰ *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, ICC-01/09-02/11-382-Red Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute Pre-Trial Chamber II, 23 January 2012 para. 41.

⁵⁷¹ Ibid para. 44.

⁵⁷² Ibid para. 50.

⁵⁷³ Ibid [emphasis added].

53(2)(c), the Prosecutor can decline to proceed with an investigation or prosecution of a situation or case otherwise falling under the jurisdiction of the Court and which is admissible if it would not serve the ‘interests of justice’.⁵⁷⁴ To reach such a decision all the circumstances should be taken into account, including the gravity of the crime, the interests of the victims and the situation of the accused.

As discussed in Section 2.3.3, in accordance with Article 53 and Rules 104 to 110, the Prosecutor may decide that an investigation or prosecution is not warranted in the interests of justice. The PTC may decide on its own initiative to review such a decision, which will then only be effective if confirmed by the PTC. Otherwise, the Prosecutor shall proceed with the investigation or prosecution.

This particularly ‘political’ power given to the Prosecutor, but ultimately to be wielded by the PTC, allows the Court to make determinations as to the possibility that it may not be in the interests of justice to investigate or prosecute. This has been the source of great interest and speculation from commentators. Although, based on the language of the Preamble, it appears that the Statute creates a presumption in favour of criminal prosecutions,⁵⁷⁵ some have argued that the language of Article 53 gives some leeway to consider, under certain circumstances, alternative mechanisms to criminal justice.⁵⁷⁶

⁵⁷⁴ Article 53(1)(c) includes within the parameters to be considered by the Prosecutor when determining if there is a reasonable basis to proceed with an investigation, whether ‘Taking into account the gravity of the crime and the interests of the victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.’ Article 53(2)(c) includes within the elements that the Prosecutor may take into account when concluding that there is no sufficient basis for prosecution that, ‘A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of the victims and the age of infirmity of the alleged perpetrator, and his or her role in the alleged crime’.

⁵⁷⁵ See, *inter alia*, (n 280) Robinson, ‘Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court’ 485; Kenneth A. Rodman, ‘Is Peace in the Interests of Justice? The Case for Broad Prosecutorial Discretion at the International Criminal Court’ (2009) 22 LJIL 99, 102-103.

⁵⁷⁶ (n 575) Rodman 104; (n 280) Robinson, ‘Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court’ 483-484; John Dugard, ‘Possible Conflicts of Jurisdiction with Truth Commissions’ in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, vol I (Oxford University Press 2002) 702.

Rodman argues that not every exercise of political discretion constitutes ‘politicization, amoral realpolitik’.⁵⁷⁷ Robinson adds that the notion of the interests of justice should be given a broad interpretation – one that is not confined to the interests of retributive or criminal justice.⁵⁷⁸ In certain circumstances, factoring in power realities is indispensable to the determination of the kind of justice and accountability mechanisms that are possible and necessary to end violent conflicts.⁵⁷⁹ At the other end of the spectrum, Human Rights Watch (HRW), for example, has argued that the Prosecutor’s duties should be interpreted in light of the object and purpose of the Statute, requiring a narrow construction of the ‘interests of justice’ test.⁵⁸⁰ Specifically, HRW insists that the Prosecutor should not fail to pursue an investigation or prosecution ‘because of national efforts, such as truth commissions, national amnesties, or traditional reconciliation methods, or because of concerns regarding an ongoing peace process’.⁵⁸¹ After all, it argues, issues related to international peace and security fall within the domain of the UNSC pursuant to Article 16, and not that of the Prosecutor.⁵⁸²

3.4.2 *The Prosecutor’s approach*

Once again, the Statute provides no definition or clarification as to the meaning of the terms ‘interests of justice’. Further, as previously mentioned, the Prosecutor has not so far made public any decision not to investigate or prosecute based on these provisions.

The Prosecutor did, however, advance a policy on the issue in September 2007, giving at least some limited clarification as to the OTP’s approach, although stressing that the policy ‘deliberately does not enter into detailed discussions

⁵⁷⁷ (n 575) Rodman 126.

⁵⁷⁸ (n 280) Robinson, ‘Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court’ 488.

⁵⁷⁹ (n 575) Rodman 125.

⁵⁸⁰ Human Rights Watch, ‘Policy Paper: The Meaning of “The Interests of Justice” in Article 53 of the Rome Statute’ (*Human Rights Watch*, June 2005) 2 <http://www.hrw.org/sites/default/files/related_material/2005_ICC_Interests_%20of_Justice.pdf> accessed 30 June 2014.

⁵⁸¹ *Ibid* 4-5.

⁵⁸² *Ibid* 7.

about all of the possible factors that may arise in any given situation’.⁵⁸³ The OTP’s approach is based on three essential pillars. First, the exercise of discretion under Article 53(1)(c) and (2)(c) is exceptional in nature, as there is a presumption in favour of investigations and prosecutions whenever the criteria of jurisdiction and admissibility have been met. Second, the criteria to be adopted will be guided by the object and purpose of the Statute, ‘namely the prevention of serious crimes of concern to the international community through ending impunity’. Lastly, the OTP argues that there is a difference between the ‘interests of justice’ and the ‘interests of peace’, and the latter ‘falls within the mandate of institutions other than the Office of the Prosecutor’,⁵⁸⁴ which appears to be a direct reference to the UNSC.

The policy paper further specifies that the notion of the ‘interests of justice’ needs only to be considered when positive determinations have been made on both jurisdiction and admissibility.⁵⁸⁵ However, it argues, while jurisdiction and admissibility are positive requirements, the interests of justice are not. Accordingly, the interests of justice is only a ‘potential countervailing consideration that might produce a reason not to proceed’, such that the Prosecutor does not need to conclude positively that an investigation or prosecution ‘is’ in the interests of justice.⁵⁸⁶

The policy paper also gives some guidelines as to the interpretation of the additional factors to be considered in accordance with the provisions. In relation to gravity, the OTP reiterates its approach that the scale, nature, manner of commission, and impact of the crimes are determinative.⁵⁸⁷ In relation to the interests of victims, it stresses that it will listen to the views of all parties concerned including ‘victims, their communities and the broader societies in which it may be required to act’.⁵⁸⁸ It further emphasises that, apart from the interests of victims in seeing justice done, there are other essential interests, such as their protection.⁵⁸⁹ As to the circumstances of the accused, it stresses its

⁵⁸³ OTP, *Policy Paper on the Interest of Justice* (International Criminal Court, 2007) 1.

⁵⁸⁴ Ibid.

⁵⁸⁵ Ibid 2.

⁵⁸⁶ Ibid 2-3.

⁵⁸⁷ Ibid 5.

⁵⁸⁸ Ibid.

⁵⁸⁹ Ibid.

policy of focusing on those bearing the greatest degree of responsibility, noting however that in certain circumstances justice may not be served by the prosecution of, for example, terminally ill defendants or suspects who have been subjected to serious human rights violations.⁵⁹⁰

Highlighting the exceptional nature of the provisions on the interests of justice, the paper appears to draw a clear distinction between the ‘interests of justice’ and what it calls ‘the interests of peace’. It underlines that, with the entry into force of the Statute, ‘a new legal framework has emerged (...) [which] necessarily impacts on conflict management efforts’.⁵⁹¹ Going even further, and arguably in response to the debate about the impact of the arrest warrants in the peace process of the Uganda situation,⁵⁹² it stresses that:

it is no longer about whether we agree or disagree with the pursuit of justice in moral or practical terms: it is the law. Any political or security initiative must be compatible with the new legal framework insofar as it involves parties bound by the Rome Statute.⁵⁹³

However, in an approach that appears to contradict its emphasis on the pursuit of justice now being ‘the law’ - which appears to refer to criminal justice - the paper later endorses other complementary justice mechanisms, reiterating ‘the need to integrate different approaches’.⁵⁹⁴ Notably, it argues for the need for a comprehensive strategy to combat impunity, stressing that criminal justice provides only one part of the necessary response which, in itself, may prove to be insufficient.⁵⁹⁵ It further ‘endorses the complementary role that can be played by domestic prosecutions, truth seeking, reparations programs, institutional reform and traditional justice mechanisms in the pursuit of a

⁵⁹⁰ Ibid 7.

⁵⁹¹ Ibid 4.

⁵⁹² Amongst those supporting the argument that the ICC, as a legal institution with a mandate to prosecute, should not make political decisions, it being for the UNSC to shoulder that burden, *see, inter alia*, (n 277) Ssenyonjo 389. For those arguing in favour of an ICC’s deferral of the case to Uganda *see, inter alia*, Kasaija Phillip Apuuli, ‘The ICC’s Possible Deferral of the LRA case to Uganda’ (2008) 6 JICJ 801.

⁵⁹³ OTP, *Interests of Justice* 2007 4.

⁵⁹⁴ Ibid 7.

⁵⁹⁵ Ibid.

broader justice.’⁵⁹⁶ Finally, it stresses the valuable role of such measures ‘in dealing with large numbers of offenders and in addressing the impunity gap.’⁵⁹⁷

The paper insists, however, that the interests of justice ‘should not be conceived of so broadly as to embrace all issues related to peace and justice’ and reiterates that comprehensive solutions addressing humanitarian, security, political, development and justice elements will be necessary.⁵⁹⁸ In an ostensible attempt to offload the responsibility for making difficult decisions as to whether and when those comprehensive solutions would be warranted, it reiterates that the Statute recognises a role for the UNSC in Article 16, as necessary for the maintenance of international peace and security.⁵⁹⁹ It stresses that the broader matter of international peace and security is not the responsibility of the Prosecutor, as ‘it falls within the mandate of other institutions’.⁶⁰⁰

In the 2013 Policy Paper on Preliminary Examinations, the OTP reiterates that matters affecting peace and security remain within the remit of the UNSC.⁶⁰¹ Accordingly, it states that the interests of justice provision ‘should not be considered a conflict management tool requiring the Prosecutor to assume the role of a mediator in political negotiations’.⁶⁰² Further, advancing a novel argument, it stresses that feasibility is not a separate factor when determining whether to open an investigation, as it might prejudice the consistent application of the Statute and could encourage obstructionism to dissuade the Court from intervention.⁶⁰³ Lastly, it insists on a strong presumption in favour of investigations and prosecutions and reiterates that decisions not to proceed in the interests of justice will be highly exceptional.⁶⁰⁴

Arguably in order to avoid being scrutinised, the Prosecutor has not so far explicitly taken any decision not to investigate or prosecute under this provision. Similarly, the PTC has followed a literal interpretation of the provisions and has

⁵⁹⁶ Ibid 8.

⁵⁹⁷ Ibid.

⁵⁹⁸ Ibid.

⁵⁹⁹ Ibid.

⁶⁰⁰ Ibid 9.

⁶⁰¹ OTP, Preliminary Examinations 2013 16.

⁶⁰² Ibid 16-17.

⁶⁰³ Ibid 17.

⁶⁰⁴ Ibid.

declined to exercise their inherent powers to review the Prosecutor's actions. The PTC could have, for example and in accordance with Regulation 48(1), triggered an explicit decision from the Prosecutor by means of a request for specific information necessary for the PTC to exercise its functions and responsibilities set forth in Article 53(3)(b). The lack of explicit decisions by the Prosecutor is even more patent in cases when it seems quite obvious that tacit decisions have been taken, eg not to request authorisation to initiate a *proprio motu* investigation into the situation in Colombia, not to present new charges against Lubanga, not to prosecute Bemba within the context of the DRC situation and not to prosecute those other than the LRA commanders within the context of the Uganda situation. In order to ensure certainty, equal access to justice for victims and to avoid the perception that the Court is partisan, the PTC should more actively monitor progress during the Prosecutor's preliminary examinations and investigations and, when warranted, ensure that their powers to review the Prosecutor's decisions are not obstructed by the Prosecutor himself.

3.5 Conclusions

This Chapter has explored the essential role of the PTC in determining the scope of the concepts at the core of the Court's 'political' action: those of complementarity, gravity and the interests of justice. The Statute gives the Prosecutor discretion to establish his own prosecutorial policy and to interpret and apply the concepts in the manner he considers appropriate. However, in providing for the necessary checks and balances to the Prosecutor's discretion, the drafters created the PTC as the body responsible for scrutinising the Prosecutor's actions and safeguarding the Court's independence and impartiality.

Although recognising that the ICC's Prosecutors have both been, and certainly will also be in the future, individuals of outstanding capacity and with high moral values, one should not underestimate their limitations. There is a clear risk that the Prosecutor, being tasked with investigating and prosecuting cases in a highly political environment and undertaking the additional function of promoting national proceedings, yet being without a police force or enforcement

powers of any kind (not even to subpoena witnesses) and therefore rendered absolutely dependent on international cooperation and resources, may prove altogether too susceptible to political pressures.

As has been amply demonstrated during the Court's first decade, the Prosecutor cannot be left alone to guard the Court's gates. The OTP has appeared in some situations powerless when trying to avoid political pressures and manipulation from States. The risk of the Court becoming politicised and being used as an instrument for victor's justice is too high. The adoption of a proactive and firm role by the PTC in avoiding those types of pressures, by scrutinising whether the Prosecutor's actions are a legitimate exercise of his discretion, will not only encourage a more transparent decision-making process within the OTP, but will also lead to genuine investigations and prosecutions at the national level.

In line with its role, the PTC, as well as the AC, should be more prepared to make politically difficult decisions. Indeed, while operating within the legal framework of the Statute, the PTC should be responsive to the specific demands of the different scenarios it faces. Particularly when determining the scope of the highly sensitive issues of complementarity, gravity and the interests of justice, judges should exercise their supervisory role by carefully balancing the need to apply uniform criteria - applying impartially the same general rule to all those who are alike, without prejudice and without bowing to special interests or caprice and thereby ensuring legal certainty - against the need to identify when different cases should be treated differently. When a situation or case warrants a different interpretation, the PTC should resort to the flexibility purposely included by the drafters of the Statute and be ready to depart from previously devised tests or interpretations, while ensuring that the context, objects and purposes of the Statute are respected.

Chapter 4. The role of the PTC at the pre-investigative stage of the proceedings: activating the Court's jurisdiction.

4.1 Introduction

Pursuant to Article 13, the Court may exercise its jurisdiction in relation to State Parties only if activated by (i) a referral from the UNSC; (ii) a referral from a State Party or (iii) *proprio motu* by the Prosecutor. In the case of non-party States, it will be necessary for the Court to be empowered either by a referral from the UNSC or by the relevant State's acceptance of the Court's jurisdiction pursuant to Article 12(3), followed by any of the Article 13 triggering mechanisms.

Article 19(1) provides that the Court shall satisfy itself that it has jurisdiction in any case brought before it. This provision has been consistently interpreted in the Court's jurisprudence as recognising the 'power and duty, commonly referred to as '*Kompetenz-Kompetenz*' or '*la compétence de la compétence*'.⁶⁰⁵ The different PTCs have stressed that it is a 'fundamental principle that any judicial body, including any international tribunal, retains the power and the duty to determine the boundaries of its own jurisdiction and competence',⁶⁰⁶ which is a 'part, and indeed a major part, of the incidental or inherent jurisdiction of any judicial or arbitral tribunal, consisting of its jurisdiction to determine its own jurisdiction'.⁶⁰⁷ Accordingly, only the Court has the power to determine whether a situation or case falls within its jurisdiction, whether the Court should in fact exercise jurisdiction and to frame the scope of its own jurisdiction.⁶⁰⁸

This Chapter will analyse the PTC's gatekeeping function at the pre-investigative

⁶⁰⁵ *Kony et al.*, ICC-02/04-01/05-377 para. 45.

⁶⁰⁶ *Ibid*; *Bemba*, ICC-01/05-01/08-14-tENG para. 11; *Situation in Uganda*, ICC-02/04-01/05-147 Decision on the Prosecutor's application that the Pre-Trial Chamber disregard as irrelevant the submission filed by the registry on 05 December 2005 Pre-Trial Chamber II, 9 March 2006 para. 22.

⁶⁰⁷ *Uganda*, ICC-02/04-01/05-147 para. 23.

⁶⁰⁸ See Holmes, 'Complementarity: National Courts versus the ICC' 672; Tuiloma Neroni Slade and Roger S. Clark, 'Preamble and Final Clauses' in Roy S. Lee (ed), *The International Criminal Court The making of the Rome Statute Issues Negotiations Results* (Kluwer Law International 1999) 431; *Kony et al.*, ICC-02/04-01/05-377 para. 45; *Gaddafi and Al-Senussi*, ICC-01/11-01/11-163 para. 37.

stage of the proceedings as regards the triggering the Court's involvement. Particular attention will be paid to the interpretation of this role as elaborated in the Court's case law during the first decade of its existence, with a focus on where further development or reform is needed in order to enable the PTC to safeguard the independence and legitimacy of the Court. Each triggering mechanism will be discussed in separate sections: Section 4.2 will focus on the UNSC's referrals, Section 4.3 on State Parties' referrals and Section 4.4 on *proprio motu* investigations. Section 4.5 provides conclusions as to the strength and use of the current mechanisms at the disposal of the PTC to comply with its gatekeeping role at the stage of the triggering the Court's jurisdiction.

4.2 Security Council Referrals

4.2.1 Drafting History

Since the beginning of the work towards a draft Statute, concerns had been expressed about the need to reconcile the role of the Court - as a legal entity in charge of investigating and prosecuting international crimes - with the Council's fulfilment of its primary responsibility for the maintenance of international peace and security in accordance with Article 24 of the UN Charter. At the same time, there was concern about the risk of reducing the credibility and moral authority of the Court if the UNSC - a purely political body - was to be allowed unlimited interference with the Court's work.

The ILC 1994 draft Statute envisaged the UNSC, acting under Chapter VII of the UN Charter, referring 'matters' to the Court.⁶⁰⁹ However, concerns were raised as regards the substantial inequality that the UNSC's power to activate the Court's jurisdiction would create between members of the Council, particularly its permanent members, and other States. In particular, due to the fact that the permanent members could veto any referral not beneficial to their interests⁶¹⁰ such an inequality, it was argued, was 'not likely to encourage the widest possible adherence of States to the Statute'.⁶¹¹ In addition, it was proposed that

⁶⁰⁹ UN Doc A/49/10 (1994) Article 23(1).

⁶¹⁰ (n 244) Yee 147.

⁶¹¹ UN Doc A/49/10 (1994) 88.

unless the Council so authorised, no prosecution could be initiated in relation to a case arising out of a situation ‘which is being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter’.⁶¹² This limitation was considered by several ILC members as undesirable since the Court ‘should not be prevented from operating through political decisions taken by other forums’.⁶¹³

At the *Ad Hoc* Committee in 1995, several options were still under discussion, some of which involved granting the Council the ability to refer situations to the Court, therefore ‘obviat[ing] the need for the creation of additional *ad hoc* tribunals’.⁶¹⁴ Others fiercely opposed such a role warning that it would:

reduce the credibility and moral authority of the court; excessively limit its role; undermine its independence, impartiality and autonomy; introduce an inappropriate political influence over the functioning of the institution; confer additional powers on the Security Council that were not provided for in the Charter; and enable the permanent members of the Security Council to exercise a veto with respect to the work of the court.⁶¹⁵

The draft article that was eventually proposed by the Preparatory Committee to the Rome Conference was the result of a series of compromises between the different delegations and contained numerous options.⁶¹⁶ The solution that was eventually adopted in Rome, after long debate,⁶¹⁷ was to confer upon the Council two main roles: (i) to refer situations for the Court’s investigation, without the imposition of territorial or personal limitations but subject to the control of legality by the Court, as provided in Articles 13(b) and 53; and (ii) to defer investigations or prosecutions – or prevent them from being initiated – for a renewable period of up to 12 months, as provided in Article 16.

The manner in which the triggering of the Court’s jurisdiction by the UNSC has operated in practice, and the way in which the different PTCs have exercised their gate keeping function, is discussed below.

⁶¹² Ibid 85, Article 23(3).

⁶¹³ Ibid 87.

⁶¹⁴ UN Doc A/50/22 (1995) paras 121-122.

⁶¹⁵ Ibid para. 121.

⁶¹⁶ UN Doc A/CONF.183/2/Add.1 (1998) Article 10.

⁶¹⁷ See, *inter alia*, William A. Schabas, *An Introduction to the International Criminal Court* (Cambridge University Press 2008) 167.

4.2.2 The Proceedings for the Activation of the Court's Jurisdiction by a UNSC Referral

According to Article 13(b), the UNSC acting under Chapter VII of the UN Charter may trigger the jurisdiction of the Court by referring to the Prosecutor a situation in which one or more of the crimes under the Court's jurisdiction appear to have been committed. As previously stressed, the territorial and personal parameters of the Court's jurisdiction are not applicable to referrals by the Council. In such situations, the Court is empowered to exercise universal jurisdiction over the core crimes, as long as they are committed after the entry into force of the Statute.

In order for the jurisdiction of the Court to be activated through this mechanism, it will be necessary for the Council to first reach an agreement to act under Chapter VII of the UN Charter. Consequently, pursuant to Article 39 of the Charter, the situation in relation to which the Council may decide to intervene must amount to a 'threat to the peace, breach of the peace, or act of aggression' and the referral will act as a measure 'to maintain or restore international peace and security'. In accordance with Article 24 of the Charter, the Council has been invested with the primary responsibility for the maintenance of international peace and security.

Article 53 and Rules 104 to 110 specify the proceedings that follow a UNSC referral. These provisions contain some legal safeguards aimed at preventing UNSC referrals from undermining the Court's independence, impartiality and autonomy, as feared by the drafters of the Statute. The Council's referrals will always be subject to the Prosecutor's assessment of compliance with the statutory requirements for the activation of the Court's jurisdiction. It should be noted that the Prosecutor is not allowed to assess the Council's determination as to whether the situation indeed constitutes a threat to international peace and security, which is the exclusive domain of the UNSC. However, after analysing compliance with the requirements of Article 53(1), the Prosecutor will decide independently, before starting any investigation, whether or not there is a 'reasonable basis to proceed' under the Statute. Where the Prosecutor is satisfied that there is a reasonable basis to proceed, he shall open an

investigation. However, as discussed in Chapter 2, this particular discretionary power given to the Prosecutor has the potential to undermine the credibility and legitimacy of the Court if not subject to appropriate checks and balances. In order to prevent the possibility that the Prosecutor could be unduly influenced by the Council's political agenda, this thesis argues that an additional safeguard should be included. It is herein argued that the PTC should be given the power to review the Prosecutor's positive assessment of the existence of a 'reasonable basis to proceed' with an investigation following a referral.

As discussed in Section 2.4.1, if the Prosecutor's assessment were to lead him to conclude that there is no reasonable basis to proceed with an investigation, the matter could be reviewed by a PTC, *proprio motu* or at the request of the Council in accordance with Article 53(3). So far, the Prosecutor has acceded to the UNSC and opened investigations in relation to the two situations referred by it. Therefore, there has been no opportunity for the PTC to intervene at this stage pursuant to Article 53.

A close examination of the two situations referred by the UNSC to the Court so far provides a basis to affirm that the safeguards established by the Statute and the Rules are still insufficient to fully preserve the independence and impartiality of the Court. As described below, the PTC has a fundamental role to play in reinforcing the legitimacy of the Court as a whole, particularly in the context of UNSC referrals.

4.2.3 *The Practice of Security Council Referrals*

On 31 March 2005, taking into account the Report of the UN Commission of Inquiry that found that the Government of Sudan and an associated militia were committing crimes under international law against certain African tribes in Darfur,⁶¹⁸ the UNSC passed Resolution 1593 (2005).⁶¹⁹ The Resolution referred to

⁶¹⁸ UNSC, *UN Doc S/2005/60, Report of the International Commission of inquiry on Darfur to the United Nations Secretary-General, pursuant to Security Council Resolution 1564 of 18 September 2004, 1 February 2005* (2005).

⁶¹⁹ UNSC, *UN Doc S/RES/1593, Adopted by the Security Council at its 5158th meeting, 31 March 2005* (2005).

the ICC's Prosecutor the 'situation in Darfur since 1 July 2002'⁶²⁰ and decided that 'the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with the Court'.⁶²¹ However, it explicitly recognised that 'States not party to the Rome Statute have no obligation under the Statute'.⁶²² Nevertheless, it urged 'all States and concerned regional and other international organizations to cooperate fully' with the Court and the Prosecutor.⁶²³ Soon after the referral, on 6 June 2005, the Prosecutor decided to open an investigation 'into the situation in Darfur, Sudan'.⁶²⁴

On 26 February 2011, in the midst of the 'Arab Spring', and following reports from the media, as well as from the AU,⁶²⁵ the UN,⁶²⁶ the Arab League and various NGOs,⁶²⁷ about serious violations of human rights and international humanitarian law - which included allegations of hundreds of civilian protestors being killed and persecuted by the government in Tripoli, Benghazi and other cities in Libya - the Security Council passed Resolution 1970 (2011).⁶²⁸ The Resolution referred to the Prosecutor the 'situation in the Libyan Arab Jamahiriya since 15 February 2011'.⁶²⁹ In exactly the same terms as the Sudan referral, it decided that the Libyan authorities must cooperate fully with and provide the necessary assistance to the Court and urged all States and concerned regional and other international organizations to also fully cooperate, all the

⁶²⁰ Ibid para. 1.

⁶²¹ Ibid para. 2.

⁶²² Ibid.

⁶²³ Ibid.

⁶²⁴ OTP, 'Press Release: ICC - The Prosecutor of the ICC opens investigation in Darfur' (2005) <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/2005/Pages/the%20Prosecutor%20of%20the%20icc%20opens%20investigation%20in%20darfur.aspx> accessed 31 January 2013.

⁶²⁵ African Union, *PSC/PR/COMM(CCLXI)*, *Communique of the 261st Meeting of the Peace and Security Council*, 23 February 2011 (2011).

⁶²⁶ UNSC, *UN Doc SC/10180*, *Security Council Press Statement on Libya*, 22 February 2011 (2011); UN, 'Secretary-General Ban Ki-moon, Opening remarks at press encounter following his briefing to the Security Council on Peace and Security in Africa' (*UN News Centre*, 25 February 2011) <http://www.un.org/apps/news/infocus/speeches/statments_full.asp?statID=1094#> accessed 20 August 2011; UN, *UN Doc A/HRC/S-15/2*, *Human Rights Council, Fifteenth special session, S-15/2 Situation of Human Rights in the Libyan Arab Jamahiriya*, 25 February 2011 (2011).

⁶²⁷ See, inter alia, Human Rights Watch, 'Libya: Commanders Should Face Justice for Killings. Reports of "Random" Fire in Tripoli, At Least 62 Dead' (*Human Rights Watch*, 22 February 2011) <<http://www.hrw.org/print/news/2011/02/22/libya-commanders-should-face-justice-killings>> accessed 20 August 2014; International Crisis Group, 'Immediate International Steps Needed to Stop Atrocities in Libya' (*International Crisis Group*, 22 February 2011) <<http://www.crisisgroup.org/en/publication-type/media-releases/2011/immediate-international-steps-needed-to-stop-atrocities-in-libya.aspx>> accessed 20 August 2014.

⁶²⁸ Res 1970 (2011).

⁶²⁹ Ibid para. 4.

while recognising that non-Party States had no obligations under the Statute.⁶³⁰ Soon after the referral, on 3 March 2011, the Prosecutor announced the opening of an investigation.⁶³¹

The experience of the Darfur and Libya situations demonstrate that the safeguards included in the Statute may not be sufficient to minimise the risk of UNSC referrals jeopardising the independence and impartiality of the Court. With the two referrals the Council has imposed personal and temporal limitations on the Court's jurisdiction, in clear violation of the Statute, thereby undermining the Court's autonomy. When faced with this situation, however, the Prosecutor did not object to the referrals and tacitly accepted the limitations, which raises doubts as to the OTP's capacity to protect itself from the Council's potential interference.

As to the personal limitations, although ostensibly complying with the Article 13(b) requirement of referring a complete situation of crisis,⁶³² the Council included in both referrals an exemption from the Court's jurisdiction for nationals from States not party to the Statute contributing to operations established or authorised by the Council or the AU.⁶³³ With this limitation, the Council contravened the Statute by not referring a complete situation of crisis but effectively only isolated acts, since it excluded from the Court's jurisdiction such crimes as may have been committed by nationals of certain States. The Council further subjected 'all alleged acts or omissions arising out of or related to operations' committed by nationals of non-Party States to 'the *exclusive jurisdiction* of that contributing State'.⁶³⁴ In that way, the Council disregarded the essential complementary nature of the Court and attempted to prevent it from complying with its key goal of fighting against impunity. If the limitation

⁶³⁰ Ibid para. 5.

⁶³¹ OTP, 'Press Release: ICC Prosecutor to open an investigation in Libya' (2011) <http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/icc0111/press%20releases/Pages/Statement%20020311.aspx> accessed 11 February 2013.

⁶³² Res 1593 (2005) para. 1; Res 1970 (2011) para. 4.

⁶³³ Res 1593 (2005) para. 6 'Decides that nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorised by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State'. See, in similar terms, Res 1970 (2011) para. 6.

⁶³⁴ Res 1593 (2005) para. 6 [emphasis added]; Res 1970 (2011) para. 6 [emphasis added].

were to be applied as mandated by the Council, the Court and other States would be prevented from prosecuting individuals who may have perpetrated crimes within the context of the Sudan or Libya situations, who are nationals of non-Party States who fail to prosecute. The fight against impunity would then be frustrated.

The attempt to reserve for contributing States exclusive jurisdiction over crimes committed by their nationals does not only contravene the Statute but also may be seen as contrary to the Geneva Conventions, which oblige State Parties to 'bring such persons [alleged to have committed, or to have ordered to be committed grave breaches to the Conventions], *regardless of their nationality*, before [their] own courts'.⁶³⁵ Arguably, it also contravenes Article 5 of the Convention Against Torture, which similarly obligates its State Parties to take measures to establish their jurisdiction over the offences covered by the Convention, even when perpetrators are not their nationals.⁶³⁶ According to the terms of the referrals, third States will also be prevented from exercising jurisdiction over non-nationals under their jurisdiction who are nationals of a contributing State non-party to the Statute.⁶³⁷

In spite of the doubtful legality of the personal limitation imposed, the Prosecutor did not object to the referrals. As regards the Sudan situation, the acceptance of the referral appears to have been grounded on (i) the report of the International Commission of Inquiry on Darfur, which provided substantial evidence that crimes under the jurisdiction of the Court had been committed

⁶³⁵ 75 UNTS 31 Article 49; 75 UNTS 85 Article 50; 75 UNTS 135 Article 129; 75 UNTS 287 Article 146.

⁶³⁶ UN Doc A/RES/39/46 (1984) Article 5 establishes: '1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases: (a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State; (b) When the alleged offender is a national of that State; (c) When the victim was a national of that State if that State considers it appropriate. 2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in Paragraph 1 of this article. 3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.'

⁶³⁷ See additional arguments for the illegality of the Sudan Resolution advanced by Sharon A. Williams and William A. Schabas, 'Article 13: Exercise of Jurisdiction' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (C.H. Beck - Hart - Nomos 2008) 571-573.

with impunity,⁶³⁸ and (ii) the fact of it being extremely unlikely that a new UNSC Resolution without limitations could ever be agreed upon.⁶³⁹ When the situation in Libya was referred in February 2011 with the same restrictive paragraph, the urgency of the situation, likely coupled with the desire to avoid an appearance of inconsistency following acceptance of the qualification in the Sudan case, was sufficient to allow the limitation to pass without challenge.

Since, as previously discussed, the Statute does not provide for a review by the PTC of the Prosecutor's decision to open an investigation following a referral, the PTC did not have an opportunity to express its views at the time the investigation was opened. Nonetheless, the PTC could have declared the referral to be illegal at the time it was requested to issue a warrant or summons.⁶⁴⁰ Indeed, pursuant to its powers under Article 19(1) to satisfy itself that it has jurisdiction in any case brought before it, the relevant PTC could have ruled that the triggering procedure was in breach of the Statute and, therefore, that the Court's jurisdiction had not been properly activated. PTC I chose not to do so. However, one remark from PTC I in the *Al-Bashir* case appeared to represent a response to the Council's limitation on the scope of the referral. When deciding on the request for a warrant of arrest, PTC I stressed that, by referring a situation to the Court pursuant to Article 13(b) of the Statute, the UNSC 'has also accepted that the investigation into the said situation, as well as any

⁶³⁸ See UN Doc S/2005/60 (2005).

⁶³⁹ See UNSC, 'Press Release SC/8351, Security Council 5158th Meeting (Night), Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court' (*United Nations*, 2005) <www.un.org/News/Press/docs/2005/sc8351.doc.htm> accessed 4 December 2012. This press release helps us to understand the complexity of the political negotiations related to paragraph 6 of Resolution 1593. The resolution was adopted by 11 votes in favour, none against and 4 abstentions (United States, China, Algeria and Brazil). The abstention from the US was conditional upon the inclusion of the paragraph excluding the possibility for the Court to exercise jurisdiction over nationals of States non-Party to the Statute. The US approach was that the paragraph would be 'precedent-setting, as it clearly acknowledged the concerns of States not party to the Rome Statute and recognised that persons from those States should not be vulnerable to investigation or prosecution by the Court, absent consent by those States or referral by the Council'. China abstained for similar reasons, arguing that it 'would have preferred that the perpetrators stand trial in Sudanese courts.' Algeria abstained arguing that the African Union, and not the International Criminal Court, 'was best placed to carry out so delicate undertaking because it could provide peace, while also satisfying the need for justice.' However, Brazil abstained exactly because it was unable to support paragraph 6. The disagreement with paragraph 6 was also seconded by Argentina, although it decided to support the resolution, on the basis of the Report by the High Commissioner for Human Rights that clearly demonstrated that crimes against humanity were committed in Darfur.

⁶⁴⁰ For the power to exercise substantive judicial review of the legality of UNSC Resolutions given the lack of equivalent control at the UN level, see *European Commission and Others v Yassin Abdullah Kadi* Judgment of the Court (Grand Chamber), 18 July 2013 ECJ paras 130-134.

prosecutions arising therefrom, will take place in accordance with the statutory framework provided for in the Statute, the Elements of Crimes and the Rules as a whole'.⁶⁴¹ This warning could be understood as an implied notice that the personal limitation - which was in clear breach of 'the statutory framework provided by the Statute'⁶⁴² - was deemed inoperative. After all, it is for the judicial body, and not for the Council, to determine the scope of the Court's jurisdiction even when activated by a referral. In effect, when referring a situation to the Court, the Council subjects the situation and cases arising therefrom exclusively to the terms of Statute and to the Court's legal framework.

The Court has not yet embarked on the investigation or prosecution of nationals other than those from the States in which the referred situation had taken place (referred States). It remains to be seen what the response of the Prosecutor and the PTC would be if and when crimes committed by nationals of a non-party State need to be addressed. It should be expected that they will disregard the limitation imposed by the Council and subject the referral to the Court's 'statutory framework', as signalled by PTC I. Accordingly, as long as crimes under the jurisdiction of the Court are committed within the territorial parameters of the situation for which the jurisdiction of the Court has been activated by the Council's referral, the Court should be entitled to prosecute the perpetrators regardless of their nationality. In such a scenario, even if the Court may not be able to secure the arrest and surrender of a national of a non-party State - given that cooperation will probably not be forthcoming and political pressures may be strong - the mere issuance of a warrant or summons would send a strong message as regards the Court's independence and impartiality.

As to the temporal scope of the situations of crisis referred to the Court, a plain reading of the Statute does not appear to allow for the imposition of arbitrary temporal limitations. Article 13 provides for the referral of '[a] situation in which one or more of [the crimes under the Statute] appears to have been

⁶⁴¹ *Bashir*, ICC-02/05-01/09-3 para. 45.

⁶⁴² For the argument that one of the options was to sever the offending paragraph see (n 637) Williams and Schabas, 'Article 13: Exercise of Jurisdiction' 572-573.

committed'. Therefore, the Prosecutor should have the power to investigate the full extent of the crimes committed within the context of the situation of crisis referred to him. The only temporal limitation unrelated to the context of the situation referred is that established by Article 11, which limits the Court's jurisdiction to crimes committed after its entry into force, ie 1 July 2002 or the date of entry into force for the relevant State. In this respect, the initial temporal limitation imposed by the Council when referring the situation in Darfur is justified by the clear terms of Article 11.⁶⁴³

More problematic are referrals purporting to establish starting dates later than the entry into force of the Statute. For example, the referral of the situation in Libya by UNSC Resolution 1970 sought to limit jurisdiction to crimes committed after 15 February 2011. Apart from that date, the referral does not contain any other indications as to the subject matter of the situation of crisis referred to the Court. Accordingly, it can be deduced that the Council referred to the Court only the situation related to the crimes committed during the popular uprising in Libya triggered by the so-called 'Arab Spring Revolution', and excluded the systematic abuses allegedly committed by the Gaddafi regime before that date.⁶⁴⁴ The revolutionary period may, of course, be differentiated from the pre-revolutionary history of the Gaddafi regime, there being an arguable case for investigating the former in isolation. However, the starting date chosen by the UNSC appears arbitrary, in spite of the fact that it coincides with the first days of protests in Benghazi.⁶⁴⁵ Indeed, as stressed by PTC I, Muammar Gaddafi publicly condemned the uprising in Tunisia in speeches broadcast by Libyan state television as early as 15 January 2011.⁶⁴⁶ It is therefore at least probable that crimes directly linked to the plan, defined by PTC I as being to 'deter and quell, by all means, the civilian demonstrations against the [Libyan] regime which

⁶⁴³ Res 1593 (2005) para. 1, stating 'Decides to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court'.

⁶⁴⁴ Some of the alleged abuses of the Gaddafi's regime, during the period excluded by the UNSC referral were even mentioned by PTC I in the decision of the warrants of arrest in the Libya case. See *Gaddafi and Al-Senussi*, ICC-01/11-01/11-1 para. 20.

⁶⁴⁵ Aljazeera, 'Battle for Libya: Key moments. Timeline of decisive battles and political developments in Libya's uprising against Muammar Gaddafi. Last Modified: 23 Aug 2011 12:43' (23 August 2011)
<<http://www.aljazeera.com/indepth/spotlight/libya/2011/08/20118219127303432.html>>
accessed 05 September 2013.

⁶⁴⁶ *Gaddafi and Al-Senussi*, ICC-01/11-01/11-1 para. 26.

began in Libya soon after the events in Tunisia and Egypt which led to the departure of their Presidents in the early months of 2011',⁶⁴⁷ were committed before the date chosen by the Council. Notably, as found by PTC I, 'people who were identified as dissidents to the regime or as planning the demonstrations of the 17 February were arrested [beforehand] by the Security Forces to prevent them from demonstrating'.⁶⁴⁸ As such, when limiting the scope of the referral to only crimes committed as from 15 February 2011, the UNSC may have excluded crimes under the jurisdiction of the Court committed within the context of the same ongoing situation.

As noted above, pursuant to Article 13(b), the Statute defines the scope of investigations in terms of a 'situation'. The term was not introduced at random; rather, it was carefully chosen by the drafters of the Statute in order to avoid politically driven prosecutions.⁶⁴⁹ With a view to preventing the Court from focusing only on specific crimes or on certain perpetrators or even on crimes committed by only one side of the conflict, the Statute requires that the subject-matter of referrals are 'situations' where crimes within the jurisdiction of the Court appear to have been committed. Accordingly, any arbitrary temporal limitation included in the referral goes against the clear terms of the Statute. The Prosecutor should not and cannot be precluded *a priori* from analysing the entire context of the situation of crisis for which the jurisdiction of the Court is activated or be prevented from choosing cases for prosecution within the overall extent of the situation. The temporal scope of an investigation can only be defined by the situation itself.

In accordance with the current terms of the Statute, in cases where the Prosecutor does not exercise his power to investigate the full context of the situation of crisis regardless of the limitations imposed by the Council, the PTC is prevented from intervening at the time of the initiation of the investigation. The PTC's intervention will only be triggered by the Prosecutor's request for the issuance of a warrant of arrest or a summons to appear under Article 58. When the request complies with the requirements of Article 58(1) the PTC 'shall' issue

⁶⁴⁷ Ibid para. 76.

⁶⁴⁸ Ibid para. 28.

⁶⁴⁹ (n 244) Yee 147.

the warrant or summons. That an investigation had been narrowed based upon limitations imposed by the Council is not in itself reason to refuse to issue a properly substantiated warrant or summons. It would be totally illogical, and contrary to the objects and purposes of the Statute, if the PTC was to prevent cases qualifying for prosecution and falling within the scope of the situation as referred to the Prosecutor from proceeding merely because the referral was unduly limited.

As argued before, as an additional safeguard to the Court's independence and impartiality, an amendment to the Statute granting the PTC the power to review the Prosecutor's positive determination to open an investigation following a referral appears to be necessary. This would give the PTC the opportunity not only to assess the legality of the referral but would also allow it to determine *ab initio* the material scope of the situation of crisis to be investigated. This determination would be relevant since, as will be discussed in Chapter 5, pursuant to Article 54(1)(a), '[i]n order to establish the truth, [the Prosecutor shall] extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under the Statute'. Accordingly, although the Prosecutor has discretion to select cases for prosecution, he is nevertheless mandated to investigate the full extent of the situation in order to establish the truth. Only after investigating the full extent of the situation may the Prosecutor choose which cases to pursue from among the many qualifying for prosecution. That decision, although discretionary, cannot be arbitrary and must be justified either by a Prosecutorial policy (eg the necessity to focus on the most responsible perpetrators) or by practical considerations (eg the amount and quality of the evidence collected or the prospect of obtaining cooperation for a successful prosecution). Although the PTC does not have the power to dictate the Prosecutor's policy or review the merits of the practical considerations involved in a decision not to prosecute, the PTC does have the right, pursuant to Regulation 48 and in order to be able to exercise its powers under Article 53(3) and Rule 110, to request from the Prosecutor information or documents necessary to determine whether the decision not to prosecute was based only on consideration of the interests of justice. Consequently, although the PTC has in fact no power to order the

Prosecutor to proceed against certain individuals or crimes - unless the decision not to proceed is based on the 'interests of justice' - it can stimulate transparent decision-making within the OTP, allowing for informed public scrutiny of his activities. The need to explain the concrete reasons for not proceeding against certain individuals, groups or crimes would encourage the Prosecutor to investigate fully and discourage him from acting based on political motives. Further, it would encourage the cooperation of States with the Prosecutor and the Court, since failure to cooperate will be also exposed to public scrutiny.

This brings us to another matter that arises in relation to referrals from the Council, which is likely to be the main challenge for the Court: the issue of the enforcement of States' obligations to cooperate with the ICC. In order to fulfil its mandate to investigate and prosecute, the Court needs the support of States. State cooperation is required, *inter alia*, to secure the arrest and surrender of suspects, to facilitate the production and collection of evidence and to ensure the appearance of witnesses. After all, the Court has neither its own police force nor enforcement powers of any kind. State cooperation is thus critical for the Prosecutor to be able to conduct meaningful investigations and prosecutions. In relation to this, the PTC has a fundamental role to play in compelling States to fulfil their duty to cooperate. Indeed, in order to ensure that the ICC is able to fulfil its mandate, Part 9 of the Statute establishes a detailed regime of cooperation by States. Article 86 imposes on States Parties the duty to cooperate fully with the Court. In addition, pursuant to Article 87(5)(a), the Court may invite non-party States to provide assistance to the Court on the basis of an agreement or on any other appropriate basis. In accordance with Article 87(5)(b) and (7), where a State Party or a non-party State that has entered into an agreement fails to cooperate, the Court may inform the ASP or, where it is the referring party, the Council.

Accordingly, there is no doubt that the Council referral is sufficient to activate the Court's jurisdiction as regards States Parties, without the need for additional consent from the State. In such a case, Part 9 of the Statute directly applies and the State is obliged to cooperate with the Court. If the State fails to cooperate,

the Court, ie the PTC at the investigative or pre-trial stages of the proceedings,⁶⁵⁰ can make a finding of non-cooperation and refer the matter to the ASP or the UNSC as appropriate.

However, in the case of non-party States - probably the main source of situations referred by the Council - the case will be different. If there is an agreement to cooperate with the Court pursuant to Article 87(5), but the State refuses to cooperate, there may be a finding of non-cooperation and referral of the matter to the ASP or the UNSC. If there is no Article 87(5)(a) agreement, the extent, source and nature of the non-party State's duty to cooperate with the Court are at stake.⁶⁵¹ In principle, as a treaty-based institution, the Court's Statute is only binding on the States that have ratified it.⁶⁵² As such, fundamental legal questions arise as to the applicability of the Statute to non-party States, both those which are referred and also third-party States. Are the provisions of the Statute directly applicable to non-party States? Is the obligation to cooperate determined by the terms of Statute or by the terms of the referral? These questions will need to be addressed by the PTC as the judicial organ generally competent to determine whether a State's failure to cooperate with the Court prevents it from exercising its functions and powers.

As to the referred States, the UNSC's resolutions have so far stated that they 'shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution'.⁶⁵³ However, in spite of the fact that, under Article 25 of the UN Charter, UN Member States are obliged to accept and carry out decisions of the UNSC, commentators have discussed whether the wording of Resolutions 1593 (2005) and 1970 (2011) actually contain a binding

⁶⁵⁰ For the argument that the term 'the Court' in Article 87(7) should be understood as the competent Chamber see Göran Sluiter, 'Obtaining Cooperation from Sudan - Where is the Law?' (2008) 6 JICJ 871, 873-874.

⁶⁵¹ For discussion of the legal issues arising out of the Council's referrals see, *inter alia*, ibid; Corrina Heyder, 'The U.N. Security Council's Referral of the Crimes in Darfur to the International Criminal Court in Light of U.S. Opposition to the Court: Implications for the International Criminal Court's Functions and Status' (2006) 24 Berkeley Journal of International Law 650; Dapo Akande, 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities' (2009) 7 JICJ 333; Simon M. Weldehaimanot, 'Arresting Al-Bashir: the African Union's opposition and the legalities' (2011) 19 AJICL 208; Dapo Akande, 'The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC' (2012) 10 JICJ 299.

⁶⁵² Article 34 of the Vienna Convention on the Law of Treaties.

⁶⁵³ See UNSC Resolution 1593 (2005), paragraph 2 and UNSC Resolution 1970 (2011), paragraph 5.

obligation for the referred States to cooperate with the Court under the terms of the Statute. Sluiter, for example, compares the vague language of Resolutions 1593 and 1970 with the clear wording used by Resolution 827 (1993) that created the ICTY, which stated that full cooperation should take place in accordance with the Statute of the ICTY and obliged States to take any measures necessary under their domestic law.⁶⁵⁴ Does this mean that the referred States in Resolutions 1593 and 1970 are only obliged to cooperate in accordance with their domestic laws? Or should Resolutions 1593 and 1970 be understood as implying that the Statute applies *mutatis mutandis* to the referred States?⁶⁵⁵ Is Article 87(7) applicable to them in the sense of being considered a ‘State Party’ by virtue of and for the purposes of the referral? Or, is there simply no mechanism available for the Court to obtain cooperation from referred non-party States?

In the first decision addressing the issue in one of the cases arising from the situation in the Sudan,⁶⁵⁶ PTC I stressed that both the task of investigating and prosecuting crimes within the jurisdiction of the Court and the obligation of Sudan to cooperate with the Court stem directly from the UN Charter⁶⁵⁷ and Resolution 1593 (2005), which referred the situation to the Court.⁶⁵⁸ However, using slightly different language and not directly relying on Article 87(7), PTC I decided to ‘inform’ the Council of the lack of cooperation by Sudan, stating that

⁶⁵⁴ UNSC Resolution 827 (1993), by which the Council decided ‘that all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 of the Statute’.

⁶⁵⁵ (n 650) Sluiter 876-878.

⁶⁵⁶ It should be noted that the Prosecutor attempted to trigger from PTC I a finding of non-cooperation within the terms of Article 87(7) of the Rome Statute. See *The Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman*, ICC-02/05-01/07-48-Red Prosecution request for a finding on the non-cooperation of the Government of the Sudan in the case of *The Prosecutor v Ahmad Harun and Ali Kushayb*, pursuant to Article 87 of the Rome Statute Office of the Prosecutor, 19 April 2010.

⁶⁵⁷ In particular article 25 of the UN Charter, by which the ‘Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter’.

⁶⁵⁸ *The Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman*, ICC-02/05-01/07-57 Decision informing the United Nations Security Council about the lack of cooperation by the Republic of the Sudan Pre-Trial Chamber I, 25 May 2010 6.

the Council was vested with the power to take any action related to Sudan's failure to cooperate with the Court.⁶⁵⁹

In the case arising out of the situation in Libya, however, PTC I has clearly and repeatedly affirmed that the Statute, and particularly Part 9, is directly applicable to the referred State.⁶⁶⁰ In May 2014, PTC I explicitly stated that, in case of Libya's non-compliance with obligations to cooperate with the Court, 'one of the tools available to the Court is to make a finding of non-cooperation by the State and refer the matter to the Security Council'.⁶⁶¹ It further stated that, pursuant to Regulation 109,⁶⁶² before making such a finding the Chamber should hear from the State.⁶⁶³ Accordingly, the Chamber not only found that the Statute and Part 9 were applicable to a referred non-party State, but were also applicable to the provisions of the Statute specifically referring to States Parties.

However, although Libya has not complied with requests to provide information,⁶⁶⁴ the Chamber has so far only threatened it with a possible finding of non-cooperation and transmission to the Council,⁶⁶⁵ failing to take any concrete action.⁶⁶⁶ PTC I appears to be reluctant to make a finding of non-cooperation and refer the situation to the UNSC, instead preferring to give more time to Libya to comply with the requirements for a finding of inadmissibility in

⁶⁵⁹ Ibid 6-7.

⁶⁶⁰ *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-72 Decision on Libya's Submissions Regarding the Arrest of Saif Al-Islam Gaddafi Pre-Trial Chamber I, 7 March 2012 paras 12-13; *Gaddafi and Al-Senussi*, ICC-01/11-01/11-163 paras 27-30; *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-269 Decision on the 'Urgent Application on behalf of Abdullah Al-Senussi for Pre-Trial Chamber to order the Libyan Authorities to comply with their obligations and the orders of the ICC' Pre Trial Chamber, 6 February 2013 para. 21; *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-545 Decision requesting Libya to provide submissions on the status of the implementation of its outstanding duties to cooperate with the Court Pre-Trial Chamber I, 15 May 2014 paras 2, 6-7; *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-563 Decisions on matters related to Libya's duties to cooperate with the Court Pre-Trial Chamber I, 11 July 2014 para. 2.

⁶⁶¹ *Gaddafi and Al-Senussi*, ICC-01/11-01/11-545 para. 7.

⁶⁶² Regulation 109 establishes the procedure for a finding of non-cooperation pursuant to Article 87(7).

⁶⁶³ *Gaddafi and Al-Senussi*, ICC-01/11-01/11-545 para. 7.

⁶⁶⁴ *Gaddafi and Al-Senussi*, ICC-01/11-01/11-563 para. 12.

⁶⁶⁵ Ibid para. 13.

⁶⁶⁶ Ibid 6.

relation to the *Gaddafi* case.⁶⁶⁷ The Court continues to afford such latitude despite more than three years having passed since Libya first failed to comply with its cooperation requests.⁶⁶⁸ This approach may be sharply contrasted with that adopted in relation to Sudan, which was referred to the Council for it to take appropriate measures, although not technically through a finding of non-cooperation.⁶⁶⁹ The stance adopted in relation to Sudan may be explained on account of its posture of direct opposition to the Court, the State having disregarded the Court's actions and failed to take any measures to address the alleged crimes. Libya's attitude is different insofar as its lack of compliance with the Court's request to transfer the accused is motivated, at least ostensibly, by the desire to try the crimes domestically, rather than to shield the perpetrators from justice.

As to the cooperation of third-party States in the investigation of situations referred by the Council, in the absence of an agreement pursuant to Article 87(5), their duty to cooperate with the Court will depend exclusively on the obligations imposed on them, if any, by the UNSC Resolution. In scenarios where the referred States do not cooperate with the Court, the cooperation of third-party States and of the Council itself through the execution of cooperation requests issued by the Court - particularly requests for the arrest and surrender of suspects, but perhaps also for the application of political or economic pressure - may be the only mechanism by which the Court will be able to effectively comply with its mandate.⁶⁷⁰ Regrettably however, instead of demanding international cooperation, the Council has opted to highlight that non-party States 'have no obligation under the Statute' and simply 'urged' them to cooperate fully.⁶⁷¹

⁶⁶⁷ As discussed in Chapter 3, in two decisions recently confirmed by the AC, after analyzing the domestic proceedings, PTC I found the case against Saif Al Islam Gaddafi to be admissible, while the case against Abdullah Al-Senussi was found inadmissible.

⁶⁶⁸ Libya has failed to surrender Gaddafi to the Court despite his being under arrest since 19 November 2011 *see Gaddafi and Al-Senussi*, ICC-01/11-01/11-163 para. 3.

⁶⁶⁹ *Harun and Kushayb*, ICC-02/05-01/07-57.

⁶⁷⁰ For an interesting discussion of the role that the US could potentially have played in securing Sudan's cooperation with the Court had the referral imposed a compelling obligation, *see Heyder* 654-656.

⁶⁷¹ Res 1593 (2005) para. 2; Res 1970 (2011) para. 5.

In the *Bashir* case, arising from the Darfur situation, PTC I originally interpreted the UNSC referral as providing the basis to request cooperation from non-party States.⁶⁷² PTC I stated that, although the concerned State was not party to the Statute, it had been ‘urge[d]’ by the UNSC to cooperate fully with the Court.⁶⁷³ However, in a more substantiated decision on Mauritania’s non-surrender to the Court of Al Senussi (a case arising from the Libya situation), PTC I noted that the Statute, as an international treaty, could only impose obligations and confer duties based on the consent of States.⁶⁷⁴ While the Council could alter this situation by imposing on non-party States obligations to cooperate, in the matter before the PTC, Mauritania was under no obligation *vis-à-vis* the Court since Resolution 1970 stressed that non-party States did not have obligations under the Statute and only ‘urge[d]’ them to cooperate.⁶⁷⁵ This decision was later followed in the *Bashir* case by PTC II, stressing that a non-party State ‘may decide to execute the outstanding warrant’, but noting that the Court does not have enforcement mechanisms to demand compliance.⁶⁷⁶ As such, PTC II emphasised that it ‘relies on the States’ cooperation, without which it cannot fulfil its mandate and contribute to ending impunity’.⁶⁷⁷

However, the difficulty in securing cooperation is not limited to non-party States. Even in relation to States Parties - which undoubtedly have a binding duty to cooperate with the Court - the enforcement of their obligations in cases arising out of situations referred by the Council remains very problematic. Particularly in the case against Al-Bashir, it has been painfully evident that the Court by itself cannot ensure cooperation from States.⁶⁷⁸ The AU has taken the

⁶⁷² *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-145 Order Regarding Omar Al-Bashir’s Potential Visit to the Republic of Chad and to the State of Libya Pre-Trial Chamber II, 15 February 2013 paras 12-13.

⁶⁷³ *Ibid* para. 13.

⁶⁷⁴ *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-420 Decision on the request of the Defence of Abdullah Al Senussi to make a finding of non-cooperation by the Islamic Republic of Mauritania and refer the matter to the Security Council Pre-Trial Chamber I, 28 August 2013 para. 12.

⁶⁷⁵ *Ibid* paras 14-15.

⁶⁷⁶ *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-204 Decision on the ‘Prosecution’s Urgent Notification of Travel in the Case of The Prosecutor v Omar Al Bashir’ Pre-Trial Chamber II, 7 July 2014 para. 11-12.

⁶⁷⁷ *Ibid* para. 12.

⁶⁷⁸ The Court has repeatedly informed the UNSC of the visits made by Omar Al-Bashir to different State Parties to the Statute in Africa, which have all refused to arrest him. *See, inter alia*, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-107 Decision informing the United Nations Security Council and the Assembly of States Parties to the Rome Statute about Omar Al-

position that Al Bashir's immunity, as a sitting Head of State of a non-party State, should be respected and that his potential arrest would undermine the peace process in Darfur.⁶⁷⁹ Consequently, it has instructed its member states 'not to cooperate pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities'.⁶⁸⁰

Confronted with the recurring refusal of States Parties to comply with the request for arrest and surrender of Al Bashir, PTC I has stressed that, pursuant to Article 119(1), disputes concerning the judicial functions of the Court shall be settled by a decision of the Court itself.⁶⁸¹ Therefore, States Parties cannot unilaterally disregard the Court's requests and should bring the matter of any alleged conflicting international obligations to the Chamber in order for it to make a determination.⁶⁸² As to the issue of whether sitting Heads of non-party States enjoy immunity, PTC I has held that the principle in international law that the immunity of either former or sitting Heads of State cannot be invoked to oppose a prosecution by an international court applies equally to former or sitting Heads of non-party States, whenever the Court exercises jurisdiction.⁶⁸³ Accordingly, PTC I held that State Parties cannot rely on Article 98(1),⁶⁸⁴ since

Bashir's presence in the territory of the Republic of Kenya Pre-Trial Chamber I, 27 August 2010; *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-109 Decision informing the United Nations Security Council and the Assembly of States Parties to the Rome Statute about Omar Al-Bashir's recent visit to the Republic of Chad Pre-Trial Chamber I, 27 August 2010; *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-129 Decision informing the United Nations Security Council and the Assembly of States Parties to the Rome Statute about Omar Al-Bashir's recent visit to Djibouti Pre-Trial Chamber I, 12 May 2011.

⁶⁷⁹ See, *inter alia*, African Union, Assembly/AU/Dec.245(XIII), *Decision on the meeting of African States parties to the Rome Statute of the International Criminal Court (ICC)*, 3 July 2009 (2012) paras. 2-3.

⁶⁸⁰ See, *inter alia*, *ibid* para. 10; African Union, Press Release No. 002/2012, *On the Decisions of Pre-trial Chamber I of the International Criminal Court (ICC) pursuant to article 87(7) of the Rome Statute on the alleged failure by the Republic of Chad and the Republic of Malawi to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of President Omar Hassan Al Bashir of the Republic of the Sudan*, 9 January 2012. (2012).

⁶⁸¹ See, *inter alia*, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-139 Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir Pre-Trial Chamber I, 12 December 2011 para. 11; *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-140 Decision rendue en application de l'article 87-7 du Statut de Rome concernant le refus de la Republique du Tchad d'accéder aux demandes de cooperation delivrees par la Cour concernant l'arrestation et la remise d'Omar Hassan Ahmad Al Bashir Pre-Trial Chamber I, 13 December 2011 para. 10.

⁶⁸² *Al Bashir*, ICC-02/05-01/09-139 para. 12; *Al Bashir*, ICC-02/05-01/09-140 para. 11.

⁶⁸³ *Al Bashir*, ICC-02/05-01/09-139 para. 39.

⁶⁸⁴ Article 98(1) provides that 'The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations

there is no conflict between the State Parties' obligations towards the Court and under international law, there being under customary international law an exception to the immunity of Heads of State where international courts seek their arrest.⁶⁸⁵

As discussed, the different PTCs have made use of the mechanisms provided in the Statute in order to obtain cooperation from States to the maximum extent possible. However, it is clear that without concrete and meaningful action being taken by the Council, the Court will remain unable to effectively pursue justice. It should be noted that, as yet, some four years since the Court first informed the Council of the lack of States' cooperation in the Darfur-Sudan situation,⁶⁸⁶ the Council has taken no decision supporting the enforcement of the requests. In their reports to the Council the ICC's Prosecutors have repeatedly stressed the lack of cooperation from Sudan and other States, yet the Council has failed to respond.⁶⁸⁷ The inability or unwillingness of the Council to secure cooperation is further evidenced by the Darfur situation, where Council Resolutions have simply highlighted the lack of progress in national proceedings, while refraining from even mentioning the need to cooperate with the Court.⁶⁸⁸

Accordingly, unless and until the Council decides to effectively impose on States actual binding obligations to cooperate with the Court - reflecting a serious commitment to fight against impunity - the Court will continue to be unable to effectively comply with its mandate in relation to the Council's referrals. The

under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of the third State for the waiver of the immunity.'

⁶⁸⁵ *Al Bashir*, ICC-02/05-01/09-139 para. 43.

⁶⁸⁶ *The Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman*, ICC-02/05-01/07-60 Report of the Registrar on the notification of the 'Decision informing the United Nations Security Council about the Lack of Cooperation by the Republic of Sudan' Registrar, 8 July 2010. Annexes 1 and 2 attach acknowledgments of the reception by the UNSG of PTC I's decisions informing lack of cooperation.

⁶⁸⁷ OTP, 'Statement to the United Nations Security Council on the situation in Darfur, the Sudan, pursuant to UNSCR 1593 (2005)' (*International Criminal Court*, 13 December 2012) <<http://www.icc-cpi.int/iccdocs/PIDS/statements/UNSC1212/UNSCDarfurSpeechEng.pdf>> accessed 24 August 2014.

⁶⁸⁸ See, *inter alia*, UNSC, *UN Doc S/RES/2063 (2012)*, *Adopted by the Security Council at its 6819th meeting, 31 July 2012 (2012)*, reaffirming its previous Resolutions without even mentioning Res 1593. Even more damaging, it expresses a 'strong commitment to the sovereignty (...) of Sudan and its determination to work with the Government of Sudan, in full respect of its sovereignty'. While 'expressing deep concern at the increased violence and insecurity in some parts of Darfur', it only 'urges the Government of Sudan to do its utmost to bring the perpetrators' to justice.

role of the PTC in these types of situations is critical in creating a consistent jurisprudence stressing the Court's impartiality and independence from international politics. The PTC should continue to keep a full record of those who fail to cooperate with the Court. The powerful message sent by judicial decisions of an international court, highlighting the evasive behaviour of the accused and identifying those who protect them, should not be underestimated.

4.3 State Party Referrals

4.3.1 Drafting History

Another means of triggering the Court's jurisdiction is through a referral from a State Party. In accordance with the Articles 13(a) and 14(1), a State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed.

In an initial proposal for a *Draft Code of Offences*, submitted by the UN Special Rapporteur in 1991, a right of complaint by States and international organisations was contemplated, but without clearly indicating which States should be entitled to lodge a complaint, referring only to 'any states injured by an international offence'.⁶⁸⁹ In 1993, the ILC Working Group's Draft restricted the right to lodge a complaint to State Parties and States retaining the custody of the suspect.⁶⁹⁰ In the hope of encouraging ratifications, the ILC 1994 draft Statute suggested limiting the right to lodge complaints to States Parties only.⁶⁹¹ However, since the draft conceived of an opting-in regime, wherein States would choose the crimes for which they recognised the Court's jurisdiction, it allowed States Parties to lodge complaints based on a 'reciprocity restriction', ie only in relation to the crimes for which the complainant State had also accepted the competence of the Court.

⁶⁸⁹ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2010) 305.

⁶⁹⁰ Antonio Marchesi, 'Article 14: Referral of a situation by a State Party' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (C.H.Beck - Hart - Nomos 2008) 575.

⁶⁹¹ UN Doc A/49/10 (1994) Article 25, Commentary (2).

In 1995, the *Ad Hoc* Committee eventually rejected the opting-in mechanism and set aside the reciprocity restriction.⁶⁹² At the same time, the option that States Parties be empowered to refer entire situations of crisis - and not only specific crimes - gained wide support.⁶⁹³ This was envisaged as a means to avoid politicisation and promote efficiency. It was also agreed that a State's complaint should not automatically trigger the jurisdiction of the Court without notice being given to the States concerned and a determination being made as to whether any State was willing and able to effectively investigate and prosecute the crimes domestically.⁶⁹⁴

Of further significance to the subsequent debate on the practice of self-referrals, is that concerns were raised at the *Ad Hoc* Committee in relation to the possibility that State Party referrals could be used for frivolous or politically motivated purposes.⁶⁹⁵ Although this scepticism did not lead to an elimination of the States referral system as such, a proposal was submitted directed at restricting the ability to refer situations to 'interested' States only, ie the territorial State, the custodial State or the State of nationality of the victim or suspect.⁶⁹⁶ Later during the Rome Conference, the predominant view was that, by their very nature, the crimes under the jurisdiction of the Court were of concern to the international community as a whole, and therefore, every State was 'interested' in their prosecution.⁶⁹⁷ Therefore, the agreement during the Rome Conference was that any State Party could refer situations to the Court, not just those with links to the crime, victims or perpetrators.

The fear of abuse of this triggering mechanism brought several proposals offering safeguards against 'frivolous, groundless or politically motivated complaints'.⁶⁹⁸ Among the proposals that succeeded and were included in Articles 14(2), 53 and 18 are: (i) the requirement that the referring State provide sufficient information and supporting documentation to serve as the point for a future investigation; (ii) the provision that the Court's jurisdiction

⁶⁹² UN Doc A/50/22 (1995) para. 110.

⁶⁹³ Kirsch and Robinson, 'Referral by States Parties' 620.

⁶⁹⁴ UN Doc A/50/22 (1995) para. 112.

⁶⁹⁵ (n 690) Marchesi 578.

⁶⁹⁶ UN Doc A/50/22 (1995) para. 112.

⁶⁹⁷ (n 693) Kirsch and Robinson, 'Referral by States Parties' 622.

⁶⁹⁸ UN Doc A/49/10 (1994) Article 25, Commentary (5).

following a referral is not activated automatically, but only after an internal screening allowing the Court - the Prosecutor and to a certain extent the PTC - to reject frivolous referrals or those not warranting the Court's intervention, and (iii) the obligation on the Prosecutor to notify interested States and, if warranted, to give them the opportunity to effectively investigate and prosecute.⁶⁹⁹ As discussed in Chapter 2, the PTC has a critical role to play in the proceedings under both Article 53 and Article 18 of the Statute.

4.3.2 The proceedings for the activation of the Court's jurisdiction by a referral of a State Party

Pursuant to Articles 13(a) and 14, a State Party can refer to the Prosecutor any situation in which one or more of the crimes under the jurisdiction of the Court appear to have been committed. A plain reading of the provisions suggests that the threshold for the referral of a situation by a State Party is lower than the one imposed on the UNSC. After all, as discussed in Section 4.2.2, the Council can only refer a situation to the Court where it represents a threat to or breach of the peace or otherwise comprises an act of aggression. In the case of State referrals, however, the Statute does not contemplate any filter or specific procedure that the State must follow prior to a referral, such as obtaining the approval of the national parliament or judiciary.

Nevertheless, pursuant to Article 14(2), the referral must specify the relevant circumstances and be accompanied by such supporting documentation as is available to the referring State. The referring State must therefore provide the Court with sufficient information to allow the Prosecutor to make the initial determination of whether there is a 'reasonable basis to proceed' in accordance with Article 53. The first part of the proceedings that will follow a referral by a State Party are identical to those in relation to referrals by the UNSC, particularly as regards Article 53 and Rules 104 to 110. As a result, the Prosecutor may only initiate an investigation if the information available to him provides a reasonable basis to believe that the situation complies with the requirements of Article 53(1).

⁶⁹⁹ (n 693) Kirsch and Robinson, 'Referral by States Parties' 622.

As discussed above, within the context of the proceedings under Article 53, the Prosecutor will assess the information available and independently decide after this preliminary examination whether to open an investigation. Again, the PTC is not charged with assessing the merits of a decision by the Prosecutor to open an investigation. In the CAR situation the Prosecutor took more than two years to conduct preliminary examinations following the referral, which raised some concerns as to the possibility that the Prosecutor may leave situations under indefinite periods of preliminary examination in order to avoid triggering the PTC's review of a decision not to investigate.⁷⁰⁰ Had this indeed been the Prosecutor's strategy, it would have been an effective one - once again showing that the limitation of judicial oversight to formal prosecutorial decisions not to proceed has the potential to undermine the credibility and legitimacy of the Court. Therefore, an additional safeguard should be included so that the PTC is afforded the power to review the Prosecutor's positive assessment that there is a reasonable basis to proceed with an investigation following a State referral. As the Statute presently stands, the first opportunity for the PTC to assess the merits of the investigation will be when and if the Prosecutor requests the issuance of a warrant of arrest or a summons to appear against an identified suspect. Of course, if the Prosecutor decides not to open an investigation, the PTC may review the prosecution's decision either at the request of the referring State or *proprio motu*, in accordance with Article 53(3).

In the case of State Party referrals or when the Prosecutor initiates a *proprio motu* investigation pursuant to Article 15 an additional safeguard, aimed at ensuring that the Court only intervenes as a mechanism of last resort, is provided by Article 18 of the Statute and Rules 52 to 57 of the Rules. According to these provisions, once the Prosecutor has decided to open an investigation as a result of a referral from a State Party or *proprio motu*, it shall conduct initial proceedings that may lead to preliminary rulings on admissibility by the PTC. Based on this provision, it falls to the PTC both to check the legality of the

⁷⁰⁰ (n 516) El Zeidy, 'The Gravity Threshold under the Statute of the International Criminal Court' 51-56.

Prosecutor's decision and to protect the Prosecutor from unfounded accusations and political manipulations.⁷⁰¹

As with referrals by the Council, with State referrals there have been no cases thus far in which the PTC has exercised its powers according to Articles 53 and 18. However, State referrals have also presented new and unexpected challenges for the PTC in complying with its role of counterbalancing the Prosecutor's discretion.

4.3.3 The practice of State Referrals

At the time of writing, the Prosecutor has opened investigations in four situations pursuant to Articles 13(a) and 14. These are the situations in Uganda, the DRC, the CAR and the Republic of Mali. A subsequent referral of a different situation in the CAR is still under preliminary examination by the Prosecutor. Against initial predictions, all State Party referrals to date have, in fact, been 'self-referrals', ie the same States where the crimes have been committed have referred the situations to the Court.

The situation in Uganda, the first situation referred to the Court, was submitted in terms of the 'situation concerning the Lord's Resistance Army (LRA)' by the Ugandan President, Yoweri Museveni, in December 2003.⁷⁰² After analysing the information submitted, the Prosecutor decided, ostensibly in order to avoid focusing only on the crimes alleged to have been committed by one side to the conflict, to broaden the scope of the situation. Accordingly, an investigation was opened into 'the situation concerning Northern Uganda' on 29 July 2004.⁷⁰³

⁷⁰¹ (n 228) Nsereko, 'Article 18. Preliminary rulings regarding admissibility' 628.

⁷⁰² ICC, 'Press Release: ICC - President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC' (2004) <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/2004/Pages/president%20of%20uganda%20refers%20situation%20concerning%20the%20lord_s%20resistance%20army%20_lra_%20to%20the%20icc.aspx> accessed 11 March 2013.

⁷⁰³ ICC, 'Press Release: ICC - Prosecutor of the International Criminal Court opens an investigation into Northern Uganda' (2004) <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/2004/Pages/Prosecutor%20of%20the%20international%20criminal%20court%20opens%20an%20investigation%20into%20nothern%20uganda.aspx> accessed 11 March 2013.

On 19 April 2004, the DRC President Joseph Kabila referred to the Court '*la situation qui se déroule dans mon pays depuis le 1er juillet 2002, dans laquelle il apparaît que des crimes relevant de la compétence de la Cour Pénale Internationale ont été commis.*'⁷⁰⁴ On 26 June 2004, the Prosecutor decided to open an investigation into the 'grave crimes allegedly committed on the territory of the Democratic Republic of Congo (DRC) since 1 July 2002.'⁷⁰⁵ As part of the same wave of referrals actively encouraged by the OTP, on 7 January 2005, the government of the CAR referred the situation concerning 'crimes within the jurisdiction of the Court committed anywhere on the territory of the Central African Republic since 1 July 2002.'⁷⁰⁶ On 22 May 2007, more than 2 years later, the Prosecutor opened an investigation.⁷⁰⁷ On 13 July 2012, the Republic of Mali referred to the Court '*les crimes les plus graves commis depuis le mois de Janvier 2002 sur son territoire*',⁷⁰⁸ and the Prosecutor decided to open an investigation into that situation on 16 January 2013.⁷⁰⁹

The fact that so far the only State referrals triggering the jurisdiction of the Court have been self-referrals from the territorial States has been a source of great debate among commentators. Arguments have been put forward both supporting and criticising the practice. Those who criticise it have focused their attention on the undesirable risk of 'asymmetric or selective referrals', by which

⁷⁰⁴ *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-32-AnxA1 Letter of Referral, 3 March 2004, which can be translated as 'the situation ongoing in my country since 1 July 2002, in which it appears that crimes relevant to the Court's competence have been committed.'

⁷⁰⁵ ICC, 'Press Release: ICC - The Office of the Prosecutor of the International Criminal Court opens its first investigation' (2004) <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/2004/Pages/the%20office%20of%20the%20Prosecutor%20of%20the%20international%20criminal%20court%20opens%20its%20first%20investigation.aspx> accessed 11 March 2013.

⁷⁰⁶ ICC, 'Press Release: ICC - Prosecutor receives referral concerning Central African Republic' (2005) <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/2005/Pages/otp%20Prosecutor%20receives%20referral%20concerning%20central%20african%20republic.aspx> accessed 11 March 2013.

⁷⁰⁷ ICC, 'Press Release: ICC - Prosecutor opens investigation in the Central African Republic' (2007) <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/2007/Pages/Prosecutor%20opens%20investigation%20in%20the%20central%20african%20republic.aspx> accessed 11 March 2013.

⁷⁰⁸ ICC, 'Letter of Referral' (2012) <<http://www.icc-cpi.int/NR/rdonlyres/A245A47F-BFD1-45B6-891C-3BCB5B173F57/0/ReferralLetterMali130712.pdf>> accessed 11 March 2013, which can be translated as referring 'the graves crimes committed after the month of January 2012 in our territory.'

⁷⁰⁹ OTP, 'Press Release: ICC Prosecutor opens investigation into war crimes in Mali: "The legal requirements have been met. We will investigate"' (2013) <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr869.aspx> accessed 11 March 2013.

governments will primarily seek to refer crimes attributed to rebel groups or non-governmental parties to an armed conflict.⁷¹⁰ Those supporting the right of sovereign States to relinquish jurisdiction in favour of international adjudication argue that given (i) the unprecedented capacity of non-State actors to commit large scale atrocities and to challenge and undermine the authority of States, (ii) the reality of failed States, and (iii) the manifest historical failure of inter-State human rights complaint mechanisms, a common interest exists between States and the Court in the prosecution of international crimes.⁷¹¹ In particular, considerations related to the public perception of fairness, national security and the complexity and high costs involved in trials held in conformity with international standards, all support the argument that a referral to the ICC can be a beneficial solution for States that - although willing and able to prosecute - may be reluctant to carry out proceedings before national courts.⁷¹²

In view of the above, the recourse to self-referrals, although not found in a specific provision in the Statute nor likely to have been envisaged by the drafters as the primary source of situations and cases before the Court, should not have come as much of a surprise.⁷¹³ Neither is the preponderance of such referrals necessarily problematic - nothing prevents a State with a direct interest in the prosecution of certain crimes from referring a situation to the Court.

Nevertheless, the right of 'interested' States to refer situations to the Court should be exercised in a manner that is compatible with their duty 'to exercise (...) criminal jurisdiction over those responsible for international crimes', as recalled by paragraph 6 of the Preamble. It can be argued that self-referrals are reconcilable with a State's duty to prosecute, since in light of the overarching goal of the Statute to end impunity, the State's duty to exercise criminal jurisdiction 'should be broadly understood as the obligation to ensure that a

⁷¹⁰ Andreas Muller and Ignaz Stegmiller, 'Self-Referrals on Trial. From Panacea to Patient' (2010) 8 JICJ, 1270.

⁷¹¹ Payam Akhavan, 'Self-Referrals before the International Criminal Court: Are States the villains or the victims of atrocities?' (2010) 21 Crim LF 103, 113.

⁷¹² Ibid 110-111.

⁷¹³ For a different interpretation of the preparatory works and the view that self-referrals were not foreseen by the drafters of the Statute, see (n 306) Schabas, 'Complementarity in Practice: Some Uncomplimentary Thoughts' 13; (n 710) Muller and Stegmiller 1269.

genuine investigation be undertaken, be it by the State itself, be it by way of extradition to another State, or even by way of surrender to an international criminal jurisdiction'.⁷¹⁴ Therefore, in principle, it seems perfectly permissible that a self-referral may be considered tantamount to a 'waiver of complementarity', ie a waiver of the State's right to primacy under the Statute.⁷¹⁵

The Court's jurisprudence has so far endorsed self-referrals, noting that they reflect a 'purposive interpretation of the Statute' aimed at avoiding the unchecked persistence of impunity and the denial of justice to thousands of victims.⁷¹⁶ In the *Katanga* case, the AC stressed that there may be some 'merit in the argument that the sovereign decision 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"' ⁷¹⁷ and that a '*general* prohibition of a relinquishment of jurisdiction in favour of the Court is not a suitable tool for fostering compliance by States with the duty to exercise criminal jurisdiction'.⁷¹⁸

However, although self-referrals can be qualified as a legal and suitable way of triggering the Court's jurisdiction, the safeguards provided by the Statute in order to minimize the risks that they may entail appear to be insufficient. In particular, the power granted to the Prosecutor to reject frivolous or politically motivated referrals and to define the scope of the situation to investigate may be meaningless in practice if the Prosecutor is unduly eager to bring cases before the Court and to secure cooperation from States. A close look at the first three situations triggered by interested States supports this view. In the situation in Uganda, for example, although the Prosecutor did not accept the limitation imposed by Museveni for the situation to comprise only the crimes allegedly committed by the LRA, at the time of writing, some ten years after the referral, the only case that has been initiated is that against the LRA's leaders. Similarly, in the situations in the DRC and the CAR the Prosecutor has targeted only rebel groups as opposed to governmental forces. While the targeting of

⁷¹⁴ Claus Kress, 'Self-Referrals' and 'Waivers of Complementarity' (2004) 2 JICJ, 946.

⁷¹⁵ Ibid.

⁷¹⁶ *Katanga and Ngudjolo*, ICC-01/04-01/07-1497 para. 79.

⁷¹⁷ Ibid para. 85.

⁷¹⁸ Ibid para. 86.

rebel forces has not in itself been unjustified, when proceedings are initiated only against those recognisable as enemies of the governments referring the situations to the Court, the credibility and legitimacy of the institution is inevitably at stake.

As indicated concerning Council referrals, pursuant to Regulation 48 in relation to Articles 54(1)(a) and 53(3)(b), the PTC could mitigate the risk of selective prosecutions by demanding more transparent decision-making within the OTP. This would allow public scrutiny of the Prosecutor's functioning, thereby encouraging his efforts to investigate fully, incentivising genuine national proceedings and cooperation with the Court and discouraging attempts to influence the Prosecutor against proceeding with the investigation and prosecution of certain individuals or groups.

Another crucial matter that arises in relation to all triggering procedures is the scope of the situation the Prosecutor is allowed to investigate. As discussed in Section 4.2.3, it appears contrary to the Statute to impose artificial temporal limitations on the situation of crisis for which the jurisdiction of the Court is activated. By the same token, the jurisdiction of the Court cannot be extended beyond the material margins of the situation of crisis that triggered the Court's jurisdiction. Referrals are not perpetual and cannot be invoked in order to allow the Court to intervene in situations for which the jurisdiction of the Court has not been legally activated.

PTC I expressed its view on the issue in the case against Callixte Mbarushimana,⁷¹⁹ in which it had to decide whether the Court was competent to prosecute him in relation to crimes allegedly committed in 2009 in the North and South Kivu Provinces of the DRC. The issue at stake was whether the DRC referral of 3 March 2004 could encompass crimes committed more than five years later, without the need for a new referral or a *proprio motu* initiative in order to trigger the jurisdiction of the Court. PTC I held that in order for a case not to exceed the parameters of the original referral 'the crimes referred to in

⁷¹⁹ *The Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-1 Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana Pre-Trial Chamber I, 28 September 2010 para. 5.

the Prosecutor's Application must have occurred in the context of the ongoing situation of crisis that triggered the jurisdiction of the Court'.⁷²⁰ PTC I explained that the situation might 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, insofar as they are sufficiently linked to the situation of crisis referred to the Court as ongoing at the time of the referral.⁷²¹

Accordingly, subsequent prosecutions for crimes under the ICC's jurisdiction may be initiated, in principle, regardless of the time of their commission, provided that the crimes are part of the same situation of crisis that activated the jurisdiction of the Court.

The OTP has occasionally attempted to interpret the Court's jurisdiction more liberally, dispensing with the requirement that crimes committed subsequent to a referral be connected to the situation of crisis in relation to which the Court's jurisdiction was activated. In relation to the situation in the DRC, former Prosecutor Moreno Ocampo claimed to have jurisdiction to investigate possible crimes that were allegedly committed during that country's 2011 presidential elections.⁷²² However, it is doubtful that the events related to the 2011 elections could be considered to be part of the same 'ongoing' situation of crisis that triggered the jurisdiction of the Court through the referral letter sent by the DRC President on 3 March 2004.⁷²³

Initially following the same approach, Prosecutor Bensouda affirmed her readiness to investigate and prosecute the crimes allegedly committed in the context of the 2013 *coup d'état* in the CAR.⁷²⁴ Again, it was hard to argue that the situation in the CAR in 2013 was in any way related to the former CAR

⁷²⁰ Ibid para. 6.

⁷²¹ Ibid.

⁷²² OTP, 'ICC Prosecutor: Those responsible for violence in the Democratic Republic of the Congo must face justice' (*International Criminal Court*, 06.12.2011) <[http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/press%20releases%20\(2011\)/Pages/otpstatement061211.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/press%20releases%20(2011)/Pages/otpstatement061211.aspx)> accessed 27 August 2013.

⁷²³ *DRC Referral*, ICC-01/04-01/06-32-AnxA1.

⁷²⁴ OTP, 'Prosecutor's statement in relation to situation in Central African Republic' (*International Criminal Court*, 22.03.2013) <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-statement-CAR-22-03-2013.aspx> accessed 27 August 2013.

situation. This incorrect interpretation of the jurisdictional margins of the situation of crisis was later amended by a declaration of the Prosecutor clarifying that the incidents and the serious allegations of crimes potentially falling within the jurisdiction of the ICC in the CAR since September 2012 ‘constitute a new situation, unrelated to the situation previously referred to the ICC by the CAR authorities in December 2004.’⁷²⁵ This declaration prompted a subsequent CAR referral on 30 May 2014 in relation to crimes committed in its territory since 1 August 2012.⁷²⁶

In order to avoid uncertainties regarding the material scope of the situation and to provide sufficient checks and balances for the Prosecutor’s discretion, it appears necessary to extend to the case of State Referrals the PTC’s competence to review the decision to open an investigation. Vesting the PTC with the power to independently assess the legality of the referral would ensure that the Prosecutor’s decision to open an investigation is a legitimate exercise of his powers under the Statute and not the result of undue political influence. The PTC should have the authority to review the Prosecutor’s determination as to the material scope of the situation of crisis in order to ensure that the boundaries of the situation to be investigated are clearly specified. If the situation is still ongoing, it will not be proper to impose artificial temporal limitations, but the context of the situation under investigation should be clearly defined.

⁷²⁵ OTP, ‘Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening a new Preliminary Examination in Central African Republic’ (*International Criminal Court*, 7 February 2014) <http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/otp-statement-07-02-2014.aspx> accessed 24 August 2014.

⁷²⁶ OTP, ‘Statement by the ICC Prosecutor, Fatou Bensouda, on the referral of the situation since 1 August 2012 in the Central African Republic’ (*International Criminal Court*, 12 June 2014) <http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/otp-statement-12-06-2014.aspx> accessed 22 August 2014.

4.4 *Proprio motu* investigations

4.4.1 *Drafting History*

The final way in which the Court's jurisdiction may be activated is by the Prosecutor acting on his own initiative. In accordance with Article 13(c) and 15, the Prosecutor 'may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court'.

As stressed in Chapter 2 above, Article 15 was the result of extensive negotiations, which eventually resulted in granting the Prosecutor the power to take *proprio motu* action to activate the jurisdiction of the Court, subject to the prior authorisation of the PTC. Discussions on the Prosecutor's *proprio motu* powers were closely related to the issue of the Court's 'inherent jurisdiction', the principle of complementarity and the protection of national sovereignty. For the best part of the negotiations the matter divided those who advocated for the need for an independent and effective Court whose jurisdiction could be activated *ex officio* by the Prosecutor and those who saw such powers as unnecessarily broad and potentially resulting in 'politically motivated or frivolous proceedings under an overly ambitious Prosecutor'.⁷²⁷

During the ILC negotiations in 1994, the suggestion of one of its members to include in the draft an authorization for the Prosecutor to initiate investigations in the absence of a complaint from a State or the Security Council was immediately rejected. The detractors argued that such a possibility was not warranted 'at the present stage of development of the international legal system',⁷²⁸ submitting that 'the autonomy of the Prosecutor was superfluous in international law'.⁷²⁹ Again at the *Ad Hoc* Committee in 1995, attempts to include in the draft a role for the Prosecutor to initiate *ex officio* investigation or prosecution of serious crimes failed, on account of certain States' insistence

⁷²⁷ (n 16) Kirsch and Robinson, 'Initiation of Proceedings by the Prosecutor' 657.

⁷²⁸ UN Doc A/49/10 (1994) Article 25, Commentary (4), 90.

⁷²⁹ ILC, UN Doc A/CN.4/464/Add.1, *Report of the International Law Commission on the work of its forty-sixth session, Official Records of the General Assembly* (Yearbook of the International Law Commission, 1994) para. 128.

that State consent was essential for any mechanism to trigger the court's jurisdiction.⁷³⁰

At the Preparatory Committee in 1996, the idea re-emerged with informal proposals from Germany, Italy and Trinidad and Tobago.⁷³¹ In its submission, the German delegation argued that:

In order to strengthen the authority of the Court as an independent international body the prosecutor shall be entitled to initiate investigations in case that he/she receives sufficient factual evidence that a crime which falls under the jurisdiction of the Court was committed.⁷³²

Although encouraged by the Committee Chairman, the idea again failed to gain sufficient support. This was mainly due to the fact that the directly related issue of the inherent jurisdiction of the Court was still far from being agreed, with many delegations strongly advocating 'opting-in' or 'opting-out' mechanisms.⁷³³ Subsequently, the discussion resumed with a new element which afforded the necessary momentum for prosecutorial activation of the Court's jurisdiction to finally garner broad support. The Swiss delegation in 1997,⁷³⁴ followed by the Argentinian delegation in 1998,⁷³⁵ suggested including the PTC within the equation of the *proprio motu* triggering procedure. The Argentinian suggestion was promptly seconded by Germany and both delegations submitted a formal proposal to the Committee on 25 March 1998.⁷³⁶ The proposal would later

⁷³⁰ UNGA, *UN Doc GA/L/2876 Press Release: Committee is told proposed International Criminal Court should be Complementary to National Jurisdictions*, 30 October 1995 (1995) 3.

⁷³¹ Preparatory Committee, *ICC Preparatory Works, Proposals by Italy and Trinidad and Tobago on Article 25 (1) and 25 (4 bis)*, 05 April 1996 (1996). This proposal suggested that 'The Prosecutor shall initiate investigations ex officio or on the basis of information obtained from any source'.

⁷³² Preparatory Committee, *ICC Preparatory Works, German Delegation - Non-paper: Articles 21, 22, 23, 24, 25*, 2 April 1996 (1996) 3. This proposal included in the draft of Article 21 a third triggering mechanism - in addition to the Security Council acting under Chapter VII of the Charter and any interested State - whereby the Prosecutor could activate the Court's jurisdiction, where he is notified of a matter and 'concludes that there is sufficient basis for a prosecution in accordance with Article 26 and 27'.

⁷³³ UNGA, *UN Doc GA/L/2774 Press Release: Preparatory Committee on International Criminal Court Discusses Inherent Jurisdiction of Court Over 'Core Crimes'*, 2 April 1996 (1996).

⁷³⁴ Preparatory Committee, *ICC Preparatory Works, Proposal of the Swiss Delegation - Article 25 Bis*, 15 August 1997 (1997).

⁷³⁵ Preparatory Committee, *ICC Preparatory Works, Argentinian Proposal - Article 46, Notification to the Prosecutor*, 17 March 1998 (1998).

⁷³⁶ Preparatory Committee, *Working Group on Procedural Matters, UN Doc A/AC.249/1998/WG.4/DP.35, Proposal submitted by Argentina and Germany*, 25 March 1998 (Preparatory Committee on the Establishment of an International Criminal Court, 16 March - 3 April 1998, 1998). The main differences between this joint Argentinean-German proposal and the

become, almost without modification, sub-paragraphs 2 to 5 of Article 15. The idea was that the Prosecutor would independently examine the information obtained from reliable sources and determine whether there was a reasonable basis to initiate an investigation. When reaching a positive conclusion, the Prosecutor would be obligated to bring the matter to the PTC for independent judicial approval before proceeding further. During the Rome Conference the issue was again highly contested, but the matter was finally settled with the adoption of the requirement of independent judicial review and approval by the PTC prior to the Prosecutor embarking on any proper investigative steps.⁷³⁷

As a result, the procedure governing the opening of an investigation upon the initiative of the Prosecutor was laid down in Articles 15 and 53, which were later complemented by Rules 46 to 50.

4.4.2 The proceedings for the proprio motu activation of the Court's jurisdiction

As described in Section 2.4.2, the Court's legal framework articulates a clear procedure to be followed by the Prosecutor and the PTC in order for the latter to authorise the former to initiate *proprio motu* investigations. However, the substantive extent of the PTC's intervention is nowhere elaborated. As with many other issues, the critical dividing line between the Prosecutor's discretion and the PTC's powers is not directly addressed in the Court's legal framework. This is one of those matters in which the lack of agreement during the preparatory works, coupled with the arduous and lengthy negotiations which continued until late in the final day of the Rome Conference, made a clear definition of substantive powers in the text of the Statute impossible. As such, it was left to the judges to determine the extent of their own powers.

Among the unresolved issues is the extent to which the PTC can determine the Prosecutor's investigative powers and the weight to be attached to the victims'

original draft prepared by Argentina were related to: (i) the way in which the information on the commission of crimes under the jurisdiction of the Court would reach the Prosecutor - here a change in terminology from 'notification' to 'information' had important consequences; and (ii) the inclusion of victims as a possible source of additional information for the Prosecutor and, most importantly, their being afforded the right to make representations before the PTC.

⁷³⁷ (n 16) Kirsch and Robinson, 'Initiation of Proceedings by the Prosecutor' 660-661.

representations. Indeed, it is not clear whether, by way of the authorisation procedure, the PTC can direct the focus of the Prosecutor's investigations, particularly in relation to certain events that may not have been identified by the Prosecutor in his application. Further, Article 15(3) simply gives the victims the right to 'make representations to the Pre-Trial Chamber'; what the PTC can actually do with those submissions is nowhere addressed.

In relation to the extent of the PTC's power under this procedure, Articles 15(4) and 42(1) may be interpreted as implying that the PTC is only entitled to review the Prosecutor's assessment of the information available to him and his subsequent determination that there is a reasonable basis to proceed with an investigation. This interpretation is grounded in an acknowledgment that the PTC is not an investigative Chamber, does not have investigative powers of its own, and is not responsible for directing the Prosecutor's investigations.⁷³⁸ However, one could also argue that the fact that the PTC does not have those powers does not mean that it should be relegated to the status of a 'rubber stamping' body. Particularly in relation to the Article 15 procedure, the PTC has the authority and power to guide the Prosecutor's investigation. It could be argued that, in accordance with Article 15(3) and Rule 50(4) and (5), the PTC can use the information provided by victims and the additional information it collects in order to determine the scope of the situation to be investigated by the Prosecutor. Because the PTC is not bound by the Prosecutor's definition of the situation, Rule 50(5) allows the PTC, should it so decide, to authorize only part of the Prosecutor's request. In addition, pursuant to its powers under Article 15(4) to examine for itself the request and supporting material in order to determine whether 'there is a reasonable basis to proceed with *an* investigation', it may be argued that the PTC can extend or reduce the scope of the investigation originally envisaged by the Prosecutor in order to frame the scope of *the* investigation it authorises.

Consequently, although the PTC cannot intervene in the Prosecutor's investigation - such as by ordering the collection of evidence or compliance with specific procedures - the role to be fulfilled by the PTC goes well beyond the

⁷³⁸ Côte d'Ivoire, ICC-02/11-15-Corr para. 20.

simple review of the Prosecutor's application and could imply the identification of a broader - or less extensive - temporal, territorial, material or personal scope than the one provisionally identified by the Prosecutor. Still, the authority to conduct the investigation and ultimately select cases for prosecution rests with the Prosecutor. The PTC has, however, the power to review the information collected and to assess the parameters of Article 53(1) of the Statute on its own, being guided, rather than limited, by the Prosecutor's identification of the situation of crisis.

4.4.3 *The practice of proprio motu investigations*

In November 2009, the Prosecutor requested the PTC's authorisation to commence an investigation into crimes against humanity allegedly committed in the Republic of Kenya following the Presidential election of 27 December 2007, 'including but not limited to' the time period from the election to 28 February 2008.⁷³⁹ After analysing the information collected, the Majority of PTC II⁷⁴⁰ decided to authorise an investigation in relation to crimes against humanity committed within the broader period obtaining between 1 June 2005 and 26 November 2009.⁷⁴¹ Consequently, the date of entry into force of the Statute for Kenya, 1 June 2005, and the date of the Prosecutor's application, 26 November 2009, determined the temporal scope of the situation.⁷⁴²

The extension of the temporal scope of the investigation was based, arguably, on the allegations of victims that 'certain areas of Kenya have repeatedly experienced violence prior to 2007 and even subsequent to 2008'.⁷⁴³ When substantiating the extension so as to cover crimes committed since the entry into force of the Statute for Kenya, the Majority of PTC II affirmed that limiting the investigation to a narrower time frame would be inconsistent with:

⁷³⁹ *Situation in the Republic of Kenya*, ICC-01/09-3 Request for authorisation of an investigation pursuant to Article 15 Office of the Prosecutor, 26 November 2009 para. 93.

⁷⁴⁰ Judge Hans-Peter Kaul dissented on the authorisation since, in his view, the acts allegedly committed did not amount to crimes against humanity *see Kenya*, ICC-01/09-19-Corr 84-163.

⁷⁴¹ *Ibid* 83.

⁷⁴² *Ibid* para. 207.

⁷⁴³ *Ibid* para. 204.

(i) the purpose behind investigating an entire situation as opposed to subjectively selected crimes and; (ii) the Prosecutor's duty to establish the truth by extending the investigation to cover all facts and evidence pursuant to Article 54(1) of the Statute.⁷⁴⁴

Accordingly, it held that it was 'logical to define the scope of the investigation as to cover events prior to December 2007 in relation to crimes against humanity allegedly committed within the entire situation'.⁷⁴⁵ It is worth noting that the Majority of PTC II reprimanded the Prosecutor for the use of broad terms such as 'including but not limited to', affirming that it was the 'responsibility of the Chamber to define the temporal scope of the authorization for investigation with respect to the situation under consideration'.⁷⁴⁶ PTC II eventually disregarded the Prosecutor's material identification of the situation and extended the jurisdiction of the Court to a time frame covering crimes that may have been entirely unrelated to 'the post-election violence of 2007-2008'. Regrettably, when moving the starting date of the investigation, PTC II did not define or delimit the material scope of the 'new' situation of crisis to be investigated. The Chamber only limited the material parameters of the investigation to 'crimes against humanity', without any requirement that they be related to the 'post-election violence' the Prosecutor intended to investigate, or any other identifiable situation of crisis.⁷⁴⁷

It should be stressed that criticism of the PTC's decision to extend the temporal parameters of the investigation as such is not intended. The Chamber certainly had the power to conclude, after reviewing the information received, that the situation to be investigated was indeed broader than the one initially identified by the Prosecutor. In such a case, however, it was incumbent upon the PTC to identify in as much detail as possible the broader situation of crisis the Prosecutor was authorised to investigate. If PTC II considered that the post-election violence was indeed part of a broader situation of crisis or that it was triggered by previous acts, it should have clarified this and defined the material scope of the situation it authorised the Prosecutor to investigate.

⁷⁴⁴ Ibid para. 205.

⁷⁴⁵ Ibid.

⁷⁴⁶ Ibid para. 203.

⁷⁴⁷ Ibid paras 208-209.

As to PTC II's decision to limit the scope of the investigation to alleged crimes committed prior to the date of the Prosecutor's application, this was justified with arguments that contradict those used to extend the starting date. PTC II did not refer - as before - to the need to investigate 'the entire situation as opposed to subjectively selected crimes', but held that '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'.⁷⁴⁸ In the view of the Majority of PTC II, since Article 53(1)(a) refers to a crime which 'has been or is being committed', it was clear that 'the authorization to investigate may only cover those crimes that have occurred up until the time of the filing of the Prosecutor's Request'.⁷⁴⁹

Therefore the date of the filing of the request was thus the last opportunity for the Prosecutor to evaluate the subject-matter of his submission and the range of criminal offences he would investigate. The rationale behind such an interpretation of Article 53(1)(a) arguably comes from an attempt to avoid the Prosecutor obtaining a *carte blanche* power to investigate future unknown matters, regardless of their connection to the situation initially identified. As has been discussed in relation to State referrals, at times the Prosecutor has appeared to suggest that referrals are perpetual, meaning that the fact of the activation of the Court's jurisdiction in relation to crimes committed within a State allows him to investigate any future crimes occurring in the same State. In order to avoid perpetual referrals, the Majority decision of PTC II effectively demands that the Prosecutor identify, at the time of the request, the crimes he believes to have been, by then, committed and which he intends to investigate.

By limiting the Prosecutor's investigation to crimes clearly identified by the date of his application, PTC II limited in advance the crimes the Prosecutor could investigate. In that way, it may have indeed prevented him from investigating unknown matters, possibly avoiding - as expected by the drafters - future unwarranted, frivolous, or politically motivated investigations. However, it also limited the Prosecutor's power to investigate crimes that, although committed after the filing of the request for authorisation, may be directly related to the context of the situation under investigation, such as, eg a possible retaliatory

⁷⁴⁸ Ibid para. 206.

⁷⁴⁹ Ibid.

attack. The literal interpretation of Article 53(1)(a) favoured by PTC II focused on the commission of specific crimes, disregarding the fact that crimes under the Statute are always embedded in a particular context: either a manifest pattern of similar conduct directed against a specific group in the case of genocide, an attack against the civilian population in the case of crimes against humanity, or an armed conflict in the case of war crimes. As such, crimes under the Statute are not generally comprised of a single act but include a series of incidents that will constitute the context of their commission. At the time of a request the context within which crimes are being committed may still be ongoing.

PTC II's interpretation may have the undesirable consequence that, in order to investigate fully, the Prosecutor will have to wait until the context under which the crimes are being committed has concluded before submitting his request for authorisation to investigate. This will be contrary to the objects and purposes of the Statute, with particular regard to the Court's obligation to 'contribute to the prevention of (...) crimes'.⁷⁵⁰ The launching of an investigation by the ICC while the context within which the crimes are being committed continues to develop can certainly contribute to preventing the commission of further crimes, because those that plan and organise the crimes will know that their acts are being closely followed by the Prosecutor. Moreover, it would be inconsistent to allow the UNSC or States to trigger the jurisdiction of the Court in relation to ongoing situations of crisis but prohibit the Prosecutor from exercising his *proprio motu* powers to do the same. The Council for example referred the situations in Sudan and Libya while the crimes were being committed, as a warning to Al Bashir and Gaddafi and specifically in order to dissuade the commission of further crimes. Similarly, PTC I in the *Mbarushimana* case held that the Court had jurisdiction to deal with a case involving crimes committed several years after the referral by the DRC, since these crimes were being committed 'in the context of the ongoing situation of crisis that triggered the jurisdiction of the Court'.⁷⁵¹

⁷⁵⁰ Statute Preamble para. 5.

⁷⁵¹ *Mbarushimana*, ICC-01/04-01/10-1 para. 6.

PTC II also allowed the Prosecutor to investigate crimes committed since 1 June 2005, without imposing the need for them to be linked to any particular situation or context. In that way, the decision broadened the scope of the Prosecutor's investigation and left the back door open for him to possibly focus on unrelated matters. Absent any safeguard to the effect that the crimes must be connected with a specific situation of crisis, the Prosecutor may eventually end up investigating crimes totally unconnected to the situation initially identified by him or that the Chamber had in mind. Consequently, PTC II in the Kenya situation failed to identify in clear terms the context and material scope of the situation of crisis it authorised the Prosecutor to investigate. It left open the possibility for him to investigate completely unknown matters, provided they occurred before the date of his request, while simultaneously prohibiting him from investigating crimes that could be directly linked to the situation of crisis he originally attempted to investigate, on account solely of their being committed after the request for authorisation.

In June 2011, the Prosecutor requested an authorisation to initiate 'an investigation into the situation in the Republic of Côte d'Ivoire since 28 November 2010'.⁷⁵² In its decision, the Majority of PTC III⁷⁵³ noted that although the Court has jurisdiction over crimes committed in Côte d'Ivoire since 19 September 2002 - pursuant to the declaration lodged by the State under Article 12(3) -⁷⁵⁴ the Prosecutor only intended to investigate crimes committed after 28 November 2010. In the view of the Prosecutor, the temporal scope was justified because (i) the violence during that period (after 28 November 2010) reached unprecedented levels; and (ii) there was sufficient information for the reasonable basis threshold to be satisfied in relation to crimes committed during that period.⁷⁵⁵ However, the Chamber noted that the Prosecutor had also suggested that 'once the Chamber has reviewed the supporting material, it may conclude that the temporal scope of the investigation should be broadened to

⁷⁵² *Situation in the Republic of Côte d'Ivoire*, ICC-02/11-3 Request for authorisation of an investigation pursuant to Article 15 Office of the Prosecutor, 23 June 2011 para. 1.

⁷⁵³ Judge Silvia Fernández de Gurmendi dissented as to the role of the PTC and the temporal scope of the investigation, see *Côte d'Ivoire*, ICC-02/11-15-Corr.

⁷⁵⁴ ICC, 'Déclaration de reconnaissance de la Compétence de la Cour Pénale Internationale' (18 April 2003) <<http://www.icc-cpi.int/NR/rdonlyres/CBE1F16B-5712-4452-87E7-4FDDE5DD70D9/279779/ICDE.pdf>> accessed 31 August 2013.

⁷⁵⁵ *Côte d'Ivoire*, ICC-02/11-14-Corr paras 173-174.

encompass events that occurred between 19 September 2002 and the date of the filing of the request'.⁷⁵⁶ The Chamber considered it to be necessary to determine both whether the investigation could be authorized to cover crimes committed before 28 November 2010 and also whether such authorisation should include crimes committed after the filing of the Prosecutor's application.

As to the end date of the investigation, the Majority of PTC III stated that it would follow PTC I's approach in the *Mbarushimana* case, 'bearing in mind the volatile environment in Côte d'Ivoire'.⁷⁵⁷ It therefore authorised the investigation to cover crimes after the date of the Prosecutor's application so long as 'at least in a broad sense, [these crimes] involve the same actors and have been committed within the context of either the same attacks (crimes against humanity) or the same conflict (war crimes)'.⁷⁵⁸ In other words, the Prosecutor was allowed to investigate 'crimes that may be committed after the date of the Prosecutor's application (...) insofar as the contextual elements of the continuing crimes are the same as for those committed prior to 23 June 2011'.⁷⁵⁹ However, the Chamber added, as an extra requirement, that it was 'necessary to ensure that any grant of authorization covers investigations into "continuing crimes"', defined as 'those whose commission extends past the date of the application'.⁷⁶⁰ Consequently, the time-frame of the investigation was extended but only to cover 'continuing crimes that may be committed in the future [after the date of the Prosecutor's application] (...) insofar as they are part of the context of the ongoing situation in Côte d'Ivoire'.⁷⁶¹

Therefore, although the Prosecutor was authorized to investigate crimes that may be committed after his application, the *Mbarushimana* approach was not followed exactly. Moreover, it is unclear what the Majority of PTC III meant by including the concept of 'continuing crimes'. It should be noted that the issue of 'continuing crimes' was a source of great debate during the preparatory works

⁷⁵⁶ Ibid para. 175.

⁷⁵⁷ Ibid para. 179.

⁷⁵⁸ Ibid.

⁷⁵⁹ Ibid.

⁷⁶⁰ Ibid.

⁷⁶¹ Ibid para. 212.

of the Statute.⁷⁶² Continuing crimes are those offences that are committed and then maintained,⁷⁶³ in which the illegal conduct does not terminate with the carrying out of the initial criminal acts involved in the offence, but persists in time. The distinguishing character of a continuing crime is that its commission repeats itself every day, and thus a new offence is created each day, as long as the accused remains involved with the course of conduct.⁷⁶⁴ Examples of continuing crimes under the Statute include, *inter alia*, enforced disappearance, enslavement, imprisonment or other severe deprivations of physical liberty, sexual slavery, enforced prostitution and using children under the age of fifteen years to participate actively in the hostilities. The prototypical continuing crime is the crime against humanity of enforced disappearance of persons, which is initially committed when the victim is arrested, detained or abducted and the perpetrator refuses to acknowledge the deprivation of liberty or to give information on the fate or whereabouts of the person. The situation of deprivation of freedom so created, accompanied by the refusal to acknowledge or provide information on the whereabouts of the victim - that is to say the consequences or effects of the crime - will continue for as long as the abducted person is unaccounted for.⁷⁶⁵

The ruling of PTC III is unclear because it states that the authorization covers 'crimes (...) committed after the date of the Prosecutor's application',⁷⁶⁶ but

⁷⁶² Mohamed M. El Zeidy, 'The Ugandan Government Triggers the First Test of the Complementarity Principle: An Assessment of the First State's Party Referral to the ICC' (2005) 5 *IntCLR* 83, 91-92.

⁷⁶³ Alan T. Nissel, 'Continuing Crimes in the Rome Statute' (2004) 25 *MichJInt'l L* 653, 654. In the view of the author, 'continuing crimes' are sometimes incorrectly called 'continuous crimes'. For the distinct meaning see also footnote 4. It should be noted that in the *Lubanga* confirmation decision PTC I equated the concepts of 'continuous crime' with that of 'permanent crime', see *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-803-tEN Decision on the confirmation of charges Pre-Trial Chamber I, 29 January 2007 para. 248.

⁷⁶⁴ For a thorough analysis of the meaning of continuing crimes and the incorporation of the related theory into the Rome Statute, see El Zeidy, 'The Ugandan Government Triggers the First Test of the Complementarity Principle: An Assessment of the First State's Party Referral to the ICC' 90-99.

⁷⁶⁵ In this sense, see the constitutive elements of the crime against humanity of enforced disappearance of persons, in ICC-ASP, ICC-ASP/1/3(part II-B), *Elements of Crimes*, 9 September 2002 (2002) 11. The Jurisprudence of human rights courts and bodies, in particular the IACtHR, has extensively discussed the matter of enforced disappearances as a continuing crime. See, *inter alia*, *Blake v. Guatemala* Judgment of January 24, 1998 (Merits), Serie C No 36 IACtHR paras 53-67. See also the discussion and recollection of international case law and practice on the issue entertained in the case of *Varnava and others v. Turkey* Judgment, 18 September 2009 ECtHR paras 85-107.

⁷⁶⁶ *Côte d'Ivoire*, ICC-02/11-14-Corr para. 179.

later specifies that such authorization refers to ‘the investigation of any ongoing and continuing crimes that may be committed after the [date of the Prosecutor’s application]’.⁷⁶⁷ It is not clear whether the terms ‘ongoing’ and ‘continuing’ are used as alternative or concurrent conditions. The term ‘ongoing’ appears to refer to the necessary link between the crimes and the ongoing context of the situation of crisis in Côte d’Ivoire. If we understand the terms to have been used in the alternative, the Prosecutor could consider himself to be allowed to investigate both ongoing and continuing crimes. He could therefore focus on instantaneous crimes committed after the filing of the application for authorization so long as such crimes form part of the ongoing situation of crisis for which authorization to investigate was granted, the result being precisely the same as that following from the *Mbarushimana* decision.

It seems, however, that the terms were used as concurrent conditions, since later in its conclusions the Majority of PTC III authorised the Prosecutor to investigate ‘continuing crimes that may be committed in the future (...) *insofar* as they are part of the context of the ongoing situation in Côte d’Ivoire’.⁷⁶⁸ The Majority of PTC III therefore imposed two concurrent conditions for the crimes committed in the future to become part of the authorised investigation: (i) they should be continuing crimes; and (ii) they should be part of the ongoing situation in Côte d’Ivoire that triggered the jurisdiction of the Court.

The problem with the cumulative conditions imposed by the Chamber to determine the end date of the investigation is how it impacts upon the notion of a continuing crime. Even before the PTC set out its conditions, if a continuing crime was committed or, more appropriately, commenced before the date of the Prosecutor’s application and its effects were to continue after that date, the Prosecutor would have had the opportunity to investigate that crime; after all, it began within the cut-off date of the Prosecutor’s request. In other words, the formulation used by the Majority of PTC III does not appear to extend the leave to investigate beyond the date of the Prosecutor’s filing. To investigate continuing crimes the commission of which started before his request, the Prosecutor did not need an explicit authorization of the Chamber to go beyond

⁷⁶⁷ Ibid.

⁷⁶⁸ Ibid para. 212.

the date of his filing. The imposition of the cumulative conditions, therefore, solely serves to bar the Prosecutor from investigating any instantaneous offence under the ICC's jurisdiction that may be committed from the Prosecutor's request onwards, even though such offence(s) may be part of the ongoing situation of crisis in Côte d'Ivoire that triggered the Court's jurisdiction. Any subsequent war crime or crime against humanity committed (however soon) after the date of the Prosecutor's request appears to be excluded from the Prosecutor's investigation - no matter how directly linked it may be to the ongoing situation that triggered the jurisdiction of the Court.

The requirements imposed by PTC III could also be understood as including, within the concept of 'continuing crime', individual acts committed after the date of the Prosecutor's application that, although constituting in itself a completed crime, will be jointly assessed as part of only one crime. This would be true, for example, of each act of enlisting or conscripting children into an armed forced or armed group, or each act of plunder committed as part of the pillaging of a town or place occurring for a prolonged period of time. It is, however, unclear whether this requirement would easily apply to any subsequent crime committed as part of the context of the investigation. For example, can any act of rape or murder committed after the cut-off date be considered part of a 'continuing' war crime or crime against humanity of murder or rape committed within the ongoing situation of crisis that triggered the jurisdiction of the Court? Accordingly, it appears that it would have been sufficient - and probably simpler - to only require that the instantaneous acts committed after the Prosecutor's application be part of the ongoing situation of crisis, without the need to add the requirement that they also be 'continuing crimes'.

In relation to the starting date of the investigation, the Majority of PTC III initially outlined a similar approach based on the requirement that crimes committed before the starting date requested by the Prosecutor must be 'part of the same situation'.⁷⁶⁹ The Chamber observed that 'while the context of violence reached a critical point in late 2010, it appears that this was a

⁷⁶⁹ Ibid para. 180.

continuation of the ongoing political crisis and the culmination of a long power struggle in Côte d'Ivoire'.⁷⁷⁰ The Chamber further stressed that the information provided by the Prosecutor and the victims gave 'indications of very serious human rights violations and abuses that have been committed since the September 2002 coup attempt that could amount to crimes within the jurisdiction of the Court'.⁷⁷¹

However, given that the Prosecutor did not refer in his application to specific incidents that may have occurred prior to 28 November 2010, the Chamber decided that it was 'unable to determine whether the reasonable basis threshold has been met with regard to any specific crimes',⁷⁷² and ordered the Prosecutor to revert to the Chamber with any additional information 'on potentially relevant crimes committed between 2002 and 2010'.⁷⁷³ Regrettably, the Majority of PTC III did not retain the notion of 'continuing crimes' in relation to the starting date of the investigation. The two-prong test advanced for the end date of the investigation would have been useful indeed in relation to the starting date, as it could have allowed for the investigation of crimes committed within the context of the situation of crisis under investigation, even if their commission or initial execution was before 28 November 2010.

Once the Prosecutor provided the further information requested, PTC III decided, in an unanimous decision in February 2012,⁷⁷⁴ that the events in Côte d'Ivoire in the period between 19 September 2002 and 28 November 2010,

although reaching varying levels of intensity at different locations and at different times, are to be treated as a single situation, in which an ongoing crisis involving a prolonged political dispute and power-struggle culminated in the events in relation to which the Chamber earlier authorised an investigation.⁷⁷⁵

⁷⁷⁰ Ibid para. 181.

⁷⁷¹ Ibid para. 182.

⁷⁷² Ibid para. 184.

⁷⁷³ Ibid para. 185.

⁷⁷⁴ *Situation in the Republic of Côte d'Ivoire*, ICC-02/11-36 Decision on the 'Prosecution's provision of further information regarding potentially relevant crimes committed between 2002 and 2010' Pre-Trial Chamber III, 22 February 2012.

⁷⁷⁵ Ibid para. 36.

Consequently, it extended the scope of the authorisation to cover ‘crimes within the jurisdiction of the Court allegedly committed between 19 September 2002 and 28 November 2010’.⁷⁷⁶ Regrettably however, PTC III did not specifically request that the crimes be linked to the situation of crisis it had just defined. Similarly, it did not clarify the issue of ‘continuing’ and ‘ongoing’ crimes in relation to the end date of the investigation.

In order to effectively prevent the Court from focusing only on specific crimes within a given time frame, which may represent crimes committed by only one side of the conflict, it is particularly important for the PTC to define the material - in addition to the temporal - scope of the situation the Prosecutor is allowed to investigate. Given that the PTC was called to intervene in the exercise of his *proprio motu* power in order to ‘prevent the Court from proceeding with unwarranted, frivolous, or politically motivated investigations that could have a negative effect on its credibility’,⁷⁷⁷ the Chamber has the responsibility to outline, in as much detail as possible, the context of the situation of crisis the Prosecutor will be allowed to investigate.

4.5 Conclusions

Just as the drafters of the Statute feared, each of the three modes of triggering the Court’s jurisdiction involves the danger of ‘politically motivated or frivolous proceedings’.⁷⁷⁸ Indeed, there is always the risk that the political agenda of State Parties or of the UNSC - and, in particular, of its five permanent members - may prompt them to refer to the Court only ‘convenient’ situations or to support the Court’s efforts only to the extent needed to fulfil their purposes. There may also be the risk of either an ‘overly ambitious’,⁷⁷⁹ or an overly cautious, Prosecutor, who may pursue respectively only those situations likely to make the greatest impact (but not necessarily be the most deserving of attention) or those where cooperation is secure and no powerful actors will be ‘disturbed’.

⁷⁷⁶ Ibid para. 37.

⁷⁷⁷ See *Kenya, ICC-01/09-19-Corr* para. 32.

⁷⁷⁸ (n 16) Kirsch and Robinson, ‘Initiation of Proceedings by the Prosecutor’ 657; UN Doc A/49/10 (1994) Article 25, Commentary (5), 90.

⁷⁷⁹ (n 16) Kirsch and Robinson, ‘Initiation of Proceedings by the Prosecutor’ 657.

When faced with these types of situations, the independence, impartiality and credibility of the Court are at stake. It is at these moments that the PTC has a fundamental role to play as the Court's gatekeeper.

When assessing the role of the PTC at the stage of activation of the Court's jurisdiction, it is necessary to distinguish between proceedings initiated by referral and those involving the exercise of the Prosecutor's *proprio motu* powers. As regards referrals, although the Statute gives the PTC the role of overseeing the Prosecutor's exercise of discretion, the mechanisms it provides are insufficient for the PTC to effectively prevent the introduction of 'inappropriate political influence over the function of the institution'.⁷⁸⁰ Indeed, as has been demonstrated by the situations referred to the Court so far, the Prosecutor appears to have lacked the courage to object to limitations of doubtful legality imposed by the Council or to resist the temptation presented self-referring States who are highly cooperative - at least for as long as the Court focuses on cases that those states consider to be 'convenient'. As such it appears necessary, in relation to referrals from both the Council and State Parties, that the PTC is given the function of reviewing the Prosecutor's positive assessment that there is a reasonable basis to proceed with an investigation. Through this review process the PTC will have the opportunity to assess the legality of the referrals and determine the context of the situation of crisis to be investigated.

In relation to *proprio motu* investigations by the Prosecutor, the Statute has given the PTC a critical role in determining whether or not the investigation should be authorised, affording the Chamber the competence to conduct its own assessment of the evidence and information it obtains from the Prosecutor and the victims. However, the different PTCs have so far failed to properly determine the contextual scope of the situations they have authorised the Prosecutor to investigate. This deficiency carries the risk of undermining the rationale behind the authorisation procedure itself. Indeed, without a concrete definition of the material scope of the situation to be investigated, there is uncertainty as to which cases the Prosecutor may focus on and the risk that he

⁷⁸⁰ UN Doc A/50/22 (1995) para. 121.

may concentrate on cases totally unrelated to the situation of crisis the PTC had in mind when authorising the commencement of the investigation.

However, as will be discussed in the following Chapter, the determination of the contextual scope of the situation to investigate will not by itself sufficiently mitigate the risk of selective prosecutions. It should be complemented by a proactive role for the PTC in stimulating transparent prosecutorial decision-making so as to allow public scrutiny of the Prosecutor's functioning, thereby encouraging his efforts to investigate fully and incentivising genuine national proceedings and cooperation with the Court, while discouraging attempts to dissuade the Prosecutor from proceeding against certain individuals or groups.

Chapter 5. The role of the PTC at the investigative stage of the proceedings: navigating between adversarial and inquisitorial traditions

5.1 Introduction

Within the margins of the situation of crisis for which the Court's jurisdiction has been activated, the Prosecutor has discretion to conduct his investigations and select cases for prosecution. The Prosecutor is however bound by his obligation to investigate fully in order to establish the truth and is subject to high international standards of due process. The gatekeeping role of the PTC at this stage is therefore essentially aimed at protecting the rights of those who may be affected by the Court's proceedings, avoiding politically driven prosecutions and ensuring that the Prosecutor's investigations are conducted in conformity with the requirements of due process.

The Statute contains features of both traditional adversarial and inquisitorial models of criminal justice, particularly at the investigative stage of the proceedings.⁷⁸¹ Article 42(1) provides for an independent Prosecutor with discretion to conduct his investigations without contemporaneous judicial supervision or direction. At the same time, however, Article 54(1)(a) imposes on the Prosecutor the obligation to extend his investigations to cover all facts and evidence necessary to 'establish the truth', investigating incriminating and exonerating circumstances equally. More importantly, the system provides for certain functions to be exercised by the PTC during the investigate stage of the proceedings. Although not transforming the PTC judges into inquisitorial investigative judges or *juges d'instruction*, these functions still afford them a significant role.

Accordingly, apart from acting on the Prosecutor's request issuing orders and warrants in support of his investigative efforts,⁷⁸² or at the request of the person who has been arrested or appeared pursuant to a summons issuing orders

⁷⁸¹ For an instructive account of the traditional distinction between adversarial and inquisitorial systems of criminal procedure and the specific features adopted by the different international courts and the ICC, see (n 21) *Cassese and others* 329-346. For the differences in relation to the Pre-Trial proceedings, see also (n 112) Marchesiello 1231-1235; (n 113) Fourmy 1209-1215.

⁷⁸² Statute Articles 54(2)(b), 56(1)(b), 57(3)(a), 57(3)(d).

including measures such as those described in Article 56 or seek cooperation as may be necessary to assist the person in the preparation of his defence,⁷⁸³ the PTC has been given crucial powers to intervene on its own initiative during the investigative stage of the proceedings. These functions are aimed at ensuring full respect for the rights of those who may be affected by the Court's investigations and future prosecutions. As described in Section 2.5, the PTC is empowered during the investigative stage, in accordance with Articles 68(3), 56(3)(a) and 57(3)(c), to: (i) allow victims to present their views and concerns; (ii) take measures to preserve evidence that would be essential to the defence at trial when the Prosecutor has failed to request measures in relation to a unique investigative opportunity; and (iii) provide for the protection and privacy of victims and witnesses, the preservation of evidence and the protection of national security information, where necessary.

Lastly, upon investigation and following the Prosecutor's finding that there is no sufficient basis for prosecution, the PTC may review such a decision in accordance with Article 53(3), at the request of the referring State, the Council or acting *proprio motu*. Alternatively, if the Prosecutor finds there to be a sufficient basis for a prosecution, the PTC shall, in accordance with Article 58(1) and (7), issue a warrant of arrest or summons to appear if, having examined the application and evidence or other information submitted by the Prosecutor it is satisfied that a case should be initiated against an alleged perpetrator.

This Chapter will assess the gatekeeping role entrusted to the PTC during the investigation stage of the Court's proceedings, referring to the emerging practice of the Court during the first decade of its existence. As will be explained, while in the first situations brought before the Court PTC I exercised some monitoring activity of the Prosecutor's investigation, the practice as it developed came to involve only very limited intervention by the PTC. Nonetheless, what kept the different PTCs occupied was mostly the delimitation of the role and extension of the participation of victims at the investigative stage. These issues will be discussed below. Section 5.2 will develop the issues raised in relation to the participation of victims at the investigation stage of the

⁷⁸³ Ibid Article 57(3)(b).

proceedings, while section 5.3 will focus on the PTC's powers to intervene *proprio motu*. Section 5.4 will examine the most significant function of the PTC at the end of the investigative stage - the review of the Prosecutor's decision whether to initiate criminal proceedings against an identified alleged perpetrator. Section 5.5 provides conclusions stressing the notorious reluctance on the part of PTC judges to firmly scrutinise the Prosecutor's actions or to become substantially involved during the investigative stage, in spite of the powers granted to the PTC by the Statute.

5.2 The participation of victims during the investigation stage of the proceedings: the 'victims of the situation'

The recognition of a role for victims in the proceedings before the Court is one of the most important achievements of the drafters of the Statute and indeed represents a significant step forward in international criminal justice.⁷⁸⁴ Its inclusion in the Statute was the result of vigorous and sustained criticism of the lack of provisions of this kind at the *ad hoc* Tribunals.⁷⁸⁵ As a result, the Statute ensures that, throughout the ICC proceedings, the victims' views will be taken into consideration, in addition to those of the accused, the Prosecutor and affected States.⁷⁸⁶ Further, and crucially, it affords victims a distinctive role as active subjects directly offended by the commission of crimes and counterpoises this with the status of witnesses, who, as passive objects of the criminal process, may be either victims of the crimes or mere bystanders. Additionally, the Statute's provisions should be recognised as a confirmation of the approach taken by international human rights instruments and associated jurisprudence in

⁷⁸⁴ Claude Jorda and Jérôme de Hemptinne, 'The Status and Role of the Victim' in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, vol II (Oxford University Press 2002) 1388, stress that under the Statute victims of international crimes were accorded a 'double status denied to them by the provisions setting up the *ad hoc* Tribunals'.

⁷⁸⁵ David Donat-Cattin, 'Article 68: Protection of victims and witnesses and their participation in the proceedings' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (2nd edn, C.H.Beck - Hart - Nomos 2008) 1277.

⁷⁸⁶ In accordance with Article 68(3) and Rule 93. See, *inter alia*, Carsten Stahn, Héctor Olásolo and Kate Gibson, 'Participation of Victims in Pre-Trial Proceedings of the ICC' 4 JICJ 219, 221.

holding that the rights to an effective remedy and to access to justice are at the core of victims' rights.⁷⁸⁷

Article 68(3) and Rule 93 grant victims a general right to participate in the proceedings before the Court. Article 68(3) provides that, where the personal interests of victims are affected, the Court shall permit their views and concerns to be presented and considered at various stages of the proceedings. Rule 93 gives the Court the power to seek the views of victims on any issue. Moreover, other provisions of the Statute and the Rules - such as, *inter alia*, Articles 15(3), 19(3), 75 and 82(4) and Rules 72(2), 92(2), 119(3) and 143 - provide victims with specific participatory rights in a number of ICC proceedings.⁷⁸⁸ While victims are not recognised as equal players in the judicial process - they are 'participants' rather than 'parties' - neither the Statute nor the Rules unambiguously address the extent of the victims' rights to participate. Instead, the parameters of their rights are left to the judges' discretion.⁷⁸⁹

Given the lack of any precedent for victims' participation in international criminal justice procedures, the way in which the issue is approached at the national level will necessarily be the primary source for interpreting the Statute, in accordance with Article 21(1)(c). In this respect, it should be noted that one of the most distinctive features of the traditional inquisitorial system of criminal justice is that victims may, in respect of some offences and under certain circumstances, trigger the commencement of a criminal prosecution or seek a review of a decision not to proceed. In some systems they can also join the criminal proceedings as 'offended individuals' or 'civil parties' and thereby exercise their right to actively participate in the investigation by introducing evidence, requesting investigative steps or questioning witnesses.⁷⁹⁰ By contrast,

⁷⁸⁷ *Situation in the Republic of Kenya*, ICC-01/09-24 Decision on Victims' Participation in Proceedings Related to the Situation in the Republic of Kenya Pre-Trial Chamber II, 4 November 2010 para. 5.

⁷⁸⁸ Sergey Vasiliev, 'Article 68(3) and personal interests of victims in the emerging practice of the ICC' in Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff Publishers 2009) 638, footnote 14.

⁷⁸⁹ Gilbert Bitti and Hakan Friman, 'Participation of Victims in the Proceedings' in Roy S. Lee (ed), *The International Criminal Court Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, Inc 2001) 459.

⁷⁹⁰ See (n 21) Cassese and others 332; (n 788) Vasiliev 679-687. In Italy, the *persona offesa dal reato* (person offended by the crime), although not a *parte* (party) to the proceedings is a *soggetto* (subject), with the right to act as *accusa privata* (private prosecutor) and the power to

in most countries that follow the adversarial tradition, victims, while not completely excluded from the criminal justice process, are granted only very limited participatory rights, such as the opportunity to provide a statement to the Court, and in some cases, to seek a review of a decision not to prosecute.⁷⁹¹

Upon a preliminary reading of the Statute and the Rules, it appears questionable whether victims have any right to participate during the investigative stage of the proceedings. Article 68(3), which grants victims the general right to participate in the proceedings before the Court, is found in Part VI of the Statute dealing with trial. However, Rules 89 to 92, containing the procedural framework for victims' participation, are included in Chapter IV of the Rules,

intervene as from the early investigative stage (*indagini preliminari*), see Mario Merconi, *Diritto Processuale Penale* (XIX edn, Edizione Giuridiche Simone 2011) 187-192; in France, the *partie lésée par l'infraction* (party damaged by the infraction) is entitled to trigger the investigation (*mise en mouvement*) and participate in the proceedings exercising the *action civile* (civil action). Prosecutions will ordinarily be triggered either by the Prosecutor (*proprio motu* or following a victim's complaint) or directly by a private party (victim or association), (n 68) Leroy 235-263; in Scotland, while the criminal procedure is largely adversarial, it is possible for an individual who has suffered a personal wrong to apply to the Court for authority to institute a prosecution. This procedure, known as a 'bill for criminal letters', is however rarely invoked and hardly ever succeeds, see Brown 18; in the Netherlands, the *slachtoffer* (victim) has the right to be notified by the police and the Prosecutor of the commencement and progress of the investigation, may have access to the relevant parts of the file, may add evidence and can seek a review of a decision not to prosecute, see *Wetboek van Strafvordering* (the Netherlands, 1921) articles 12, 51; in Chile, under a new system introduced in 2000, victims (*víctimas*) are considered parties (*interviniente*) of the criminal process, are entitled to initiate a private criminal action (*acción penal privada*) and can oppose the Prosecutor's use of his discretionary powers to dismiss or temporarily archive a case during the investigative phase by filing an independent criminal complaint (*querrela particular*), thereby forcing the Prosecutor to move forward with the investigation. Victims who have filed a complaint (*querellante*) can file an accusation and continue with the case through trial, even if the Prosecutor decides not to pursue the case in court, see Ley 19696, Código Procesal Penal, (Chile, 12 October 2000).

⁷⁹¹ 'Victims Impact Statements' exist in the US, Australia, Canada and England and Wales, see Jo-Anne Wemmers, 'Where do they belong? Giving victims a place in the criminal justice process' (2009) 20 Crim LF 395, 398. In England, the Code for Crown Prosecutors instructs Prosecutors, in deciding whether a prosecution is required in the public interest, to take into account the views of the victim and his family, see *The Code for Crown Prosecutors* (January 2013), England para. 4.12(c). As of June 2013, the CPS has launched a new initiative called the 'Victims' Right to Review Scheme' which facilitates victims seeking a review of a CPS decision not to bring charges or to terminate proceedings. This initiative was based on the 2011 Court of Appeal judgment in the case of *Killick*, which stated that victims have a right to seek a review of a CPS decision not to prosecute, see *R v Christopher Killick* [2011] EWCA Crim 1608; Crown Prosecution Service, 'Victims' Right to Review Scheme' (June 2013) <http://cps.gov.uk/victims_witnesses/victims_right_to_review/index.html> accessed 20 October 2013. A recent Directive of the European Union establishes that all Member States shall ensure, *inter alia*, in Article 10(1) that, 'that victims may be heard during criminal proceedings and may provide evidence' and in Article 11(1) that, 'in accordance with their role in the relevant criminal justice system, have the right to a review of a decision not to prosecute', see *European Union, Directive 2012/29/EU, Establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA*, 25 October 2012 (2012).

together with provisions relating to the various stages of the proceedings. Nevertheless, from its earliest decisions, against the predictions of commentators⁷⁹² and despite the Prosecutor's fierce opposition,⁷⁹³ the different PTCs interpreted Article 68(3) as providing for a general participatory right for victims at all stages of the proceedings.⁷⁹⁴

In its initial decision, PTC I took the view that the term 'proceedings', as used in Article 68(3), 'does not necessarily exclude the stage of investigation of a situation'.⁷⁹⁵ As regards the Article 68(3) requirement that the 'personal interests of the victims' be engaged, the Chamber was of the view that:

personal interests of victims are affected in general at the investigation stage, since the participation of victims at this stage can serve to clarify the facts, to punish the perpetrators of crimes and to request reparations for the harm suffered.⁷⁹⁶

In order for victims to enjoy participatory rights, PTC I adopted a twofold procedure. First, the PTC had to decide whether victims, generally speaking, were able to participate at the investigation stage of the proceedings; if so, they would be granted the 'procedural status of victims'. At the second stage, the Chamber would consider the extent of the participation of particular victims on a case-by-case basis. With regard to which specific proceedings the victims could participate in, PTC I held that it would 'decide at the time of the initiation of such proceedings whether persons having the status of victims may participate in

⁷⁹² Early commentators envisaged the participation of victims as taking place at the trial or upon the confirmation of charges, see (n 215) Schabas, *An Introduction to the International Criminal Court* 173.

⁷⁹³ See, *inter alia*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-103 Prosecution's Application for Leave to Appeal Pre-Trial Chamber I's Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 Office of the Prosecutor, 23 January 2006.

⁷⁹⁴ See, *inter alia*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-101-tEN-Corr Decision on the applications for participation in the proceedings of VPRS1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 Pre-Trial Chamber I, 17 January 2006 para. 46; *Situation in Uganda*, ICC-02/04-101 Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06 Pre-Trial Chamber II, 10 August 2007 paras 88-89; *Situation in Darfur*, ICC-02/05-111-Corr Corrigendum to Decision on the Applications for Participation in the Proceedings of Applicants a/011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07 Pre-Trial Chamber I, 14 December 2007. The attitudes adopted by the PTCs differed however between *systematic* and *casuistic* approaches. While PTC I granted victims a general right to be heard and file documents during the investigation stage, PTC II specified particular judicial proceedings in which victims could participate.

⁷⁹⁵ *Congo*, ICC-01/04-101-tEN-Corr para. 38.

⁷⁹⁶ *Ibid* para. 63.

them (...) [taking] into account the impact that such specific proceedings could have on their personal interests'.⁷⁹⁷ In addition, persons granted the 'status of victims' were 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 (...) investigation'.⁷⁹⁸ In addition, victims were also entitled 'to request the Pre-Trial Chamber, pursuant to article 68(3) of the Statute, to order specific proceedings'.⁷⁹⁹ This interpretation, particularly the possibility for victims to request the PTC to order specific procedures, potentially allowed the PTC to directly intervene in the Prosecutor's investigation.

On appeal, however, this broad approach was limited. In its judgment of December 2008, the AC observed that 'the notion of *procedural status of victims* is nowhere defined, and it is difficult to attach a specific meaning to it'.⁸⁰⁰ In interpreting Article 68(3), it distinguished between prosecutorial or investigative steps conducted by the Prosecutor, and judicial proceedings, stressing that:

'proceedings' [is] a term denoting a judicial cause pending before a Chamber. In contrast, an investigation is not a judicial proceeding but an inquiry conducted by the Prosecutor into the commission of a crime with a view to bringing to justice those deemed responsible.⁸⁰¹

⁷⁹⁷ Ibid para. 73. These included: (i) proceedings to be initiated *proprio motu* by the PTC (Articles 56(3) and 57(3)(c)), in which the Chamber would decide at the time of initiation of such proceedings whether persons having the status of victims may participate; (ii) proceedings initiated by the Prosecutor or the counsel representing the general interest of the Defence, in which victims would be entitled to participate only if they were public proceedings, unless the Chamber decided otherwise; and (iii) specific proceedings pursued by the Pre Trial Chamber at the request of victims, in case of which the PTC would rule on a case-by-case basis, after assessing the impact of such proceedings on the personal interests of the applicants. In addition, the victims were entitled to be notified of the proceedings before the Court. See *ibid* paras 73-76.

⁷⁹⁸ Ibid para. 71.

⁷⁹⁹ Ibid para. 75.

⁸⁰⁰ *Situation in the Democratic Republic of the Congo, ICC-01/04-556* Judgment on victim participation in the investigation stage of the 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 Appeals Chamber, 19 December 2008 para. 43 [emphasis added].

⁸⁰¹ Ibid para. 45.

Consequently, the AC found that victims' participation could take place only within the context of judicial proceedings.⁸⁰² Reinforcing prosecutorial independence, it further held that:

authority for the conduct of the investigations vests in the Prosecutor. Acknowledgment by the Pre-Trial Chamber of a right to [sic] victims to participate in the investigation would necessarily contravene the Statute by reading into it a power outside its ambit and remit.⁸⁰³

The AC stressed that 'participation pursuant to article 68(3) of the Statute is confined to proceedings before the Court, and aims to afford victims an opportunity to voice their views and concerns on matters affecting their personal interests'.⁸⁰⁴ Nevertheless, it notably held that '*victims are not precluded from seeking participation in any judicial proceedings, including proceedings affecting investigations, provided their personal interests are affected by the issues arising for resolution*'.⁸⁰⁵

Thus, according to the AC, victims are not entitled - as they theoretically were pursuant to prior decisions - to present their views and concerns in relation to the investigation, to file documents or to request the PTC to order specific proceedings.⁸⁰⁶ However, the PTC could still decide that victims would be allowed to participate in specific judicial proceedings held during the investigation stage. This decision should be taken on a case-by-case basis, depending on the impact of such proceedings on the victim's personal interests.⁸⁰⁷

The AC therefore clearly distinguished between investigative steps, conducted by the Prosecutor, and judicial proceedings, viewing them as distinct elements of the investigation process. Consequently, while victims cannot intervene in an

⁸⁰² Ibid.

⁸⁰³ Ibid para. 52.

⁸⁰⁴ Ibid para. 55.

⁸⁰⁵ Ibid para. 56 [emphasis added].

⁸⁰⁶ Ibid paras 41-46. See also *Situation in Darfur, ICC-02/05-177* Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 03 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 6 December 2007 Appeals Chamber, 2 February 2009 para. 7.

⁸⁰⁷ *Congo, ICC-01/04-556* paras 46-55; *Darfur, Sudan, ICC-02/05-177* para. 7.

investigation conducted by the Prosecutor, they are still able to seek participation in judicial proceedings conducted at the investigation stage.⁸⁰⁸

Following the AC's judgments, PTC II held in the Kenya situation that there was 'no reason to depart from the unified approach undertaken by the different Chambers that victims may participate in proceedings related to the situation stage'.⁸⁰⁹ Reproaching the AC for not providing 'any guidance as to the possible scenarios that could lead to [victims'] participation at the situation stage',⁸¹⁰ it indicated that victims could participate, *inter alia*, in judicial proceedings related to Articles 53,⁸¹¹ 56(3)⁸¹² and 57(3)(c),⁸¹³ Rule 93⁸¹⁴ and other instances deemed appropriate by the PTC.⁸¹⁵ These other instances would include, in particular, (i) judicial proceedings triggered by other parties or participants; (ii) judicial proceedings started *proprio motu* by the Chamber; and (iii) proceedings following from the Chamber being seized of a request from the victims themselves.⁸¹⁶

As to the procedural framework for potential participation - and presumably taking into account the considerable burden imposed by the procedure of individual assessment of each application previously applied - PTC II devised a system, later followed in other situations,⁸¹⁷ which includes the assistance of the

⁸⁰⁸ *Congo*, ICC-01/04-556 para. 57.

⁸⁰⁹ *Kenya*, ICC-01/09-24 para. 9.

⁸¹⁰ *Ibid* para. 11.

⁸¹¹ Related to the initiation of an investigation or prosecution.

⁸¹² Related to unique investigative opportunities.

⁸¹³ Related to the measures that the PTC may take, *inter alia*, for the protection and privacy of victims and witnesses and the preservation of evidence.

⁸¹⁴ Which established that a Chamber may seek the views of the victims on any issue.

⁸¹⁵ *Kenya*, ICC-01/09-24 para. 12.

⁸¹⁶ *Ibid* paras 13-16.

⁸¹⁷ *Situation in the Central African Republic*, ICC-01/05-31 Decision on Victims' Participation in Proceedings Related to the Situation in the Central African Republic Pre-Trial Chamber II, 11 November 2010 para. 2; *Situation in the Democratic Republic of the Congo*, ICC-01/04-593 Decision on victims' participation in proceedings relating to the situation in the Democratic Republic of the Congo Pre-Trial Chamber I, 11 April 2011 para. 13; *Situation in Libya*, ICC-01/11-18 Decision on Victim's Participation in Proceedings Related to the Situation in Libya Pre-Trial Chamber I, 24 January 2012 4; *Situation in Uganda*, ICC-02/04-191 Decision on Victim's Participation in Proceedings Related to the Situation in Uganda Pre-Trial Chamber II, 9 March 2012.

Victims Participation and Reparation Section (VPRS) in the completion of the victims' files and in the initial assessment of compliance with Rule 85.⁸¹⁸

As a result, the right of victims to participate in judicial proceedings at the investigation stage has been affirmed by the jurisprudence of the Court. However, the way in which the whole process has operated - even before the AC judgment - appears to have been such as to achieve only symbolic 'procedural', as opposed to substantive, participation. Indeed, despite the burdensome process for individually granting victims a right to participate in proceedings that may eventually be initiated,⁸¹⁹ no significant involvement of victims at the investigation stage has ever materialised. Some commentators have stressed that the mere fact that the victims are no longer excluded from the criminal process, being instead recognised as participants and validated when allowed to participate, represents an exercise of restorative justice.⁸²⁰ However, others are of the view that the attempts of the different PTCs to recognise a role for victims during the investigation stage has been mainly theoretical, failing to provide meaningful participation.⁸²¹ This could lead to frustrating the victims' expectations and to 'secondary victimisation'.⁸²²

⁸¹⁸ In particular, when the Chamber is seized of a request by a party or participant, including the victims of the situation, the Chamber will first determine whether they could lead or be linked to judicial proceedings. Once the Chamber has determined that judicial proceedings will take place - including when initiating them *proprio motu* - it will assess the requirements of Rule 85 in relation to the witnesses whose applications can be linked to the issues at stake, before turning later to consider whether those victims' personal interests are affected by the issue subject to judicial examination. VPRS will first distinguish between applications for participation and those seeking reparation, there being a presumption in favour of the latter in lieu of express indication. VPRS will review and ensure that they are complete - requesting additional information if necessary - and will perform an initial assessment of compliance with Rule 85, but the final assessment will be subject to judicial determination. A report on the VPRS's assessment, together with the applications, should be submitted to the Chamber only when it is determined that judicial proceedings will take place, *see Kenya, ICC-01/09-24* paras 13-23.

⁸¹⁹ For a critical review of the individualised procedure for victims' application and the urgent need to find a feasible solution that, while recognising the importance of the role of the victims, does not undermine the fairness and effectiveness the judicial process, *see* Lorraine Smith-van Lin, 'Victims' Participation at the International Criminal Court: Benefit or Burden?' in William Schabas, Yvonne McDermontt and Niamh Hayes (eds), *The Ashgate Research Companion to International Criminal Law Critical Perspectives* (Ashgate Publishing Limited 2013).

⁸²⁰ (n 791) Wemmers 416.

⁸²¹ Christine H. Chung, 'Victims' participation at the International Criminal Court: Are concessions of the Court clouding the promise?' (2008) 6 *Nw U J Int'l Hum Rts* 459, 497.

⁸²² (n 788) Vasiliev 647; Elisabeth Baumgartner, 'Aspects of victim participation in the proceedings of the International Criminal Court' (2008) 90 *IRRC* 409, 416, who points out that with respect to any given situation, the majority of victims are unlikely to be received by the Court on account of the specific incidents concerned either not being investigated or not

Sources of frustration could well be identified in the few opportunities in which victims submitted concrete requests at the investigation stage, which were later rejected with apparently minimal involvement from the PTC. In one case, for example, the issue raised before PTC I by certain victims of crimes allegedly committed by Lubanga, but not included in the charges brought by the Prosecutor, was whether the Prosecutor had taken a tacit decision not to proceed with an investigation or prosecution in relation to these crimes and whether it had taken measures for the preservation of evidence.⁸²³ Similarly, some victims requested PTC I to review the Prosecutor's alleged tacit decision not to prosecute Jean-Pierre Bemba within the context of the Congo situation.⁸²⁴ The matter touched upon the highly sensitive relationship between the Prosecutor's discretion and independence and the PTC's role in scrutinising the Prosecutor's actions during the investigative stage of the proceedings. PTC I however simply dismissed the requests stating that the Prosecutor had not taken a decision not to investigate or prosecute and that there was no indication that the Prosecutor had not taken measures to ensure the preservation of evidence.⁸²⁵ PTC I then missed, on two occasions, the opportunity to fully exercise its role of counterbalancing the Prosecutor's discretion.

One could argue that victims could be given a more active role during the phase of the investigation without unduly compromising the Prosecutor's independence. In most cases, victims are in a 'privileged' position compared to the Prosecutor as they will have experienced themselves the crimes and be able to provide evidence of it. They will also be generally located in close proximity to the place where the crimes had been committed, with more direct and immediate access to the evidence needed for the prosecution of crimes. Victims could be thus the triggering force behind the exercise of the PTC powers pursuant to Regulation 48 to request information or documents from the Prosecutor, in order for the PTC to be able to exercise its *proprio motu* powers

becoming the subject of a specific case. These individuals will therefore be left with unfulfilled hopes and expectations.

⁸²³ *Situation in the Democratic Republic of the Congo*, ICC-01/04-399 Decision on the Requests of the Legal Representative for Victims VPRS 1 to VPRS 6 regarding 'Prosecutor's Information on further Investigation' Pre-Trial Chamber I, 26 September 2007 2-3.

⁸²⁴ *Congo*, ICC-01/04-582 3.

⁸²⁵ *Congo*, ICC-01/04-399 5-6; *Congo*, ICC-01/04-582 4-5.

under Articles 53(3)(b)⁸²⁶ or 57(3)(c).⁸²⁷ Unfortunately however, as will be discussed in the following section, so far the PTC has been quite reluctant to play any active role during the investigative stage and has avoided any sort of involvement that might be interpreted as scrutinising the Prosecutor's exercise of discretion in the selection of cases for prosecution. Within this context, the PTC has in fact fallen short in providing victims with meaningful participation during the investigative stage and has limited their involvement to a symbolic acknowledgment that the applicants may be victims of the situation under investigation. However, victims have not been granted any concrete rights during the investigation stage.

5.3 PTC's intervention during the Prosecutor's investigation

As has become the norm with international criminal tribunals, the Statute provides for prosecutorial independence and a broad discretion in the selection of cases and evidence.⁸²⁸ ICL has been strongly influenced by the adversarial tradition since Nuremberg.⁸²⁹ Nonetheless, as a treaty-based institution resulting from negotiations among representatives from the different legal systems of the world, the Statute represents a novel hybrid system counterbalancing the independent Prosecutor with instances of judicial control and intervention by the PTC from the earliest stages of the investigation. A role for the PTC at the investigative stage was conceived of as a means to ensure the efficiency and integrity of the proceedings and the protection of the rights of the defence.⁸³⁰

⁸²⁶ Review of the Prosecutor's decision not to proceed in the interests of justice.

⁸²⁷ Take measures to, *inter alia*, provide for the protection and privacy of victims and witnesses and the preservation of evidence.

⁸²⁸ Statute Articles 42(1), 53(1) and (2), 54.

⁸²⁹ Nuremberg Charter Articles 14-15; ICTY Statute Articles 16, 18; ICTR Statute Articles 15, 17; Statute of the Special Court for Sierra Leone (United Nations and the Government of Sierra Leone, 16 January 2002) Article 15.

⁸³⁰ For the discussion during the drafting process of the Statute and the reasons that led to the inclusion of Articles 56-57, *see, inter alia*, Fabricio Guariglia, 'Investigation and Prosecution' in Roy S. Lee (ed), *The International Criminal Court The Making of the Rome Statute Issues, Negotiations, Results* (Kluwer Law International 1999) 233-238; Fabricio Guariglia and Gudrun Hochmayr, 'Article 56: Role of the Pre-Trial Chamber in relation to a unique investigative opportunity' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (Second edn, C.H.Beck - Hart - Nomos 2008) 1108-1109; (n 248) Guariglia, Harris and Hochmayr 1118-1119; (n 113) Fourmy 1212-1215.

Although not entitled to conduct investigations by itself or to direct the Prosecutor's investigations, the PTC has nonetheless important powers during the investigative stage. In particular, and in addition to the authority to provide for the participation of victims discussed above and the power to intervene at the request of the Prosecutor,⁸³¹ Articles 56(3)(a) and 57(3)(b) and (c) empower the PTC to act upon the request of the person who has been arrested or appeared pursuant to a summons or to take some *proprio motu* measures during the investigation stage. These provisions allow the PTC to act either in relation to a unique investigative opportunity or in order to assist the person in the preparation of his defence or provide for the protection and privacy of victims and witnesses, the preservation of evidence and the protection of national security information. In order to exercise its functions and responsibilities set forth, *inter alia*, in Articles 56(3)(a) and 57(3)(c), Regulation 48(1) provides a powerful tool allowing the PTC to request that the Prosecutor provides the necessary specific or additional information or documents in his possession.

This system, which represents an innovation from the practice of the *ad hoc* tribunals, allows for some judicial involvement during the investigation in order to protect the rights of those affected by the investigations.⁸³² It has, however, hardly ever been used. Indeed, although the instances of possible intervention were agreed upon by the drafters and included in the Statute, the first decade of the Court's existence has been marked by extreme cautiousness, with the PTC

⁸³¹ The different instances in which the PTC may act during the investigative stage of the proceedings at the request of the Prosecutor will not be analysed in detail here as they are not directed at counterbalancing the Prosecutor's discretion but to support him in his investigations. They include, *inter alia*, those referred to in Articles 56(1)(b), 57(3)(a) and 54(2)(b) in relation to 57(3)(d).

⁸³² At the *ad hoc* tribunals of Yugoslavia and Rwanda and at the Special Court for Sierra Leone, a Pre-Trial Judge was designated by the Presiding Judge of a Trial Chamber in order to review the indictment and, only upon confirmation, issue such orders and warrants as requested by the Prosecutor; therefore, there was no judicial involvement during the stage of the investigation. See ICTY Statute Article 19; Rules of Procedure and Evidence (International Criminal Tribunal for the former Yugoslavia, 11 February 1994) Rule 47; ICTR Statute Article 18; Rules of Procedure and Evidence (International Criminal Tribunal for Rwanda, 29 June 1995) Rule 47; Rules of Procedure and Evidence (Special Court for Sierra Leone, 16 January 2002) Rule 47. The Special Tribunal for Lebanon includes within its composition an international Pre-Trial Judge, whose role is also primarily to review the indictment, but who is also allowed to issue orders as may be required for the conduct of the investigation. However, the Pre-Trial Judge can only issue orders at the request of the Prosecutor; therefore, unlike the ICC's PTC, he does not have *proprio motu* powers. See Statute of the Special Tribunal for Lebanon (United Nations and the Lebanese Republic, 10 June 2007) Article 18; Rules of Procedure and Evidence (Special Tribunal for Lebanon, 20 March 2009) Rule 88.

judges appearing reluctant to exercise any sort of control over the Prosecutor's discretionary powers.

A clear example is the limited use made so far of Article 56, which provides a very powerful tool at the disposal of the Prosecutor and of the PTC, aimed at preserving evidence that may not be available subsequently for trial. In accordance with Article 56 and Rule 114, the PTC may intervene in relation to a unique investigative opportunity, either upon the request of the Prosecutor or on its own initiative. In the latter case, the PTC's power to oversee the Prosecutor's investigation is borne out of a desire on the part of the drafters to protect the rights of the defence.⁸³³ Pursuant to Article 56(3)(a), where the Prosecutor has not sought measures pursuant to this Article, but the PTC considers that such measures are required to preserve evidence that it deems would be essential for the defence at trial, it shall consult with the Prosecutor as to whether there is a good reason for his failure to request such measures. If, upon consultation, the PTC concludes that the Prosecutor's failure is unjustified, the PTC shall take such measures on its own initiative.

Guariglia and Hochmayr are of the view that the PTC will only be entitled to intervene if and when the Prosecutor informs it, pursuant to Article 56(1)(a), that a unique investigative opportunity exists. Such a reading places the determination of whether there exists a unique investigative opportunity entirely within the discretionary power of the Prosecutor.⁸³⁴ However, this does not appear to be in accordance with the drafters' intention which, as also highlighted by the authors, was to ensure 'at least partial "equality of arms" between an accused or a suspect and the Prosecutor at the stage of investigation and prosecution'.⁸³⁵ Demanding that the Prosecutor first determine that a 'unique investigative opportunity' actually exists in order for the PTC to be able to act may render the provision meaningless. Indeed, it is hard to imagine a Prosecutor simply informing the PTC that there is a unique opportunity to preserve evidence that may not be available subsequently for trial, but who does not then request the PTC to take measures necessary to

⁸³³ UN Doc A/AC.249/1998/L.13 (1998) 93. Noting in footnote 160 that the involvement of the PTC was conceived of 'in order to assure a fair trial/protect the interests of the defence'.

⁸³⁴ (n 830) Guariglia and Hochmayr 1114.

⁸³⁵ Ibid 1108.

ensure the efficiency and integrity of the proceedings. Impeding the PTC to determine that a unique investigative opportunity exists, when the Prosecutor fails to do so and after consulting with him, excessively limits the PTC's role and its powers to ensure full respect for the rights of the suspect.

Other commentators do not address this narrow interpretation given by Guariglia and Hochmayr and focus on other reasons that may have prevented so far a more extensive use of Article 56(3). Fourmy, for example, suggests that a crucial limitation on the PTC is imposed by the language of Article 56(3)(a), which mandates the decision to be based on the necessity to 'preserve evidence that [the PTC] deems would be essential for the defence at trial', ie the issue is to contribute efficiently towards ensuring a fair trial, which depends to a large extent on the Prosecutor's strategy.⁸³⁶ Schabas notes that the defence itself cannot invoke Article 56, although that difficulty appears to have been repaired by Article 57(3)(b), which authorises the PTC, upon the suspect's request, to order measures such as those described in Article 56.⁸³⁷ De Smet focuses on the practical limitations for the PTC to become aware of the existence of a unique investigative opportunity due to their lack of independent information about the situation on the ground and of investigative capacities.⁸³⁸ However, nothing prevents the PTC becoming aware of the existence of a unique investigative opportunity, either because of what is reported by the media or because the suspect or victims may have provided it with such information. This would be the case, for example, with the opportunity to preserve the official documents to be found in the offices or residences of deposed officials on the run when the media is notoriously reporting their raid, as was the case with Gaddafi's compound or the Headquarters of Libya's Intelligence Agency in Tripoli.⁸³⁹

⁸³⁶ Fourmy 1218.

⁸³⁷ Schabas, *The International Criminal Court: A Commentary on the Rome Statute* 693-694.

⁸³⁸ Simon De Smet, 'A structural analysis of the role of the Pre-Trial Chamber in the fact-finding process of the ICC' in Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff Publishers 2009) 426-428.

⁸³⁹ The Guardian, 'Gaddafi compound hit in Nato attack. Libyans claim Nato directly targeting Gaddafi in violation of UN resolution after office building and reception area damaged' (25 April 2011) <<http://www.theguardian.com/world/2011/apr/25/gaddafi-compound-hit-nato-attack>> accessed 17 November 2014; Aljazeera, 'Secret files: US officials aided Gaddafi. Al Jazeera uncovers evidence that influential Americans tried to help the now-deposed Libyan leader cling to power.' (31 August 2011)

This provision, if more widely used at the investigative stage, has the potential to serve as a powerful tool to counteract the structural imbalance between the OTP and the defence and may serve to expedite proceedings. According to Kress, depending on how wide or narrow the term ‘unique investigative opportunity’ is interpreted there will be considerable repercussions for the overall architecture of the proceedings.⁸⁴⁰ A broader interpretation may diminish the dominant position of the Prosecutor during the investigation stage and the role of the trial as the climax of the proceedings.⁸⁴¹ Notably, the provision allows the PTC to overrule a Prosecutor’s decision not to take evidence in a particular case, giving to the PTC a subsidiary *proprio motu* role as an investigative body.⁸⁴²

In accordance with Article 56(4), the admissibility of evidence preserved or collected pursuant to Article 56 ‘shall be governed at trial by article 69, and given such weight as determined by the Trial Chamber’. This provision allows for evidence collected under Article 56 to be introduced at trial, without the need for it to be reproduced at that stage. It should be noted that Article 69(2) establishes the presumption in favour of oral testimony at trial, *except* to the extent provided by the Statute and the Rules. Rule 68, which regulates the conditions under which prior recorded testimony may be introduced *in lieu* of oral testimony at trial, provides that it applies ‘when the Pre-Trial Chamber has not taken measures under article 56’. These provisions, therefore, may allow for the testimony of a witness collected under this provision to be directly submitted at trial, without the need to comply with Rule 68.

As noted by De Smet, witness recollection of relevant details diminishes considerably over time and the risk of extraneous influence on the witness increases when he or she has to wait for several years before testifying. Accordingly, this important fact-finding tool at the disposal of the PTC may be of use not only to ensure that evidence is preserved but also that it is captured

<<http://www.aljazeera.com/indepth/features/2011/08/2011831151258728747.html>> accessed 17 November 2014.

⁸⁴⁰ Kress, ‘The procedural law of the International Criminal Court in outline: Anatomy of a unique compromise’ 607.

⁸⁴¹ *Ibid* 607-608.

⁸⁴² *Ibid* 608.

when the quality remains high.⁸⁴³ As such, the possibility of collecting evidence under this provision, if more frequently used, could be of great utility in the volatile environments of the situations under the Court's jurisdiction. In addition, this provision is ostensibly of particular importance given that ICC investigations are generally lengthy, most of the time commencing long after the events have taken place, and are conducted with limited access to the territory and the victims affected by the crimes allegedly committed. In spite of its importance, however, it has hardly ever been used. Unless its exercise has remained confidential and/or under seal, it would appear that the Prosecutor has asked the PTC to take measures in order to obtain a forensic examination of certain data on only one occasion, and then ultimately did not even present that evidence at trial.⁸⁴⁴ However, the PTC has never even attempted to use its powers under Article 56(3)(a) in order to preserve evidence that may be essential for the defence at trial.

A situation similar to that relating to Article 56 has occurred in relation to the exercise by the PTC of its powers under Article 57(3)(c). The provision allows the PTC, where necessary, to 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. Guariglia and others argue that this provision does not grant additional powers to the PTC and that it only serves as a cross-reference with other provisions of the Statute.⁸⁴⁵ However, the clear text of the chapeau of Article 57(3) '[i]n addition to its other functions under this Statute, the Pre-Trial Chamber may', appears to contradict such a narrow interpretation of Article 57(3)(c).

Regrettably, however, the PTC has also been rather reluctant to make use of this provision, which could have allowed, in the *Lubanga* case for example, a better scrutiny of the extent and modalities of the Prosecutor's investigations and of the appropriateness of the measures taken by the Prosecutor to preserve evidence. Some victims of the DRC situation - who did not qualify as victims of

⁸⁴³ (n 838) De Smet 426-428.

⁸⁴⁴ *Situation in the Democratic Republic of the Congo, ICC-01/04-21* Decision on the Prosecutor's Request for Measures under Article 56 Pre-Trial Chamber I, 26 April 2005.

⁸⁴⁵ (n 248) Guariglia, Harris and Hochmayr 1126.

the crimes included in the warrant of arrest against Lubanga - requested PTC I to ask the Prosecution for information pursuant to Regulation 48, and to order the preservation of the evidence relating to the victims pursuant to the PTC's powers under article 57(3)(c). PTC I took into account the information provided by the Prosecutor that he had 'temporarily suspended' his investigations in relation to certain potential charges against Lubanga, but that he did 'not exclude' the possibility that he may continue his investigations into crimes allegedly committed by Lubanga in the future.⁸⁴⁶ After taking more than a year to decide, PTC I found that there was 'no indication' that the Prosecution was not taking measures to ensure the preservation of evidence; consequently, it did not deem it necessary to exercise authority under Article 57(3)(c), and found 'no reason' to resort to Regulation 48.⁸⁴⁷

In the *Lubanga* case, PTC I clearly decided not to intervene with the Prosecutor's discretion to select cases and charges for prosecution. As discussed in Section 1.1.2, the Prosecutor has discretion not to prosecute or amend charges, however, that decision, although discretionary, cannot be arbitrary. Although the PTC has no power to order the Prosecutor to proceed against certain individuals or crimes - unless the decision not to proceed is based on the 'interests of justice' - it can stimulate transparent decision-making within the OTP, allowing for public scrutiny of his function. The PTC may also decide not to intervene and leave the Prosecutor to freely exercise his discretion. However, in spite of its conformity with the Statute and the Rules, in the particular case of the victims of the DRC situation, what was unfortunately lacking was a direct answer from the PTC to the victims' request. The victims were entitled to know that, rather than the PTC being 'satisfied' that the Prosecutor was indeed taking the 'necessary measures to ensure the preservation of evidence',⁸⁴⁸ the PTC had in fact decided not to intervene in the exercise of discretion by the Prosecution.

It should be noted however that, on at least one occasion, PTC I played a more proactive role. In the situation in Darfur, given the slow pace of the Prosecutor's investigations and his reiterated claims to the UNSC that it was not possible to

⁸⁴⁶ *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-170 Prosecutor's Information on Further Investigation Office of the Prosecutor, 28 June 2006 paras 7-10.

⁸⁴⁷ *Congo*, ICC-01/04-399 6.

⁸⁴⁸ *Ibid.*

investigate inside Darfur because of the absence of a functioning and sustainable system for the protection of victims and witnesses, PTC I decided to act. In a rather unexpected move, in July 2006, using its powers under Rule 103(1) and Article 57(3)(c), PTC I requested observations on the protection of victims and the preservation of evidence from two *amicus curiae*: the then UN High Commissioner for Human Rights, Louise Arbour, and the Chairman of the International Commission of Inquiry on Darfur, the late Antonio Cassese.⁸⁴⁹

Both *amicus curiae* were very critical of the Prosecutor's reluctance to conduct *in situ* investigations. Cassese proposed a series of general and specific measures to take advantage from the fact that the armed conflict was still underway, which could have a serious impact on the evidence potentially available. In particular, Cassese suggested the use of Articles 56 and 57, in order to interview as many persons in the refugee camps as possible, obtain documentary evidence and record the testimony of victims which may not be available subsequently at trial.⁸⁵⁰ Arbour stressed that it was possible to conduct serious investigations during an armed conflict in general, and in Darfur in particular, without putting victims at unreasonable risk,⁸⁵¹ and demanded that the Court pursue 'all available avenues to ensure that it fulfils its mandate to deliver justice in a timely fashion'.⁸⁵² The Prosecutor responded that the measures recommended

⁸⁴⁹ *Situation in Darfur, ICC-02/05-10* Decision Inviting Observations in Application of Rule 103 of the Rules of Procedure and Evidence Pre-Trial Chamber I, 24 July 2006.

⁸⁵⁰ Antonio Cassese stressed that this was of critical importance 'for taking the testimony of victims of rape, which may not be available subsequently at trial either (i) because the victims is [sic] likely to be harassed or intimidated by other persons including militias or State officials, or (ii) because the victims' account is most likely gradually to fade or blur with the passage of time, or (iii) because the possible further deterioration of the security conditions in Darfur might make it impossible to present evidence in court.' See *Situation in Darfur, ICC-02/05-14* Observations on issues concerning the protection of victims and the preservation of evidence in the proceedings on Darfur pending before the ICC Antonio Cassese, dated 25 August 2006, notified 1 September 2006 11.

⁸⁵¹ *Situation in Darfur, ICC-02/05-19* Observations of the United Nations High Commissioner for Human Rights invited in application of Rule 103 of the Rules of Procedure and Evidence Louise Arbour, 10 October 2006 22.

⁸⁵² *Ibid* 25.

encroached upon his discretion,⁸⁵³ and stressed that he enjoyed discretion in choosing his investigative strategy.⁸⁵⁴

Whilst failing to produce the overarching consequences that it might have had, PTC I's 'impatience with the Prosecutor's pace', to borrow Schabas's words,⁸⁵⁵ eventually brought some concrete results. Soon after the *amicus curiae* reports, the Prosecutor informed the States Parties and the UNSC that he was moving towards 'the completion of the investigation and the presentation of evidence in relation to the first case'.⁸⁵⁶ A couple of months later, the first requests for warrants of arrest were submitted to the PTC.⁸⁵⁷

Although in the Darfur case the PTC's intervention arguably triggered the Prosecutor's action, the PTC again missed the opportunity to have a more active and meaningful role during the investigation and make more extensive use of its powers under Article 57(3)(c). Indeed, there was a clear pattern during the first decade of the Court's existence in that PTC was rather reluctant to exercise its *proprio motu* powers. In the situation in Kenya, PTC II stressed that 'the Court's statutory documents do not empower the Chamber to block the Prosecutor's investigative activities, unless there is a compelling need to intervene in instances such as those contemplated in article 57(3)(c) of the Statute'.⁸⁵⁸ So far, however, despite the strong criticism of the way the former Prosecutor exercised his discretion,⁸⁵⁹ the different PTCs have not seen fit to intervene. It remains to be seen whether, as the Court matures and grows in confidence, the PTC will become more actively involved during the investigation stage.

⁸⁵³ *Situation in Darfur*, ICC-02/05-16 Prosecutor's Response to Cassese's Observation on Issues Concerning the Protection of Victims and the Preservation of Evidence in the Proceedings on Darfur Pending before the ICC Office of the Prosecutor, 11 September 2006 para. 9.

⁸⁵⁴ *Ibid* para. 28; *Situation in Darfur*, ICC-02/05-21 Prosecutor's response to Arbour's observations of the United Nations High Commissioner for Human Rights invited in Application of Rule 103 of the Rules of Procedure and Evidence Office of the Prosecutor, 19 October 2006 para. 20.

⁸⁵⁵ Schabas, 'Prosecutorial Discretion v. Judicial Activism at the International Criminal Court' 758.

⁸⁵⁶ See Annex A to *Situation in Darfur*, ICC-02/05-40 Notification (with Annex) to Pre-Trial Chamber I Office of the Prosecutor, 19 December 2006.

⁸⁵⁷ *Situation in Darfur*, ICC-02/05-56 Prosecutor's Application under Article 58(7) Office of the Prosecutor, 27 February 2007.

⁸⁵⁸ *Situation in the Republic of Kenya*, ICC-01/09-39 Second Decision on Application by Nine Persons to be Questioned by the Office of the Prosecutor Pre-Trial Chamber II, 31 January 2011 para. 23.

⁸⁵⁹ See, *inter alia*, (n 518) Schabas, 'Prosecutorial Discretion v. Judicial Activism at the International Criminal Court'; (n 65) Horton; (n 47) Greenawalt; (n 100) Goldston.

5.4 Review of the Prosecutor's decision whether to prosecute an identified alleged perpetrator

The most relevant function of the PTC at the end of the investigative stage is the review of the Prosecutor's decision whether to initiate criminal proceedings against an identified alleged perpetrator.

Having undertaken an investigation, the Prosecutor may decide that there is no sufficient basis for a prosecution based on the criteria specified in Article 53(2).⁸⁶⁰ In such a case, the Prosecutor shall inform the PTC and the referring party of his conclusion and the reasons therefore. In accordance with Article 53(3), the PTC has the power to review the Prosecutor's decision, either *proprio motu* where the Prosecutor's decision is based solely on considerations relating to the interests of justice in terms of Article 53(2)(c), or at the request of the referring State or UNSC.

Conversely, the Prosecutor may find reasonable grounds to believe that a person has committed a crime within the jurisdiction of the Court and decide to prosecute him or her at any time after the initiation of the investigation. In such a case, the Prosecutor shall submit a substantiated request to the PTC in order that the Chamber - if satisfied that the requirements of Article 58 are met - issues a warrant of arrest or a summons to appear against an identified suspect. Both scenarios are examined below.

5.4.1 Review of the Prosecutor's decision not to prosecute

Pursuant to Article 53(3), the PTC has the power to review the Prosecutor's decision that 'there is no sufficient basis for prosecution' taken in accordance with Article 53(2). As stressed by commentators, the conditions for the

⁸⁶⁰ Article 53(2) of the Statute provides: '2. If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because: (a) There is not a sufficient legal or factual basis to seek a warrant or summons under article 58; (b) The case is inadmissible under article 17; or (c) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime; the Prosecutor shall inform the Pre-Trial Chamber and the State making a referral under article 14 or the Security Council in a case under article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion.'

implementation of Article 53(2) are unclear, particularly since there is no definition of what exactly a ‘decision not to prosecute’ is and there is further no deadline imposed upon the Prosecutor as to when such a decision must be taken.⁸⁶¹ A ‘decision not to prosecute’ may relate, for example, to: (i) a specific individual; (ii) certain crimes within the context of a given situation; (iii) a certain group of persons within the context of a situation; (iv) certain crimes committed by a specific individual, or indeed; (v) the failure to prosecute at all within the context of a given situation, such that no cases arise out of the situation under investigation.⁸⁶² The different possible scenarios would result in different degrees of judicial review, but the drafters of the Statute again did not specify the boundaries between prosecutorial discretion and judicial review, leaving the matter to be determined by the Court’s practice. Regrettably, the PTC has so far been reluctant to scrutinise prosecutorial choices, consistently interpreting this provision as imposing the need for an explicit decision from the Prosecutor ‘not to prosecute’. As a result, the Prosecutor has not formalised any decision not to prosecute and has thus avoided exposure to any judicial control, with the provision remaining a dead letter.⁸⁶³

In August 2007, PTC I denied a request in the situation in the DRC, from the NGO Women’s Initiatives for Gender Justice, that the PTC supervise the exercise of discretion by the Prosecutor. PTC I argued that the power to review the Prosecutor’s decisions would only arise ‘when the Prosecutor decides “not to prosecute a particular person or not to prosecute a person for particular crimes”’.⁸⁶⁴ Similarly, in September 2007, after the Prosecutor announced that it had temporarily suspended the investigation in relation to other potential charges against Lubanga, PTC I denied a request by some victims of the DRC situation for a review pursuant to Article 53(3)(b) of the Prosecutor’s implicit

⁸⁶¹ Gilbert Bitti, ‘Article 53. Ouverture d’une enquête’ in Julian Fernandez and Xavier Pacreau (eds), *Statut de Rome de la Cour Pénale Internationale Commentaire article par article*, vol II (Editions Pedone 2012) 1199; Carsten Stahn, ‘Judicial Review of Prosecutorial Discretion: Five years on’ in Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff Publishers 2009) 270.

⁸⁶² (n 861) Bitti 1199; (n 861) Stahn, ‘Judicial Review of Prosecutorial Discretion: Five years on’ 270.

⁸⁶³ (n 861) Bitti 1199.

⁸⁶⁴ *Situation in the Democratic Republic of the Congo, ICC-01/04-373 Decision on the Request submitted pursuant to rule 103(1) of the Rules of Procedure and Evidence Pre-Trial Chamber I*, 17 August 2007 para. 5.

decision not to prosecute.⁸⁶⁵ As the Prosecutor had stated that the suspension was only ‘temporary’, PTC I was of the view that ‘since the Prosecutor has not taken any decision under Article 53(1)(c) or (2)(c)’ the request was ‘not appropriate at the present stage and has no legal basis’.⁸⁶⁶ The same approach was followed in October 2010 in relation to allegations of crimes in the Ituri region in the DRC, for which Jean-Pierre Bemba was alleged to have been criminally responsible.⁸⁶⁷ PTC I noted the Prosecutor’s submission that ‘to date no decision on “interests of justice” grounds not to proceed against Mr Bemba with respect to crimes allegedly committed in Ituri has been taken’, and found ‘no reason to disbelieve, [that] there is no decision for the Chamber to review and there is, accordingly, no basis for it to exercise its powers under article 53(3)(b) of the Statute.’⁸⁶⁸

Therefore, the consistent approach so far has been for the PTC to wait for the Prosecutor to take an explicit decision not to prosecute; otherwise, the PTC considers that there is no appropriate basis to intervene. The literal interpretation of Article 53(2) followed by the Court’s jurisprudence to date has resulted in scenarios whereby, if a Prosecutor wanted to avoid being scrutinised, he need only ensure that he does not close any investigations or make any explicit decisions not to prosecute. In practical terms, however, it seems clear that in certain cases ‘tacit’ decisions have been taken, eg not to present new charges against Thomas Lubanga, not to prosecute Jean-Pierre Bemba within the context of the DRC situation and not to prosecute persons other than the FDLR commanders within the context of the Uganda situation.

In order to ensure certainty and more equal access to justice for victims, which are critical aspects of the Court’s legitimacy, the PTC should develop an approach that would allow a more active monitoring of developments in the Prosecutor’s investigations and, when warranted, ensure that their power to review the Prosecutor’s decisions is not circumvented by the Prosecutor’s inaction. Without the need for getting involved in reviewing every one of the Prosecutor’s decisions as to specific persons or crimes, the PTC could, for

⁸⁶⁵ *Congo, ICC-01/04-399.*

⁸⁶⁶ *Ibid* 5.

⁸⁶⁷ *Congo, ICC-01/04-582.*

⁸⁶⁸ *Ibid* 4-5.

example, exercise its inherent powers and periodically review prosecutorial strategies and choices within the context of a given situation. As previously argued, pursuant to Regulation 48 in relation to Articles 54(1)(a) and 53(3)(b), the PTC is entitled to demand more transparent decision-making within the OTP, thereby allowing scrutiny of the Prosecutor's function and contributing to the public perception of the Court's legitimacy.

5.4.2 Review of the Prosecutor's decision to initiate criminal proceedings against an identified alleged perpetrator

The last function of the PTC at the conclusion of the investigation stage is to review the Prosecutor's decision to initiate criminal proceedings against an identified alleged perpetrator of crimes under the Statute and, if warranted, issue either a warrant of arrest or a summons to appear.

This important function of the PTC represents a critical innovation of the Statute compared to the prior experiences of international criminal tribunals. Proceedings against an alleged perpetrator at the ICTY, ICTR and STL, for example, commence with an indictment that, in very general terms, can be considered equivalent to the ICC's Document Containing the Charges (DoCC). The indictment, as well as the DoCC, will be subject to judicial review. However, the main difference between the two systems is that, in the ICTY, the ICTR or the STL, only once the indictment is confirmed - and the person becomes an accused and is committed to trial - will an arrest warrant be issued.⁸⁶⁹ At the ICC, however, the proceedings against an identified alleged perpetrator include three clearly differentiated stages: (i) the issuance of the warrant or summons, (ii) the proceedings for the confirmation of charges, and (iii) the trial. All these three different stages of the proceedings before the ICC are subject to judicial control, but are distinct because they are subject to increasingly higher evidentiary thresholds - 'reasonable grounds to believe' for arrest or summons pursuant to Article 58(1)(a); 'substantial grounds to believe' for confirmation of charges pursuant to Article 61(7); and 'beyond reasonable doubt' for conviction pursuant to Article 66(3). Moreover, the suspect

⁸⁶⁹ ICTY Statute Articles 18-20; ICTR Statute Articles 17-19; STL Statute Articles 18, 20.

participates in the proceedings even before the charges are confirmed and he/she is committed to trial.

In order for a case to be initiated against an identified alleged perpetrator, upon investigation the Prosecutor will assess the requirements of Article 53(2) and determine whether there is sufficient basis for a prosecution. It should be stressed once again that the provision does not mandate the Prosecutor to request the initiation of a criminal prosecution every time he is satisfied that there is 'sufficient basis' for prosecution. Pursuant to Article 58(1), at any time after the initiation of the investigation the Prosecutor 'may' request the PTC to issue a warrant of arrest or a summons to appear, if satisfied that there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court. Again, the provision does not say that the Prosecutor 'shall' submit a request for warrant or summons when he is satisfied that there are 'reasonable grounds to believe' that a person has committed a crime under the Statute. As such, cases that reach the threshold of 'sufficient basis' for prosecution, can still be dismissed by the Prosecutor if he considers that they do not fulfil the 'reasonable grounds to believe' standard. Even where he does consider that the latter standard has been met, it will be up to the Prosecutor's discretion to decide whether to initiate criminal proceedings.

Indeed, the thresholds of 'sufficient basis for prosecution' and 'reasonable grounds to believe' do not sufficiently narrow the number of cases that may qualify to be prosecuted by the Court. The Prosecutor will have to further apply his discretion to decide against whom - and for what crimes - to request the initiation of criminal prosecutions. The Prosecutor will then select cases and crimes for prosecution in accordance with his policy decisions and practical considerations. This decision, although discretionary, cannot be arbitrary or biased. Once the decision is taken, the Prosecutor will submit a substantiated request to the PTC for it to issue a warrant of arrest or a summons to appear against the person in accordance with Article 58. This will be the opportunity for the PTC to assess whether the selection of cases and crimes was a legitimate exercise of the Prosecutor's discretion in accordance with his powers under the Statute and not arbitrary or the result of improper political influence. The

gatekeeping role of the PTC at this stage is thus aimed at protecting the rights of the suspect, filtering politically driven prosecutions and ensuring that cases go ahead only if substantiated by sufficient evidence.

As discussed in Section 2.5.2, pursuant to Article 58(1), the PTC shall issue the request if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that there are ‘reasonable grounds to believe’ that the person has committed a crime within the jurisdiction of the Court and the arrest appears necessary (i) to ensure the person’s appearance at trial; (ii) to ensure that the person does not obstruct or endanger the investigation or the Court’s proceedings, or; (iii) where applicable, to prevent the person from continuing with the commission of the alleged crime or a related crime within the jurisdiction of the Court that arises out of the same circumstances. Alternatively, pursuant to Article 58(7), the Prosecutor may request the issuance of a summons for the person to appear. The PTC shall issue the summons - with or without conditions restricting liberty (other than detention) if provided for by national law - if satisfied that there are reasonable grounds to believe that the person committed the crime alleged and that the summons is sufficient to ensure the person’s appearance.

The proceedings for the issuance of the warrant or summons will be generally conducted on an *ex-parte* basis. According to the PTC’s interpretation of Article 58(1), even if the proceedings are of public knowledge the PTC will only analyse information and evidence submitted by the Prosecutor. The alleged perpetrator is not able to contest the Prosecutor’s allegations. PTC II held within the context of the Kenya situation that:

the Court’s statutory provisions do not provide the person(s) named in the Prosecutor’s application with any procedural means to challenge the relevance and/or the probative value of the evidence and information submitted by the Prosecutor pursuant to article 58 of the Statute or the intrinsic quality of his investigations.⁸⁷⁰

This interpretation may comport with the letter of the Statute and may help prevent delays of the proceedings with lengthy pleadings and discussions, which

⁸⁷⁰ *Situation in the Republic of Kenya, ICC-01/09-35 Decision on Application for Leave to Submit Amicus Curiae Observations Pre-Trial Chamber II, 18 January 2011 para. 10.*

should be left for the confirmation of charges hearing that is truly adversarial in nature. However, that interpretation does not appear to be adjusted to the spirit of the Statute. Indeed as emphasised by Hall, although Article 58 does not expressly authorise the PTC to go beyond the application and evidence submitted by the Prosecutor, nothing in the Article appears to prevent the Chamber from considering other relevant information provided, for example, by the victims.⁸⁷¹ Similarly, nothing should prevent the Chamber from considering relevant information that may be provided by the suspect in the context of a public request for a warrant or summons. This could include, for example, evidence that the arrest does not appear necessary or information that the evidence submitted in support of the Prosecutor's request was obtained as a result of torture or cruel, inhuman or degrading treatment such that its admission would violate Article 69(7)(b). Indeed, as stressed in Chapter 1, the PTC should leave some flexibility in its interpretations of the Statute in order to avoid achieving formal or procedural legitimacy at the cost of substantive justice. There may be cases in which it will not be fair to ignore the information the alleged perpetrator or victims may provide, particularly in order to avoid the Court engaging in cases and issuing warrants or summonses which are manifestly unfair on account of partial or incorrect evidence provided by the Prosecutor.

Further, although the Prosecutor has discretion to decide the type and amount of evidence and information he will submit to the PTC in order to satisfy the 'reasonable grounds to believe' standard,⁸⁷² under Article 58(1) the PTC should satisfy itself that the threshold is met.⁸⁷³ Consequently, if not intimately convinced by the application, the evidence and the information submitted by the Prosecutor, the PTC might request him to provide further materials or information.⁸⁷⁴ Alternatively, the PTC may simply refuse to grant a request if it considers that the request is unconvincing.⁸⁷⁵ Indeed, in spite of the PTC's power to request further information, pursuant to Article 58(2), the Prosecutor's

⁸⁷¹ Christopher K. Hall, 'Article 58' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (C.H.Beck - Hart - Nomos 2008) footnote 15.

⁸⁷² *Lubanga*, ICC-01/04-01/06-8-Corr para. 9; *Bashir*, ICC-02/05-01/09-3 para. 24.

⁸⁷³ *Lubanga*, ICC-01/04-01/06-8-Corr para. 10.

⁸⁷⁴ See, *inter alia*, in the context of the summons to appear issued within the Kenya situation it appears that PTC II requested, in a decision that still remains *ex parte*, that the Prosecutor submit all the witnesses' statements he had relied on in his application, see *Kenyatta at al.*, ICC-01/09-02/11-01 para. 4; *Ruto et al.*, ICC-01/09-01/11-01 para. 4.

⁸⁷⁵ *Lubanga*, ICC-01/04-01/06-8-Corr.

application should be specific enough so as to contain a concise statement of the facts which are alleged to constitute crimes within the jurisdiction of the Court for which the arrest or summons is sought, in order to allow the Chamber to evaluate whether the allegations are substantiated by sufficient evidence; otherwise, the request may be summarily dismissed for lack of specificity.⁸⁷⁶

As to the issue of the amount and nature of evidence that the Prosecutor should submit in order to meet the evidentiary standard of Article 58, in the *Bashir* case the Majority of PTC I stated that this standard would only be met if the materials provided by the Prosecution ‘show that the *only reasonable conclusion* to be drawn therefrom is the existence of reasonable grounds to believe in the existence of [the crime for which the arrest is sought]’.⁸⁷⁷ On appeal, the Majority decision was reversed and the AC held that ‘the standard [PTC I] developed and applied in relation to ‘proof by inference’ was higher and more demanding than what is required under article 58(1)(a)’.⁸⁷⁸ In the view of the AC, requiring that the existence of an element ‘must be the *only* reasonable conclusion amounts to requiring the Prosecutor to disprove any other reasonable conclusion and to eliminate any reasonable doubt’; therefore, the standard applied was not that of ‘reasonable grounds to believe’ but rather ‘beyond reasonable doubt’.⁸⁷⁹ The AC held that, at this preliminary stage, the PTC does not have to be certain that the person committed the alleged offence, since the Prosecutor still has the chance to submit more evidence later.⁸⁸⁰ In subsequent cases, the PTC has applied the test developed by the AC stating that under the threshold of Article 58(1) ‘[t]he evidence need only establish a reasonable conclusion that the person committed a crime within the jurisdiction of the Court, and it is not required that this be the only reasonable conclusion that can be drawn from the evidence.’⁸⁸¹

⁸⁷⁶ PTC II has already dismissed *in limine* an application for a warrant of arrest for lack of specificity. See *Congo*, ICC-01/04-613.

⁸⁷⁷ *Bashir*, ICC-02/05-01/09-3 para. 158.

⁸⁷⁸ *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-73 Judgment on the appeal of the Prosecutor against the ‘Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Al Bashir’ Appeals Chamber, 3 February 2010 para. 39.

⁸⁷⁹ *Ibid* para. 33.

⁸⁸⁰ *Ibid* para. 31.

⁸⁸¹ *Mudacumura*, ICC-01/04-01/12-1-Red para. 19.

The PTC may also decide to issue a warrant or summons in relation only to certain specific crimes for which the Chamber is convinced that the requirements are met. It is not therefore bound by the entirety of the Prosecutor's request nor by his legal characterisation of the facts,⁸⁸² rather only on a factual basis by the evidence and information provided.⁸⁸³ The PTC can substitute the legal characterisation of the facts described in the Prosecutor's Application if it considers that they constitute a different crime than the one for which the arrest is sought. For example, in one of the cases arising from the situation in Kenya, PTC II found that acts of forcible circumcision of men did not qualify as 'other forms of sexual violence' but were more properly qualified as 'other inhuman acts'.⁸⁸⁴ Similarly, when issuing the warrant of arrest in the Libya situation, PTC I did not agree with the Prosecutor's legal characterisation of the mode of liability of the suspects,⁸⁸⁵ and issued the warrants of arrest for a slightly different mode of participation.⁸⁸⁶ Equally, the different PTCs have consistently refused to issue warrants or summonses in relation to specific crimes or incidents when they were not satisfied that there were reasonable grounds to believe that the alleged crimes had been committed.⁸⁸⁷ However, they made clear that this does not prevent the Prosecutor from presenting new evidence substantiating the rejected crime or incident in the future,⁸⁸⁸ ie at a later stage of the proceedings for the purposes of the confirmation of charges or by requesting an amendment of the warrant pursuant to Article 58(6).

The related matter of whether different and alternative modes of liability should be simultaneously included in a given warrant or summons is still not settled. In one of the cases arising out of the situation in Kenya, PTC II rejected the attribution of an alternative of mode of liability stating that it was not the 'best practice to make simultaneous findings on modes of liability presented in

⁸⁸² *Bashir*, ICC-02/05-01/09-3 para. 31; *Lubanga*, ICC-01/04-01/06-8-Corr para. 16; *Bemba*, ICC-01/05-01/08-14-tENG para. 25.

⁸⁸³ *Gaddafi and Al-Senussi*, ICC-01/11-01/11-1 para. 70.

⁸⁸⁴ *Kenyatta at al.*, ICC-01/09-02/11-01 para. 27.

⁸⁸⁵ *Gaddafi and Al-Senussi*, ICC-01/11-01/11-1 para. 66.

⁸⁸⁶ *Situation Libya*, ICC-01/11-12 Decision on the 'Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi' Pre-Trial Chamber I, 27 June 2011 para. 71.

⁸⁸⁷ *See, inter alia*, *Kenyatta at al.*, ICC-01/09-02/11-01 para. 26; *Ruto et al.*, ICC-01/09-01/11-01 para. 33; *Mudacumura*, ICC-01/04-01/12-1-Red paras 30, 41.

⁸⁸⁸ *Ruto et al.*, ICC-01/09-01/11-01 para. 33; *Kenyatta at al.*, ICC-01/09-02/11-01 para. 26.

the alternative. A person cannot be deemed concurrently as a principal and an accessory to the same crime.’⁸⁸⁹ As such, after finding reasonable grounds to believe that two of the suspects were responsible as principals,⁸⁹⁰ it found ‘no reason to examine their role in light of the alternative mode of liability’.⁸⁹¹ By the same token, in a case arising out of the DRC situation, after finding that there were reasonable grounds to believe that Sylvestre Mudacumura was criminally responsible under Article 25(3)(b),⁸⁹² PTC II did not address the alternative mode of liability under Article 28(a) advanced by the Prosecutor.⁸⁹³ However, PTC II stressed that its findings did not ‘prejudice any subsequent finding regarding the applicability of a different mode of liability at a later stage of the proceedings’.⁸⁹⁴

In a clear change of approach, in the case against Laurent Gbagbo, the Prosecutor based his request exclusively on the suspect’s participation as a principal under Article 25(3)(a), but PTC III found it to be:

undesirable, particularly at this early stage of the case, for the Chamber to limit the options that may exist for establishing criminal responsibility under the Rome Statute, because this will ultimately depend on the evidence and arguments in the case.⁸⁹⁵

PTC III then stressed that its findings ‘may well need to be revisited in due course with the parties and participants’.⁸⁹⁶ Similarly, in the case against Walter Barasa, the Single Judge of PTC II, Cuno Tarfusser found that it was:

unnecessary to take at this stage a definitive position on (...) the specific form of individual responsibility (...) [it being] more appropriate that a definitive position on those issues be taken within the context of proper adversarial proceedings.⁸⁹⁷

⁸⁸⁹ *Ruto et al.*, ICC-01/09-01/11-01 para. 36.

⁸⁹⁰ *Ibid* para. 37.

⁸⁹¹ *Ibid* para. 38.

⁸⁹² *Mudacumura*, ICC-01/04-01/12-1-Red para. 69.

⁸⁹³ *Ibid* para. 59.

⁸⁹⁴ *Ibid* para. 69, see also in similar terms *Kenyatta et al.*, ICC-01/09-02/11-01 para. 52.

⁸⁹⁵ *Gbagbo*, ICC-02/11-01/11-9-Red para. 74.

⁸⁹⁶ *Ibid* para. 77.

⁸⁹⁷ *The Prosecutor v. Walter Osapiri Barasa*, ICC-01/09-01/13-1-Red2 Warrant of arrest for Walter Osapiri Barasa Pre-Trial Chamber II, 2 August 2013 para. 19.

This change of approach may allow some flexibility leaving the decision as to the precise form of participation to a later stage of the proceedings when more evidence has been presented and the parties have been able to present their arguments.

5.5 Conclusions

The PTC's exercise of its gatekeeping role at the investigative stage of the proceedings during the first decade of the Court's existence denotes a certain reluctance on the part of the Judges to firmly scrutinise the Prosecutor's actions or to be significantly involved during this stage.

As described above, although an important part of the PTC's efforts and resources were devoted for some years to facilitating victims' 'participation' during the investigation stage, at the time of writing the role played by the victims has not in fact resulted in any concrete advantages for the victims themselves or for the Court's fact-finding and truth searching mandate. Victims' participation during the investigation of crimes has remained formal and has in fact represented nothing more than their 'symbolic' recognition. Victims have not been granted a meaningful right to present their views and concerns and to have them considered. As previously stressed, the PTC has missed the opportunity to 'profit' from the victims' 'privileged' position as regards evidence and information and have fallen short in directly addressing the victims' concerns by failing to explain the concrete reasons behind their decisions not to review the Prosecutor's exercise of discretion.

By the same token, the PTC has almost completely disregarded the considerable benefits that a more extensive use of their powers under Articles 56(3)(a) and 57(3)(c) may have for the Court and the prosecution of crimes of concern to the international community as a whole. Given that pursuant to Article 54(1)(a) the Prosecutor is obliged to investigate fully 'in order to establish the truth', the PTC should more actively use Regulation 48 and request information and documents from the Prosecutor that may allow it to exercise its powers under Articles 53(3)(b), 56(3)(a) and 57(3)(c).

Taking into particular account the fact that the Court may potentially act in relation to ongoing conflicts, the possibility of obtaining evidence as early as possible and preserving it for trial, as well as providing for the protection and privacy of witnesses and victims from the earliest stages, are crucial mechanisms for the expeditious and responsible delivery of justice. The PTC should therefore re-assess its approach to involvement during the Prosecutor's investigation as soon as possible, considering especially the length of the proceedings before the Court so far; the several incidents of allegations of witness tampering in the *Bemba* and *Kenya* cases; and the serious difficulties in prosecuting high-level officials such as Al Bashir and Kenyatta.

Similarly, although the Prosecutor has discretion to choose cases and crimes for prosecution, his decisions cannot be arbitrary. As such, in order to ensure certainty and equal access to justice for victims, the PTC should more actively monitor developments in the Prosecutor's investigations and, when warranted, ensure that its powers to review the Prosecutor's decisions are not prevented by the Prosecutor's non-action. Although the PTC has the power to order the Prosecutor to proceed against certain individuals or crimes only in those cases when the decision not to proceed is solely based on the interests of justice, the use of Regulation 48 may stimulate more transparent decision-making within the OTP, allowing scrutiny of the Prosecutor's decisions and contributing to public perceptions of the Court's legitimacy.

Lastly, as to the PTC's role in reviewing the Prosecutor's decision to proceed against an identified alleged perpetrator and issue a warrant or summons, the PTC should continue to emphasise that it is for the Chamber to be satisfied at the required threshold that the requirements to proceed are complied with. The PTC should, however, be flexible in its interpretations and avoid the promotion of formal or procedural legitimacy at the cost of substantive justice. The PTC should ensure that the Court does not engage in cases or issue warrants or summons which are manifestly unfair on account of their being based on partial or incorrect information and evidence provided by the Prosecutor.

Chapter 6. The PTC's role in determining the factual and legal scope of the Court's cases

6.1 Introduction

As discussed in Chapter 5, pursuant to Article 58, for a warrant or summons to be issued the PTC has to be satisfied that the application and evidence submitted by the Prosecutor provide 'reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court'. The issuance of a warrant or summons marks the commencement of a 'case', which relates to concrete conduct amounting to crime(s) under the jurisdiction of the Court allegedly committed by one or more identified alleged perpetrator(s). Once the person has been arrested or has appeared voluntarily, a further step has to be followed before he is committed to trial. As an additional safeguard and precondition for the trial to start, the PTC must hold a hearing - in the presence of the Prosecutor, the person charged and his counsel - aimed at deciding whether to confirm the charges on which the Prosecutor intends to seek trial.

The confirmation of charges hearing is aimed at avoiding unfounded allegations as well as ensuring the Court's efficiency, independence and impartiality. It guarantees that only cases supported by sufficient evidence go ahead, protecting the interests of the suspects and providing, at the same time, access to justice for the alleged victims. Pursuant to Article 61, the PTC will confirm the charges only when satisfied that there are 'substantial grounds to believe that the person committed each of the crimes charged'. This standard, more demanding than that for arrest or summons, is justified by the critical importance of the DeCC, which crystallises the factual scope of the case against the accused, and therefore, of the trial.

At the time of writing, charges against 16 suspects have passed the confirmation or pre-trial stage of the proceedings and 12 individuals have been committed to trial, while charges against the remaining four have not been confirmed.⁸⁹⁸ The

⁸⁹⁸ The charges against Bahar Idriss Abu-Garda, Callixte Mbarushimana, Mohammed Hussein Ali and Henry Kiprono Kosgey have not been confirmed by the PTCs. See *Abu Garda*, ICC-02/05-02/09-243-Red; *The Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-465-Red Decision on the confirmation of charges Pre-Trial Chamber I, 16 December 2011; *Kenyatta et al.*, ICC-01/09-

different PTCs have taken on average approximately one year to conduct these proceedings.⁸⁹⁹ That duration, and the issue of whether the proceedings have become in fact ‘a mini-trial or a trial before the trial’,⁹⁰⁰ has been the source of some of the most pointed criticism of the role of the PTC.⁹⁰¹

This Chapter, however, argues that the confirmation proceedings are a fundamental feature of the PTC’s gatekeeping function. As emphasised by PTC III, Article 61 ‘reflects in essence the filtering function of the Pre-Trial Chamber’.⁹⁰² Judicial scrutiny of the charges is a necessary safeguard to avoid wholly unfounded prosecutions and to focus the Court’s efforts and resources on cases for which there is substantial evidence going beyond mere suspicion. At the same time, the confirmation proceedings ensure respect for the rights of the suspects and victims and guarantee the fairness, effectiveness and expeditiousness of the Court’s proceedings as a whole.⁹⁰³

This Chapter analyses the manner in which this fundamental role entrusted to the PTC has to this point been interpreted and applied in the Court’s

02/11-382-Red; *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, ICC-01/09-01/11-373 Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute Pre-Trial Chamber II, 23 January 2012.

⁸⁹⁹ The duration of the pre-trial stage will certainly depend of a series of circumstances. Among the factors which may occasion delays are requests for postponements by either party as well as requests for additional information, adjournments pursuant to Article 61(7)(c), the assessment of the accused’s fitness and the possible joining of cases. When looking only at numbers, it generally takes approximately one year to conduct the pre-trial proceedings. See (i) *Lubanga case*, Initial Appearance (IA) 20 March 2006 - DeCC 29 January 2007; (ii) *Katanga case*, IA 22 October 2007 - DeCC 26 September 2008; (iii) *Ngudjolo case*, IA 11 February 2008 - DeCC 26 September 2008; (iv) *Mbarushimana case*, IA 28 January 2011 - DeCC 16 December 2011; (v) *Bemba case*, IA 4 July 2008 - DeCC 15 June 2009; (vi) *Abu Garda case*, IA 18 May 2009 - DeCC 8 February 2010; (vii) *Banda and Jerbo case*, IA 17 June 2010 - DeCC 7 March 2011; (viii) *Ruto et al case*, IA 7 April 2011 - DeCC 23 January 2012; (ix) *Kenyatta et al case*, IA 8 April 2011 - DeCC 23 January 2012; (x) *Ntaganda case*, IA 26 March 2013 - DeCC 9 June 2014; and (xi) *Gbagbo case*, IA 5 December 2011 - DeCC 12 June 2014.

⁹⁰⁰ The PTCs have consistently reiterated that ‘the confirmation hearing has a limited scope and purpose and should not be seen as a “mini-trial” or a “trial before the trial”’, see, *inter alia*, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-717 Decision on the confirmation of charges Pre-Trial Chamber I, 30 September 2008 para. 64.

⁹⁰¹ See, *inter alia*, Volker Nerlich, ‘The Confirmation of Charges Procedure at the International Criminal Court: Advance or Failure?’ (2012) 10 JICJ 1339; War Crimes Research Office, *Expediting Proceedings at the International Criminal Court* (American University Washington College of Law 2011) 18-25.

⁹⁰² *The Prosecutor v. Jean-Pierre Bemba*, ICC-01/05-01/08-388 Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute Pre-Trial Chamber III, 3 March 2009 para. 9.

⁹⁰³ For approaches to ensure fairness and expeditiousness of pre-trial proceedings see, *inter alia*, Ekaterina Trendafilova, ‘Fairness and Expeditiousness in the International Criminal Court’s Pre-Trial Proceedings’ in Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff Publishers 2009).

jurisprudence. Section 6.2 discusses the object and purpose of the confirmation proceedings as envisaged by the drafters of the Statute and interpreted by the Court. Section 6.3 examines more specifically the evolution of the Court's understanding of the role of the PTC in framing the factual scope of the case. Section 6.4 focuses in turn on the development of the Chamber's function as regards the determination of the appropriate legal characterisation of the facts. Finally, Section 6.5 presents conclusions.

6.2 The object and purpose of the proceedings for the confirmation of charges

As discussed in Section 5.4.2, the proceedings for the commencement of a prosecution against an alleged perpetrator at the ICC substantially differ from other experiences of international criminal justice. At the ICTY, ICTR, SCSL and STL the proceedings commence with an indictment.⁹⁰⁴ In very general terms, the indictment is more or less equivalent to the ICC's DoCC. However, although both are subject to judicial review, the level of judicial intervention necessary for their issuance differs substantially.

At the ICTY/ICTR for example, the Prosecutor issues an indictment when satisfied that a *prima facie* case exists.⁹⁰⁵ One judge is required to confirm the indictment, but the review is *ex parte* and the standard of proof is only on a '*prima facie*' basis.⁹⁰⁶ In light of this, during the first years of the tribunals' activities, most indictments issued by the ICTY/ICTR Prosecutors were summarily confirmed without further consideration. This created procedural difficulties and delays later at trial. In particular, the indictments had to be frequently amended, by the addition or withdrawal of charges, on account of the

⁹⁰⁴ The proceedings at the ECCC are rather different, being based on a non-adversarial hybrid system in which the co-prosecutors, on the basis of a complaint or *proprio motu*, initiate prosecutions. After conducting a preliminary examination, if the co-prosecutors have reason to believe that crimes under the ECCC jurisdiction have been committed, they will open the judicial investigation and send an introductory submission to the co-investigative judges. The co-investigative judges will then investigate the facts, concluding their investigation either by charging the person or dismissing the case. See Guido Acquaviva, 'New Paths in International Criminal Justice? The Internal Rules of the Cambodian Extraordinary Chambers' (2008) 6 JICJ 129.

⁹⁰⁵ (n 112) Marchesiello 1234.

⁹⁰⁶ *Ibid.*

Prosecutor's failure to clearly identify the case in the indictment document.⁹⁰⁷ The parties would frequently fail to focus their presentation of evidence on the issues in actual dispute and would enter into extensive discussions on evidentiary matters.⁹⁰⁸ As such, after years of lengthy trials, new rules were devised imposing greater judicial control during the pre-trial phase with the aim of streamlining the proceedings while ensuring their fairness and effectiveness.⁹⁰⁹ Nonetheless, these problems led ICTY Judge Iain Bonomy, among others, to suggest that a purely adversarial procedure - as was essentially in operation at the ICTY/ICTR - was not suitable for trying complex and highly political international criminal cases.⁹¹⁰

Learning from these experiences, the ICC's Statute provides for increased judicial control over the activities of the Prosecutor.⁹¹¹ Although there were different views as to the model to be adopted, during the preparatory works of the Statute there was a general consensus that the effectiveness of the investigation and prosecution of crimes had to be balanced with the need to ensure fairness to the accused.⁹¹² The understanding was that 'there will be no *fair trial* without a *fair pre-trial*'.⁹¹³ The model eventually adopted resembles preliminary hearings held under common law procedure,⁹¹⁴ with the addition of certain mechanisms found in continental judicial systems aimed at speeding up proceedings and supervising the Prosecutor.⁹¹⁵ In accordance with this framework, proceedings for the confirmation of charges are held by a Chamber,

⁹⁰⁷ (n 113) Fourmy 1211.

⁹⁰⁸ See, *inter alia*, Ian Bonomy, 'The Reality of Conducting a War Crimes Trial' (2007) 5 JICJ 348, 350-351; Mark B. Harmon, 'The Pre-Trial Process at the ICTY as a Means of Ensuring Expeditious Trials. A Potential Unrealized' (2007) 5 JICJ 377, 389-392.

⁹⁰⁹ For the measures implemented in order to ensure expediency in the proceedings and the critical role assigned to ICTY's pre-trial judges see, *inter alia*, (n 908) Bonomy; (n 908) Harmon.

⁹¹⁰ See, *inter alia*, (n 908) Bonomy 349-350; Jérôme de Hemptinne, 'The Creation of Investigating Chambers at the International Criminal Court. An Option Worth Pursuing?' (2007) 5 JICJ 402, 404-405; Robert Heinsch, 'How to Achieve Fair and Expeditious Trial Proceedings before the ICC: Is it Time for a More Judge-Dominated Approach?' in Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff Publishers 2009) 488-489.

⁹¹¹ Kuniji Shibahara and William A. Schabas, 'Article 61 Confirmation of the Charges before the Trial' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (Second edn, C.H. Beck - Hart - Nomos 2008) 1173.

⁹¹² (n 830) Guariglia, 'Investigation and Prosecution' 234.

⁹¹³ (n 112) Marchesiello 1232.

⁹¹⁴ (n 215) Schabas, *An Introduction to the International Criminal Court* 140; (n 112) Marchesiello 1233.

⁹¹⁵ (n 113) Fourmy 1211-1213; (n 112) Marchesiello 1232-1233.

composed of three judges, before which the person charged has the right to be present and to contest the evidence.⁹¹⁶ Going even further and given the experience of the *ad hoc* tribunals, some have even suggested that it would have been appropriate to have built in even greater judicial control by establishing investigating chambers to further enhance the effectiveness, legitimacy and fairness of the international proceedings.⁹¹⁷

One of the most significant differences between the systems of international tribunals is that, in the ICTY, ICTR or STL, the arrest warrant is issued only after the indictment is confirmed and the person has become an accused committed to trial.⁹¹⁸ The suspect however does not have any involvement in the proceedings for the confirmation of the indictment. The ICC's Statute, in contrast, gives the person the right to participate in the confirmation proceedings. According to Article 61(1), the confirmation should take place within a reasonable time 'after' the person's surrender or voluntary appearance before the Court. Although this is 'subject to the provisions of paragraph 2', which regulate the confirmation of charges 'in the absence of the person',⁹¹⁹ an initial appearance by an accused is nonetheless a pre-condition for the confirmation to take place.⁹²⁰ The participation of the alleged perpetrator in the confirmation hearing makes the Court's system radically different from that of the other tribunals, in which the individual cannot participate before the issuance of the indictment.⁹²¹

According to Article 61(7), based on the hearing the PTC may: (a) confirm all or some of the charges; (b) decline to confirm all or some of the charges, or; (c) adjourn the hearing and request the Prosecutor to consider providing further evidence, conducting further investigations or amending a charge. Pursuant to Article 61(9), after the charges are confirmed and before the trial begins, the

⁹¹⁶ For the main differences between the ICTY/ICTR review of the indictment and the ICC confirmation of charges see *The Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-514 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' Appeals Chamber, 30 May 2012 para. 43.

⁹¹⁷ (n 910) de Hemptinne 414-417.

⁹¹⁸ ICTY Statute Articles 18-20; ICTR Statute Articles 17-19; STL Statute Articles 18, 20.

⁹¹⁹ Article 61(2) deals with situations where the accused waived his right to be present or fled.

⁹²⁰ (n 112) Marchesiello 1244; (n 215) Schabas, *An Introduction to the International Criminal Court* 139.

⁹²¹ (n 21) Cassese and others 368.

Prosecutor may amend the charges with the permission of the PTC, but if the Prosecutor seeks to add additional charges or substitute the initial charges for more serious ones, a new confirmation of charges hearing must be held.⁹²²

The different PTCs have consistently stressed that the confirmation proceedings are ‘designed to protect the rights of the Defence against wrongful and wholly unfounded charges’.⁹²³ The pre-trial proceedings indeed ensure that prosecutions are not frivolous, thereby protecting the accused from prosecutorial abuse.⁹²⁴ The PTC acts as the ‘judicial guarantor of the proceedings’,⁹²⁵ ensuring that only those persons ‘against whom sufficiently compelling charges going beyond mere theory or suspicion have been brought’ will be committed to trial.⁹²⁶

In addition to helping avoid wrongful prosecutions, the confirmation proceedings ensure ‘judicial economy by allowing to distinguish between cases that should go to trial from those that should not’.⁹²⁷ They also give the defence the opportunity to challenge the evidence submitted by the Prosecutor and gather and present its own evidence, which ensures equality of arms and guarantees efficient and effective trial proceedings.⁹²⁸ At the confirmation hearing ‘a

⁹²² It should be noted that although the Statute refers to the confirmation ‘hearing’, the established jurisprudence considers the hearing to include not only the oral sessions of the confirmation proceedings but also the written submissions, this is relevant due to the deadline imposed by Regulation 53 for the Chamber to deliver its written DeCC within 60 days from the date the confirmation hearing ends. See, *inter alia*, *Bemba*, ICC-01/05-01/08-388 paras 30-37.

⁹²³ *Lubanga*, ICC-01/04-01/06-803-tEN para. 37; *Katanga and Ngudjolo*, ICC-01/04-01/07-717 para. 63; *Abu Garda*, ICC-02/05-02/09-243-Red para. 39; *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09-121-Corr-Red Decision on the Confirmation of Charges Pre-Trial Chamber I, 7 March 2011 para. 31; *Mbarushimana*, ICC-01/04-01/10-465-Red para. 41; *Kenyatta et al.*, ICC-01/09-02/11-382-Red para. 52; *The Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-432 Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute Pre-Trial Chamber I, 3 June 2013 para. 18.

⁹²⁴ (n 215) Schabas, *An Introduction to the International Criminal Court* 140.

⁹²⁵ *Bemba*, ICC-01/05-01/08-388 para. 28.

⁹²⁶ *Lubanga*, ICC-01/04-01/06-803-tEN para. 37; *Abu Garda*, ICC-02/05-02/09-243-Red para. 39; *Banda and Jerbo*, ICC-02/05-03/09-121-Corr-Red para. 31; *Gbagbo*, ICC-02/11-01/11-432 para. 18.

⁹²⁷ *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-424 Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo Pre-Trial Chamber II, 15 June 2009 para. 28; *Banda and Jerbo*, ICC-02/05-03/09-121-Corr-Red para. 31; *Mbarushimana*, ICC-01/04-01/10-465-Red para. 41; *Ruto et al.*, ICC-01/09-01/11-373 para. 40; *Kenyatta et al.*, ICC-01/09-02/11-382-Red para. 52; *Gbagbo*, ICC-02/11-01/11-432 para. 18.

⁹²⁸ (n 113) Fourmy 1225.

suspect may contest both matters of statutory interpretation and evidential aspects of the Prosecutor's case'.⁹²⁹

Another fundamental difference between the ICC and the other tribunals is that, as described in previous Chapters, for the first time in the history of international criminal justice, the victims have a role to play and can participate in the proceedings. This includes the confirmation hearing since, as stressed by PTC I, this is 'an essential stage of the proceedings'⁹³⁰ in which the victims of the alleged crimes are entitled to participate in order to satisfy their right to truth and justice.⁹³¹ Accordingly, victims have been consistently allowed to present their views and concerns and participate throughout the pre-trial proceedings with substantial procedural rights.⁹³²

In terms of Article 61, the threshold to be satisfied for the charges to be confirmed is 'substantial grounds to believe'. For the interpretation of this standard of proof the different PTCs have so far relied on internationally recognised human rights jurisprudence.⁹³³ Accordingly, they have requested the Prosecutor to 'offer concrete and tangible proof demonstrating a clear line of reasoning underpinning its specific allegations'.⁹³⁴ The evidentiary rules at confirmation are more relaxed than those for trial - pursuant to Article 61(5) the Prosecutor may rely on documentary or summary evidence and does not need to

⁹²⁹ *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, ICC-01/09-02/11-425 Decision on the appeal of Mr Francis Kirimi Muthaura and Mr Uhuru Muigai Kenyatta against the decision of Pre-Trial Chamber II of 23 January 2012 entitled 'Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute' Appeals Chamber, 24 May 2012 para. 33.

⁹³⁰ *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-462-tEN Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing Pre-Trial Chamber I, 22 September 2006 5.

⁹³¹ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-474 Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case Pre-Trial Chamber I, 13 May 2008 paras 31-44.

⁹³² For a summary of the different procedural rights granted to victims at the pre-trial stage in the *Lubanga*, *Katanga*, *Kony*, *Bemba* and *Abu Garda* cases see Salinas and Sloan 247-251

⁹³³ *Lubanga*, ICC-01/04-01/06-803-tEN para. 38; *Katanga and Ngudjolo*, ICC-01/04-01/07-717 para. 65.

⁹³⁴ *Lubanga*, ICC-01/04-01/06-803-tEN para. 39; *Katanga and Ngudjolo*, ICC-01/04-01/07-717 para. 65; *Bemba*, ICC-01/05-01/08-424 para. 29; *Abu Garda*, ICC-02/05-02/09-243-Red para. 37; *Mbarushimana*, ICC-01/04-01/10-465-Red para. 40; *Ruto et al.*, ICC-01/09-01/11-373 para. 40; *Kenyatta et al.*, ICC-01/09-02/11-382-Red para. 52; *The Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-309 Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda Pre-Trial Chamber II, 9 June 2014 para. 9; *The Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-656-Red Decision on the confirmation of charges against Laurent Gbagbo Pre-Trial Chamber I, 12 June 2014 para. 19.

call the witnesses expected to testify at trial. Nonetheless, the different PTCs have stressed that they would commit a suspect to trial only if, after analysing the evidence, they are ‘thoroughly satisfied that the Prosecution’s allegations are sufficiently strong’.⁹³⁵

While of critical importance and aimed at achieving a series of purposes, the confirmation proceedings nevertheless have a limited scope and ‘should not be seen as a “mini-trial” or a “trial before the trial”’.⁹³⁶ As a consequence, the different PTCs have refrained from entering into any premature in-depth analysis of the guilt or innocence of the suspects, refusing to evaluate ‘whether the evidence is sufficient to sustain a future conviction’,⁹³⁷ so as not to exceed their mandate. As emphasised by De Smet, the confirmation proceedings ‘serve as a protection for the accused against unsubstantiated accusations, not as a preparatory condemnation’.⁹³⁸

Marchesiello characterises the PTC’s role during the confirmation proceedings as ‘filtering, safeguarding and pushing ahead’.⁹³⁹ The PTC has indeed actively exercised their ‘filtering’ and ‘safeguarding’ functions. However, the way in which the role of the PTC has so far been interpreted has not actually permitted it to contribute substantially to ‘pushing ahead’ the Court’s proceedings as a whole. The contribution of the DeCC and of the confirmation proceedings in general to the preparation of the trial itself has been, in fact, very limited.⁹⁴⁰ The PTC is however not principally responsible for this.

Article 74(2) states that the TC’s decision on the merits of the case (i) shall be based on its evaluation of the evidence and the entire proceedings; (ii) shall not exceed the facts and circumstances described in the charges and any amendments thereto; and (iii) the Court may base its decision only on evidence submitted and discussed before it at trial. However, one particular decision of

⁹³⁵ *Lubanga*, ICC-01/04-01/06-803-tEN para. 39.

⁹³⁶ *Katanga and Ngudjolo*, ICC-01/04-01/07-717 para. 64. See also *Abu Garda*, ICC-02/05-02/09-243-Red para. 39.

⁹³⁷ *Abu Garda*, ICC-02/05-02/09-243-Red 40. See also, *Mbarushimana*, ICC-01/04-01/10-465-Red para. 44; *Ntaganda*, ICC-01/04-02/06-309 para. 100.

⁹³⁸ (n 838) De Smet 428.

⁹³⁹ (n 112) Marchesiello 1238.

⁹⁴⁰ For a similar view see (n 838) De Smet 438; (n 901) Nerlich 1348-1354.

TC I in the *Lubanga* case, subsequently followed by the other TCs, limited the impact of the work of the PTC in the subsequent trials, particularly in relation to the probative value of the evidence submitted and relied upon at pre-trial. TC I stressed that the Court's legal framework 'undoubtedly established the unfettered authority of the Trial Chamber to rule on procedural matters and the admissibility and relevance of evidence'.⁹⁴¹ Accordingly, it ruled that the evidence presented for confirmation 'must be introduced, if necessary, *de novo*' at trial.⁹⁴² More importantly, it stated that the record of the pre-trial proceedings transmitted to the TC pursuant to Rule 130 is 'to be used [only] as a "tool" to help with preparation and the progress of the case'.⁹⁴³ According to this approach, which is based on a rather strict interpretation of Article 74(2),⁹⁴⁴ although the TC receives the full record of the pre-trial proceedings in which the parties have submitted and discussed the evidence, that very same evidence upon which the PTC based its findings has to be submitted, admitted and discussed again at trial.

Arguably, within the scope of its powers under Article 69(2),⁹⁴⁵ Rule 132(2),⁹⁴⁶ and Regulation 54(g) and (i),⁹⁴⁷ the first step that a TC could take in preparation for trial would be to confer with the parties concerning the extent to which the evidence included in the record of the pre-trial proceedings should be admitted for the purposes of trial. Evidentiary submissions by the parties and an item-by-item decision by the TC as to their admissibility should be sufficient for it to be able to rely on that evidence as 'submitted and discussed before it at trial' in

⁹⁴¹ *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-1084 Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted Trial Chamber I, 13 December 2007 para. 5.

⁹⁴² *Ibid* para. 8.

⁹⁴³ *Ibid*.

⁹⁴⁴ Article 74(2) provides: 'The Trial Chamber's decision shall be based on its evaluation of the evidence and the entire proceedings. The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges. The Court may base its decision only on evidence submitted and discussed before it at the trial.'

⁹⁴⁵ Allowing for the introduction of documents and written transcripts.

⁹⁴⁶ Which allows the TC to confer with the parties in order to facilitate the fair and expeditious conduct of the proceedings.

⁹⁴⁷ Regulation 54 allows the TC to issue any orders in the interests of justice for the purposes of the proceedings, including in sub-paragraph (g) to determine the number of documents referred to in Article 69(2) to be introduced at trial and sub-paragraph (i) the extent to which a participant can rely on recorded evidence, including the transcripts and audio and video-recorded of evidence previously given.

accordance with Article 74(2). A change of approach in this direction should be encouraged as it may substantially expedite the trial proceedings.

Further, PTC I in the *Banda & Jerbo* case opined that the role of the PTC goes beyond the filtering of cases,⁹⁴⁸ and includes the power to ‘determine the factual ambit of the case for the purposes of the trial and circumscribe it by preventing the Trial Chamber from exceeding that factual ambit.’⁹⁴⁹ Pursuant to Article 74(2) and Regulation 55(1), the TC cannot exceed ‘the facts and circumstances described in the charges and any amendments to the charges’.⁹⁵⁰ Accordingly, the factual margins of the case against the accused - and therefore of the trial - are those delimited by the PTC in its DeCC.

The DoCC prepared by the Prosecutor has no mandatory force in itself. As stressed by PTC I, a favourable decision by a PTC does not amount to a confirmation of the DoCC, but of the charges contained therein.⁹⁵¹ What constitutes the ‘charges’ against an accused is not the DoCC, but rather, the charges ‘as confirmed’ by the PTC. As such, the DoCC has to be read in conjunction and in light of the DeCC. Although the Statute does not define the term ‘charge’, pursuant to Regulation 52,⁹⁵² charge has been understood as being composed of both ‘the facts and circumstances underlying the alleged crime as well as of their legal characterisation’.⁹⁵³ Therefore, the essential elements of a charge are: (i) a factual description of the crimes; and (ii) their

⁹⁴⁸ *Banda and Jerbo*, ICC-02/05-03/09-121-Corr-Red para. 32.

⁹⁴⁹ *Ibid* para. 34.

⁹⁵⁰ Regulation 55(1) gives the TC the authority to modify the legal characterisation of the facts, stating: ‘In its decision under article 74, the Chamber may change the legal characterisation of facts to accord with the crimes under articles 6, 7 or 8, or to accord with the form of participation of the accused under articles 25 and 28, without exceeding the facts and circumstances described in the charges and any amendments to the charges.’

⁹⁵¹ *Banda and Jerbo*, ICC-02/05-03/09-121-Corr-Red para. 38.

⁹⁵² Regulation 52 requires the DoCC to include: ‘a) The full name of the person and any other identifying information; b) A statement of the facts, including the time and place of the alleged crimes, which provides a sufficient legal and factual basis to bring the person or persons to trial, including relevant facts for the exercise of jurisdiction by the Court; c) A legal characterisation of the facts to accord both with the crimes under articles 6, 7 or 8 and the precise form of participation under articles 25 and 28.’

⁹⁵³ *Ruto et al.*, ICC-01/09-01/11-373 para. 44; *Kenyatta et al.*, ICC-01/09-02/11-382-Red para. 56.

legal characterisation, including both the crimes and the form of participation.⁹⁵⁴

Below the different interpretations given thus far to the PTC functions in determining the factual scope of the case and its legal characterisation are examined.

6.3 The PTC's role in determining the factual scope of the case

Together with establishing which cases should proceed to trial, the determination of the factual scope of the cases that pass this screening is one of the most important manifestations of the PTC's gatekeeping function at the pre-trial stage. The jurisprudence of the different Chambers of the Court has consistently stressed that '[t]he power to frame the charges lies at the heart of the Pre-Trial Chamber's functions'.⁹⁵⁵ However, the extent to which the PTC may in practice delimit the factual scope of the trial remains greatly contested. What can a PTC actually do when presented with facts and circumstances not properly, or not at all, captured in the charges brought by the Prosecutor? Can the PTC alter the charges of its own accord when issuing the DeCC? To what extent can a PTC use its Article 61(7)(c) power to adjourn the hearing and request that the Prosecutor provide further evidence, conduct further investigations or amend a charge? Are any 'facts and circumstances' discussed during the confirmation hearing that amount to a crime under the jurisdiction of the Court 'relevant' for the PTC's consideration? Is the PTC limited in its analysis of the facts by the crimes identified by the Prosecutor in its DoCC? Different answers to these questions have been advanced through the different cases that have come before the Court. They are analysed below to illustrate the current understanding of the PTC's function and identify its strengths and deficiencies.

⁹⁵⁴ Dov Jacobs, 'A Shifting Scale of Power: Who is in Charge of the Charges at the International Criminal Court?' in William A. Schabas, Yvonne McDermott and Niamh Hayes (eds), *The Ashgate Research Companion to International Criminal Law Critical Perspectives* (Ashgate Publishing Limited 2013) 207.

⁹⁵⁵ *Lubanga*, ICC-01/04-01/06-1084 para. 39.

6.3.1 Which facts are to be delimited by the PTC in the DeCC?

The *Lubanga* case was the first to progress to confirmation proceedings. As has been extensively reported, the charges brought by the Prosecutor were controversially limited to the war crimes of conscripting, enlisting and using children under the age of fifteen to participate actively in the hostilities,⁹⁵⁶ pursuant to 8(2)(e)(vii).⁹⁵⁷ It was alleged by the Prosecutor that the crimes were committed in Ituri between September 2002 and December 2003, within the context of an armed conflict ‘not of an international character’.⁹⁵⁸ At confirmation, the defence contested the characterisation of the armed conflict, alleging that Ituri was under the control of Uganda, Rwanda and the United Nations Organisation Mission in the Democratic Republic of the Congo (MONUC) during the relevant period.⁹⁵⁹ The legal representative of victims also stated that the involvement of Uganda and Rwanda was common knowledge, however, it recalled that the Statute qualifies the alleged acts as criminal under the Statute whether committed in an international or non-international conflict.⁹⁶⁰

In light of the evidence submitted,⁹⁶¹ PTC I found that the armed conflict was of an ‘international character’ from July 2002 to 2 June 2003, due to the presence of Uganda as an occupying power,⁹⁶² and that between 2 June and late December 2003 the armed conflict was ‘not of an international character’.⁹⁶³ PTC I took note of Article 61(7)(c)(ii),⁹⁶⁴ under which it would have been possible for the PTC to adjourn the hearing and request the Prosecutor to consider amending a charge, but stressed that the purpose of the provision was to ‘prevent the Chamber from committing a person for trial for crimes which would be materially different’ from those set out in the DoCC.⁹⁶⁵ Since Articles

⁹⁵⁶ *Lubanga*, ICC-01/04-01/06-803-tEN paras 9-12.

⁹⁵⁷ The provision proscribes, in *armed conflicts not of an international character*, the conduct of conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities.

⁹⁵⁸ *Lubanga*, ICC-01/04-01/06-803-tEN paras 9-12.

⁹⁵⁹ *Ibid* para. 200.

⁹⁶⁰ *Ibid*.

⁹⁶¹ *Ibid* paras 167-199, 212-219.

⁹⁶² *Ibid* para. 220.

⁹⁶³ *Ibid* paras 227-237.

⁹⁶⁴ *Ibid* para. 202.

⁹⁶⁵ *Ibid* para. 203.

8(2)(b)(xxvi)⁹⁶⁶ and 8(2)(e)(vii) ‘criminalise the same conduct’, their differentiation resting solely on whether the armed conflict may be considered international in character, the PTC did not find it necessary to resort to Article 61(7)(c)(ii).⁹⁶⁷ Accordingly, without any formal amendment, the Chamber confirmed the crimes charged under both Article 8(2)(b)(xxvi) and 8(2)(e)(vii).⁹⁶⁸ In short, PTC I in effect committed the suspect to trial for three newly added charges not brought by the Prosecutor.

The decision of PTC I, presided over at that time by the French Judge Claude Jorda, was consistent with the proactive approach originally taken by that Chamber. As discussed in Section 5.3, this was the same Chamber that actively requested information as to the progress of the Prosecutor’s investigations in Sudan and the DRC. The addition of charges in the *Lubanga* DeCC, although triggered by the submissions of the suspect and the victims, was based on the evidence and information provided at the hearing. It has however been criticised as infringing upon the separation of powers created in the Statute between the Prosecutor and the PTC.⁹⁶⁹ Indeed, a literal interpretation of Article 61(1),⁹⁷⁰ (4),⁹⁷¹ (7)(c)⁹⁷² and (9)⁹⁷³ supports the conclusion that the Prosecutor retains the exclusive power to decide on the individuals and conduct to be brought to trial. Nevertheless, as discussed in Section 1.2.3, although the Prosecutor enjoys discretion, his decisions cannot be arbitrary or biased. The PTC’s power to review the Prosecutor’s decisions in order to determine whether they are a legitimate exercise of his discretion is then exercised at this stage of the proceedings when deciding whether or not to confirm the charges brought by the Prosecutor. However, the PTC does not have the power to amend the charges

⁹⁶⁶ This Provision proscribes, in *international armed conflicts*, the conduct of conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

⁹⁶⁷ *Lubanga*, ICC-01/04-01/06-803-tEN para. 204.

⁹⁶⁸ Ibid 156-157.

⁹⁶⁹ (n 954) Jacobs, ‘A Shifting Scale of Power: Who is in Charge of the Charges at the International Criminal Court?’ 210.

⁹⁷⁰ Given that the provision refers to the ‘charges on which the Prosecutor intends to seek trial’.

⁹⁷¹ Given that the provision allows the Prosecutor, before the hearing, to continue the investigation and amend or withdraw any charges.

⁹⁷² Allowing the PTC to suspend the hearing and *request the Prosecutor to consider* either provide further evidence or amend a charge.

⁹⁷³ Allowing the Prosecutor to amend the charges after confirmation with the permission of the PTC or to withdraw the charges after the commencement of the trial with the permission of the TC.

directly. The Chamber must assess the evidence submitted and determine whether it indeed fulfils the threshold for the case to be committed to trial. If it does not, pursuant to Article 61(7), the PTC has only two alternatives: either to decline to confirm the charges or otherwise to ‘request the Prosecutor’ to ‘consider’ providing further evidence, conducting further investigations or amending the charges. The PTC is not allowed to charge a suspect by itself or to alter the charges without the Prosecutor’s consent.

The fact that the PTC is not permitted to charge a suspect or alter the charges submitted by the Prosecutor does not however imply that the PTC’s function is that of a rubber-stamping body. In the *Lubanga* case PTC I rightly understood that its role was not limited to a simple revision of the Prosecutor’s DoCC, yet no doubt technically speaking when adding charges by itself it failed to follow the procedure provided by Article 61(7) the Statute. PTC I was right in that, as a general rule, a PTC does not have to simply follow the Prosecutor’s characterisation and ignore any fact that comes to its attention if not related to the charges brought by the Prosecutor. The PTC should rather use the full extent of its powers during the confirmation proceedings and request the Prosecutor to consider providing further evidence, conducting further investigations or amending the charges whenever warranted by the evidence or information provided at the hearing. This would allow the PTC to exercise meaningful judicial control over the Prosecutor’s choices, in accordance with the Statute and without infringing upon the Prosecutor’s independence.

In the same *Lubanga* case both parties sought, unsuccessfully, leave to appeal the DeCC. Instead of granting appeal, PTC I directed the parties to raise the matter before the relevant TC pursuant to Regulation 55,⁹⁷⁴ stressing that ‘there is nothing to prevent the Prosecution or the Defence from requesting that the Trial Chamber reconsider the legal characterisation of the facts described in the charges against Thomas Lubanga Dyilo and as confirmed by the Chamber’.⁹⁷⁵ This approach was rather unfortunate. As described in the previous section, the PTC’s involvement at the pre-trial stage of a case should contribute to the

⁹⁷⁴ See above footnote 950.

⁹⁷⁵ *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-915 Decision on the Prosecution and Defence applications for leave to appeal the Decision on the confirmation of charges Pre-Trial Chamber I, 24 May 2007 para. 44.

preparation and streamlining of the trial proceedings. Leaving to the TC issues that could have been effectively addressed at the pre-trial stage - by the AC if not by the PTC itself - can only delay proceedings. In addition, although PTC I treated the issue as one of the 'legal characterisation of facts', it is clear that it actually added to the charges facts that were not pleaded by the Prosecutor, but by the suspect and the victims (specifically the involvement of third party States in the conflict within a certain period of time).⁹⁷⁶ A review by the AC would have given some clarity as to whether PTC I was actually acting within the scope of its powers when adding those facts. The use of Regulation 55 at trial is not the proper method of resolving discrepancies that have arisen already at the confirmation stage. The disagreement about the inclusion of these new facts and the PTC's recommendation that the parties request at trial a re-characterisation of the facts pursuant to Regulation 55, only created uncertainty for the suspect about the nature, cause and content of the charges, infringing upon his rights as guaranteed by Article 67(1)(a), to be informed promptly and in detail of the nature, cause and content of the charges.

As encouraged by PTC I, as soon as the TC in charge of the trial was constituted, the Prosecutor requested it to either rule that PTC I had acted *ultra vires* or to use Regulation 55 to modify the legal characterisation of the facts.⁹⁷⁷ In a decision of great relevance to the interpretation of the role and functions of the PTC, TC I clearly stated that it had 'no authority to ignore, strike down or declare null and void the charges as confirmed by the Pre-Trial Chamber'.⁹⁷⁸ It emphasised that the PTC and the TC have separate functions at the different stages of the proceedings and that there is no hierarchy or appellate jurisdiction of the TC over any decision of the PTC.⁹⁷⁹ TC I stressed that it 'has not been given a power to review the only decision of the Pre-Trial Chamber that is definitely binding on the Trial Chamber',⁹⁸⁰ and held accordingly that it could not nullify or ignore PTC I's DeCC.⁹⁸¹ It did however consider that, so long as the facts and circumstances described in the charges were not exceeded, pursuant

⁹⁷⁶ *Lubanga*, ICC-01/04-01/06-803-tEN para. 200.

⁹⁷⁷ *Lubanga*, ICC-01/04-01/06-1084 para. 29.

⁹⁷⁸ *Ibid* para. 39.

⁹⁷⁹ *Ibid* para. 43.

⁹⁸⁰ *Ibid*.

⁹⁸¹ *Ibid* para. 44.

to Regulation 55 it could give a different legal characterisation to those facts.⁹⁸² TC I therefore gave the parties and participants notice that there was a possibility that it may modify the legal characterisation of the armed conflict pursuant to Regulation 55.⁹⁸³ In its final judgment, after analysing the relevant evidence presented at trial,⁹⁸⁴ TC I eventually changed the legal characterisation of the facts determining that ‘the armed conflict relevant to the charges was non-international in character’.⁹⁸⁵ Consequently, instead of the issue having been solved at the pre-trial stage of the proceedings, as would have been preferable, the parties and TC I spent time and resources at trial discussing and presenting evidence as to the facts relevant to the nature of the conflict.

Another significant matter that should have been dealt with at the confirmation stage in the *Lubanga* case was the issue of the limited charges brought by the Prosecutor. As stated, the Prosecutor only charged Lubanga with the crimes of conscripting, enlisting and using children to participate actively in hostilities. Without denying the gravity of those crimes, it appears that even at the confirmation stage the Prosecutor provided information and evidence related to other crimes under the jurisdiction of the Court, which were not included in the charges against Lubanga. Indeed, during the confirmation the defence complained that the Prosecutor included in the DoCC facts that were not relevant to the confirmation or otherwise of the specific charges, yet PTC I was of the view that nothing prevented the Prosecution from mentioning facts that would be helpful in understanding the context in which the conduct charged occurred.⁹⁸⁶

In the course of the trial, the testimony of the witnesses was again not strictly limited to facts relevant to the crimes charged. The legal representatives of victims requested that TC I use Regulation 55 to re-characterise the facts so as to include the crime against humanity or war crime of sexual slavery as well as

⁹⁸² Ibid para. 47.

⁹⁸³ Ibid para. 48.

⁹⁸⁴ *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2842 Judgment pursuant to Article 74 of the Statute Trial Chamber I, 14 March 2012 paras 543-565.

⁹⁸⁵ Ibid 566.

⁹⁸⁶ *Lubanga*, ICC-01/04-01/06-803-tEN para. 152.

the war crime of inhuman and/or cruel treatment.⁹⁸⁷ TC I by Majority,⁹⁸⁸ interpreted Regulation 55 as providing for two distinct sets of proceedings: (i) under sub-paragraph 1, the possibility to change the legal characterisation of the facts at the time of the issuance of TC's final judgment, subject only to the limitation of not exceeding the facts and circumstances described in the charges and any amendments to the charges,⁹⁸⁹ and; (ii) under sub-paragraph 2, the possibility to re-characterise at any time during the trial, subject to the safeguards of sub-paragraph 3, but not limited by the facts and circumstances described in the charges.⁹⁹⁰ Accordingly, the Majority of TC I gave notice to the parties and participants of the possibility that the legal characterisation of the facts might be subject to change in order to include the crimes mentioned by the victims.⁹⁹¹

It transpires from the dissenting opinion that both the DoCC and the DeCC made reference to the severe sanctions and rigorous and strict discipline faced by children.⁹⁹² Accordingly, PTC I could also have made use of Article 61(7)(c) at the confirmation stage in relation to these additional facts that might have amounted to crimes under the jurisdiction of the Court but were not included in the charges, and could have asked the Prosecutor to provide further evidence, conduct further investigations or amend the charges. PTC I could have also combined its power under Article 61(7)(c) with that of Regulation 48 to ask for additional information or documents and Article 53(3)(b) to review the Prosecutor's decision not to proceed in the interests of justice. The PTC could have requested the Prosecutor to provide information as to whether his decision

⁹⁸⁷ *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2049 Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court Trial Chamber I, 14 July 2009 para. 1.

⁹⁸⁸ Judge Adrian Fulford dissented arguing that Regulation 55 creates an indivisible or singular process and that the Statute left control over the framing and effecting of any changes to the charges exclusively to the PTC, as part of a scheme clearly designed to ensure that, once the trial has begun, the charges are not subject to any further amendment, addition or substitution and can only be withdrawn at the request of the Prosecutor with leave of the Chamber. See *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2069-Anx1 Second Corrigendum to Minority opinion on the 'Decision giving notice to the parties and participants that the legal characterisation of facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court' of 17 July 2009 Trial Chamber I, 31 July 2009 paras 16-17, 21-33.

⁹⁸⁹ *Lubanga*, ICC-01/04-01/06-2049 para. 27.

⁹⁹⁰ *Ibid* paras 28-29.

⁹⁹¹ *Ibid* para. 35.

⁹⁹² *Lubanga*, ICC-01/04-01/06-2069-Anx1 paras 46-49.

not to prosecute these conduct was based on the belief that it was not in the interests of justice to do so. Dealing with these matters at the confirmation stage would have addressed, if not altogether pre-empted, some of the criticisms raised in relation to the *Lubanga* case, particularly, as discussed in Sections 3.2.3.1 and 3.4.2, the application and interpretation of the principle of complementarity and of the gravity threshold.

Deciding on the appeal against the TC I's Majority Regulation 55 Notice, the AC, in a judgment of great significance for the future understanding of the concept of 'facts and circumstances underlying the charges', reversed the decision on the basis that Regulation 55(2) and (3) 'may not be used to exceed the facts and circumstances described in the charges or any amendments thereto'.⁹⁹³ In the AC's view, Regulation 55 is aimed at avoiding:

the risk of acquittals that are merely the result of legal qualifications confirmed in the pre-trial phase that turn out to be incorrect, in particular based on the evidence presented at trial. This would be contrary to the aim of the Statute to 'put an end to impunity'.⁹⁹⁴

Accordingly, the purpose of Regulation 55 is to close accountability gaps, which is fully consistent with the Statute.⁹⁹⁵ It may not be used, the AC stressed, by the TC to extend *proprio motu* the scope of the trial to facts not alleged by the Prosecutor, as this would be contrary to the distribution of powers under the Statute, which gives the Prosecutor the power to proffer charges against suspects.⁹⁹⁶

The AC further noted that while Regulation 55 authorises the modification of the legal characterisation of the facts underlying the charges,⁹⁹⁷ it does not stipulate what specific changes may be permissible.⁹⁹⁸ By way of clarification, the AC stated that Article 74(2), which limits the scope of the trial decision on the

⁹⁹³ *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2205 Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court' Appeals Chamber, 8 December 2009 para. 1.

⁹⁹⁴ *Ibid* para. 77.

⁹⁹⁵ *Ibid*.

⁹⁹⁶ *Ibid* para. 94.

⁹⁹⁷ *Ibid* para. 93.

⁹⁹⁸ *Ibid* para. 100.

merits to the facts and circumstances described in the charges and any amendments, confines the scope of Regulation 55 as well to the facts and circumstances described in the charges and any amendment thereto.⁹⁹⁹ In a seminal statement which, despite being perhaps the most significant of the whole decision was to be found in a footnote, the AC specified:

In the view of the Appeals Chamber, the term ‘facts’ refers to the factual allegations which support each of the legal elements of the crime charged. These factual allegations must be *distinguished from the evidence* put forward by the Prosecutor at the confirmation hearing to support a charge (article 61(5) of the Statute), *as well as from background or other information* that, although contained in the document containing the charges or the confirmation decision, does not support the legal elements of the crime charged. The Appeals Chamber emphasises that in the confirmation process, the facts, as defined above, must be identified with sufficient clarity and detail, meeting the standard in article 67(1)(a) of the Statute.¹⁰⁰⁰

This fundamental distinction made by the AC between the factual allegations ‘supporting’ the legal elements of the crimes charged, and the evidence and background information which ‘do not support’ the legal elements of the crimes, although apparently straightforward, has proven in practice to be a difficult line to draw.

In the *Banda & Jerbo* case, PTC I attempted to clarify the issue. It first reiterated the PTC’s power to circumscribe the factual ambit of the case for the purpose of trial.¹⁰⁰¹ It specified that ‘no delimiting or otherwise constraining power can be ascribed to facts and circumstances which, despite having been mentioned or dealt with at the pre-trial stage, do not appear in the charges as confirmed by the Chamber’.¹⁰⁰² Accordingly, it distinguished those facts and circumstances ‘underlying the charges’ - which would limit the factual scope of the case - from other facts ‘subsidiary’ or otherwise related to the charges, providing background information but not mentioned in the charge itself, which

⁹⁹⁹ Ibid para. 93.

¹⁰⁰⁰ Ibid para. 90, footnote 163 [emphasis added].

¹⁰⁰¹ *Banda and Jerbo*, ICC-02/05-03/09-121-Corr-Red para. 34.

¹⁰⁰² Ibid para. 36.

would be ‘deprived of any limiting power *vis-à-vis* the Trial Chamber’.¹⁰⁰³ Again in a footnote, the Chamber noted:

[i]t is understood that the ‘legal elements of the crime charged’ include all the constitutive elements of such a crime as well as the objective and subjective elements of the mode of liability according to which the crime charged has been confirmed by the Chamber.¹⁰⁰⁴

However, when assessed in the context of the *Banda and Jerbo* DeCC, this clarification does not cast much light upon what exactly the Chamber meant by the facts and circumstances ‘underlying the charges’ and the ‘legal elements of the crimes charged’, nor is it conclusive as to whether the Chamber did in fact draw a line between underlying and subsidiary facts. Examining this particular DeCC highlights the uncertainty at play: did the Chamber understand its ‘constraining power’ to be limited to the ‘charges’ or ‘counts’ as referred to in paragraph 5 of the DeCC?¹⁰⁰⁵ Or was it referring instead to the more detailed description of the ‘charges’ as mentioned at pages 4-5 of the DeCC?¹⁰⁰⁶ Footnote 49 clarifies that the Chamber understood the ‘legal elements’ to include ‘constitutive elements’ of the crimes as well as ‘subjective and objective’ elements of the mode of liability, yet does this mean that the Chamber understood its ‘limiting power *vis-à-vis* the Trial Chamber’ to include every factual finding mentioned between paragraphs 48 and 161 of the DeCC? Or were the operative elements limited to the description of the counts in paragraphs 59, 88, 110 and 124?

The DeCC in the *Banda and Jerbo* case was also ambiguous as to the dividing line between ‘underlying’ and ‘subsidiary’ facts, despite the significance of the distinction for the criminal liability of the accused. In particular, PTC I did not consider it necessary to examine the potential responsibility of the accused as

¹⁰⁰³ Ibid paras 36-37.

¹⁰⁰⁴ Ibid para. 37, footnote 49.

¹⁰⁰⁵ Paragraph 5 of the DeCC baldly states: ‘Accordingly, the Prosecutor charges Abdallah Banda and Saleh Jerbo with the war crimes of: I. violence to life and attempted violence to life, within the meaning of articles 8(2)(c)(i), 25(3)(a) and 25(3)(f) of the Rome Statute (“Statute”); II. intentionally directing attacks against personnel, installations, materials, units and vehicles involved in a peacekeeping mission, within the meaning of articles 8(2)(e)(iii) and 25(3)(a) of the Statute; and III. pillaging, within the meaning of articles 8(2)(e)(v) and 25(3)(a) of the Statute’, see *ibid* para. 5.

¹⁰⁰⁶ Ibid 4-5.

indirect co-perpetrators¹⁰⁰⁷ as it was satisfied that the suspects personally participated in the attack¹⁰⁰⁸ and otherwise made essential contributions thereto, including planning, ordering and providing the troops. Accordingly, it confirmed the charges for their alleged responsibility as co-perpetrators.¹⁰⁰⁹ It is an open question whether, as a consequence of this decision, the TC will be limited to consideration only of the facts relevant to the alleged confirmed co-perpetration. What if it were not proven at trial beyond reasonable doubt that the suspect participated in the attack? Must the suspect therefore be acquitted? Or will it be possible for the TC to rely on other facts considered in the DeCC or mentioned in the DoCC that may be relevant to a re-characterisation of the criminal liability as indirect co-perpetration pursuant to Regulation 55? As illustrated, the clarification given by PTC I is simply insufficient.

In the *Ruto et al.* and the *Kenyatta et al.* cases, PTC II also attempted to clarify its understanding of the extent to which the DeCC establishes the factual subject matter of the trial. It also upheld the view that the facts ‘underlying the charges’ are ‘the only ones that cannot be exceeded by the Trial Chamber once confirmed by the Pre-Trial Chamber’.¹⁰¹⁰ It further specified that facts or evidence that are subsidiary to the facts described in the charges ‘are of relevance only to the extent that facts described in the charges may be inferred from them’.¹⁰¹¹ As such, the Chamber found it unnecessary to engage in the examination of each and every subsidiary fact mentioned in the DoCCs, as it had only to analyse them to the extent necessary to satisfy the evidentiary threshold.¹⁰¹² The Chamber further stressed that this

does not prevent the Prosecutor from relying on these or other subsidiary facts in the future, in the same way that the parties are not precluded

¹⁰⁰⁷ Ibid para. 125, 162.

¹⁰⁰⁸ Ibid para. 155.

¹⁰⁰⁹ Ibid para. 162.

¹⁰¹⁰ *Ruto et al.*, ICC-01/09-01/11-373 para. 47; *Kenyatta et al.*, ICC-01/09-02/11-382-Red para. 59.

¹⁰¹¹ *Ruto et al.*, ICC-01/09-01/11-373 para. 47; *Kenyatta et al.*, ICC-01/09-02/11-382-Red para. 59.

¹⁰¹² *Ruto et al.*, ICC-01/09-01/11-373 para. 48; *Kenyatta et al.*, ICC-01/09-02/11-382-Red para. 60.

from relying at trial upon new or additional evidence from that presented at the pre-trial stage of the case.¹⁰¹³

Notably, in relation to these cases, the Chamber included some additional specifications. In the *Kenyatta et al.* case, PTC II included in the DeCC a special section called ‘overall conclusions of the chamber’,¹⁰¹⁴ where the individuals, charges and mode of liability were specified in relation to which the Chamber believed the required threshold was satisfied. The Chamber further stressed that the charges ‘must be confirmed to the extent specified’ in that paragraph¹⁰¹⁵ and, although the operative part only states that certain charges are confirmed against certain suspects, it seems clear that the charges are not merely confirmed as described in the DoCC by the Prosecutor, but rather made subject to the general specifications included in the conclusions. It should be recognised that, as a consequence, the temporal and geographical scope of the case was restricted¹⁰¹⁶ and the conduct further specified.¹⁰¹⁷ It remains to be seen whether these specifications will be actually helpful at trial. At first sight, it appears that issues may arise in relation to, among other things, the fact that the temporal scope of the case was limited to only four days and, in the absence of a settled description of the facts on which the assessment of criminal liability is based, the description of the conduct was either too general or too specific. By the same token, in the *Ruto et al.* case, PTC II included two brief paragraphs in which it summarised the conduct which it was satisfied had met the required threshold.¹⁰¹⁸ In the dispositive part of the decision, PTC II clearly stated that

¹⁰¹³ *Ruto et al.*, ICC-01/09-01/11-373 para. 48; *Kenyatta et al.*, ICC-01/09-02/11-382-Red para. 60.

¹⁰¹⁴ *Kenyatta et al.*, ICC-01/09-02/11-382-Red paras 428-430.

¹⁰¹⁵ *Ibid* para. 429.

¹⁰¹⁶ The Prosecutor has brought charges for crimes allegedly committed ‘from on or about 30 December 2007 to 31 January 2008 (...) in or around locations including Nakuru town (Nakuru District, Rift Valley Province) and Naivasha town (Naivasha District, Rift Valley Province)’. However, the Chamber was satisfied of the commission of crimes only ‘in or around Nakuru between 24 and 27 January 2008 and in or around Naivasha between 27 and 28 January 2008’. See *ibid* paras 21, 428.

¹⁰¹⁷ For example, in Count 7 the Prosecutor brought charges for the crime against humanity of ‘other inhumane acts’ describing the conduct as ‘the inflicting of great suffering and serious injury to body or to mental or physical health by means of inhumane acts upon civilians supporters of the [ODM]’. However, PTC II was satisfied of more specific conduct amounting to ‘(i) severe physical injury of perceived ODM supporters; and (ii) infliction of serious mental suffering to perceived ODM supporters by way of subjecting them to witnessing the killings and mutilations of their close relatives’. See *ibid* paras 21 (Count 07), 428(d).

¹⁰¹⁸ *Ruto et al.*, ICC-01/09-01/11-373 paras 349, 367.

the charges were confirmed ‘to the extent specified’ in those paragraphs.¹⁰¹⁹ Although in both cases PTC II arguably attempted to afford the TC sufficient latitude to adopt its own interpretation of the facts of the case, the manner in which it did so may have inadvertently actually limited the TC’s freedom.

In both cases the potential limiting effect of the DoCC on the PTC’s power to frame the factual allegations was also discussed. In the *Ruto et al.* case, when presented with a request from a legal representative of victims to make use of Article 61(7)(c)(ii) adjourning the hearing and request the Prosecutor to consider amending a charge in order to include additional conduct, PTC II was of the view that it could not do so, insofar as the provision referred to ‘amending’ a charge and not ‘adding’ a new one.¹⁰²⁰ Presented with the same situation, in the *Kenyatta et al.* case, PTC II stated that ‘consistent with the principle of prosecutorial discretion, the Chamber is not vested with the authority to request the Prosecutor to consider adding a new charge, *i.e.* to expand the factual ambit of the charges as originally presented’.¹⁰²¹

This restrictive approach to the role of the PTC seems unjustified. As previously stated, in effect the PTC cannot usurp the Prosecutor’s power to bring conduct and suspects before the Court. The PTC is not allowed to amend by itself the charges without the agreement of the Prosecutor pursuant to the procedure outlined in Article 61(7)(c). However, nothing prevents the PTC from exercising its powers under Regulation 48 to ask the Prosecutor for information as to whether he has decided not to prosecute certain conduct. The very reason for the victims having been given the right to present their views and concerns in the different stages of the proceedings was to help the Court in the truth-finding process. As discussed in previous Chapters, the Prosecutor may have several reasons for not prosecuting, including, of course, the failure to obtain sufficient evidence to secure a conviction, in which case the victims themselves could assist the Prosecutor in the completion of the investigations. It may also be the case that a prosecution is not warranted in accordance with the Prosecutor’s policy decisions. Further, the assessment of the available evidence may have led

¹⁰¹⁹ Ibid 138.

¹⁰²⁰ Ibid para. 278.

¹⁰²¹ *Kenyatta et al.*, ICC-01/09-02/11-382-Red para. 285.

the Prosecutor to conclude that the conduct did not amount to a crime under the Statute, or that the case would not be admissible under Article 17, either because it has been investigated or prosecuted at the national level or because it is not of sufficient gravity to justify action by the Court. In each of these scenarios, the State or the UNSC making the referral may ask the PTC to review the prosecutor's decision not to prosecute, yet this only becomes possible to the extent that the referring party is aware that such a decision has been taken and the reasons thereof. Most importantly, the Prosecutor may have decided not to prosecute the conduct for considerations related to the 'interests of justice'. As has been extensively discussed in the previous Chapters, in this case the PTC has the power to review *proprio motu* the Prosecutor's decision pursuant to Article 53(3)(b) and this review can be triggered by a request for information under Regulation 48. Accordingly, in order to exercise its functions under the Statute and allow those affected by the Court's work to exercise their rights, the PTC should use these opportunities to demand from the Prosecutor more transparent decision-making, contributing to a more positive public perception of the Court's legitimacy.

Learning from these previous experiences, the recent decisions in the *Ntaganda* and *Gbagbo* cases include greater detail as to the actual factual scope of the alleged conduct. In the *Ntaganda* case, although not specifically stating that it was distinguishing between material and subsidiary facts, PTC II highlighted certain paragraphs that summarised the Chamber's findings and included additional detail as to the contextual elements, the specific conduct and the mode of liability, before indicating in the operative part of the decision that the charges were confirmed 'to the extent specified' in those paragraphs.¹⁰²² Similarly, in the *Gbagbo* case, a more complete section was added to the DeCC in which the specific facts and circumstances and their legal characterisation as confirmed by the Chamber were briefly summarised.¹⁰²³ These paragraphs are distinguishable from those included in previous decisions in that, without going into the full details of the evidence analysed, they include a description of the main facts to be extracted from the overall analysis of the evidence. It remains

¹⁰²² *Ntaganda*, ICC-01/04-02/06-309 63, paras 12, 31, 36, 74, 97.

¹⁰²³ *Gbagbo*, ICC-02/11-01/11-656-Red paras 266-278.

to be seen whether this approach will be effective in providing suitable flexibility for the exploration of issues that may arise at trial, while at the same time respecting the rights of the accused to be informed promptly and in detail of the nature, cause and content of the charges for which he has been committed to trial in accordance with Article 67(1)(a).

6.3.2 How much evidence and information is necessary to provide the PTC with substantial grounds to believe?

Another issue that has been highly debated is the amount and strength of the evidence that the Prosecutor should provide to the PTC in order to satisfy the evidentiary threshold of Article 61. This is directly related to the issue of the depth in which the PTC should engage with the facts and evidence in order to determine whether the case should be committed to trial.

In an unexpected and unprecedented move, in the *Banda & Jerbo* case the Prosecutor and the suspects reached an agreement after the hearing as to all material facts alleged in the DoCC. Accordingly, the Prosecutor asked the Chamber to consider all alleged facts as proven.¹⁰²⁴ However, PTC I was of the view that the proceedings for the confirmation of charges ‘are not provided for the sole benefit of the parties’. It stressed that, in accordance with Rule 69,¹⁰²⁵ the Chamber retains discretion to allow the facts ‘to be presented in full whenever either the interests of justice, which are paramount, or the interests of the victims, which are also critical, so require’.¹⁰²⁶ In addition, the Chamber noted that, pursuant to Article 61(7), it must satisfy itself that the evidence submitted provides ‘substantial grounds to believe’, irrespective of whether the parties agree on the facts of the case.¹⁰²⁷ Accordingly, the Chamber confirmed the charges only after assessing whether the evidence submitted was sufficient to commit the suspects to trial. This approach is consistent with the role of the PTC as providing judicial control over the Prosecutor’s actions. The Chamber has

¹⁰²⁴ *Banda and Jerbo*, ICC-02/05-03/09-121-Corr-Red para. 43.

¹⁰²⁵ According to Rule 69, once the Prosecutor and defence have agreed on alleged facts ‘a Chamber *may* consider such alleged facts as being proven, unless the Chamber is of the opinion that a more complete presentation of the alleged facts is required in the interests of justice, in particular the interests of victims’.

¹⁰²⁶ *Banda and Jerbo*, ICC-02/05-03/09-121-Corr-Red para. 45.

¹⁰²⁷ *Ibid* para. 46.

the responsibility to ensure that only cases supported by sufficient evidence are committed to trial and cannot permit an agreement between the parties, reached for whatever reasons, to frustrate the necessary judicial filtering of cases before they are committed to trial.

However, as to the level of judicial scrutiny that the PTC should exercise, in the *Bemba* case PTC II dismissed the defence's complaint that the Prosecutor should not be allowed to use expressions such as 'included, but not limited to' when listing the incidents in the charges, finding that it would not infringe the rights of the defence at the confirmation stage.¹⁰²⁸ The Chamber justified its view by stating that, for the confirmation proceedings, the Prosecutor 'needs to provide not all but only *sufficient* evidence which allows the Chamber to determine whether there are substantial grounds to believe that the suspect committed each of the crimes charged'.¹⁰²⁹ This approach appears to be consistent with the position that, while there should be judicial scrutiny of the charges before the case is committed to trial, the pre-trial stage should not become a 'mini-trial' or a 'trial before the trial'. The same approach as to the amount of evidence the Prosecutor must submit was followed in the *Banda & Jerbo* case, in which PTC I stressed that 'the Prosecutor is not required to tender into the record of the case more evidence than is, in his view, necessary to convince the Chamber that the charges should be confirmed'.¹⁰³⁰ Indeed, pursuant to Article 61(7), if the Chamber is not satisfied that the evidence is sufficient, it has the option to either decline to confirm the charges or to request the Prosecutor to consider providing further evidence or conducting further investigations. There is no need for the PTC to duplicate work that will be done later by the TC and enter into a full analysis of the totality of evidence of the case.

In the *Mbarushimana* case, PTC I slightly altered its approach. While continuing to stress the limited object and purpose of the confirmation hearing,¹⁰³¹ it rejected the use of the expression 'included but not limited to'. The Chamber

¹⁰²⁸ *Bemba*, ICC-01/05-01/08-424 paras 65-66.

¹⁰²⁹ *Ibid.*

¹⁰³⁰ *Banda and Jerbo*, ICC-02/05-03/09-121-Corr-Red para. 40.

¹⁰³¹ *Mbarushimana*, ICC-01/04-01/10-465-Red para. 44.

highlighted that, pursuant to Articles 61(3)(a),¹⁰³² 67(1)(a)¹⁰³³ and 74(2),¹⁰³⁴ Rule 121(3)¹⁰³⁵ and Regulation 52,¹⁰³⁶ the use of such an expression was ‘untenable insofar as it attempts to reserve for the Prosecution the right to expand the factual basis of the charges through the addition of entirely new material facts after the charges have been confirmed’.¹⁰³⁷ In the view of the Chamber, the Prosecutor,

must know the scope of its case, as well as the material facts underlying the charges that it seeks to prove, and must be in possession of the evidence necessary to prove those charges to the requisite level in advance of the confirmation hearing.¹⁰³⁸

In relation to the specificity of acts charged, PTC II in the *Bemba* case held that the Prosecutor is expected to specify, to the extent possible, *inter alia*, the location, approximate date and means by which the acts were committed.¹⁰³⁹ However, taking into account the evidentiary threshold at the pre-trial stage ‘and the fact that in case of mass crimes, it may be impractical to insist on a high degree of specificity’, PTC II was of the view that it was not necessary for the Prosecutor to demonstrate, for each individual act, the identity of the victim and of the direct perpetrator or to determine the precise number of victims.¹⁰⁴⁰

In the *Mbarushimana* case, however, PTC I stated that the DoCC ‘must contain a statement of the material facts underlying the charges, to include the dates and locations of the alleged incidents to the greatest degree of specificity possible in the circumstances’.¹⁰⁴¹ Going even further, PTC I harshly reprimanded the Prosecutor, stressing that ‘the charges and the statements of facts in the [DoCC]

¹⁰³² Which gives the suspect the right to be provided with a copy of the DoCC within a reasonable time before the hearing.

¹⁰³³ Which lists among the rights of the accused the right to be informed promptly and in detail of the nature, cause and content of the charge.

¹⁰³⁴ Which circumscribes the scope of the TC’s decision on the merits to the facts and circumstances described in the charges and any amendments thereto.

¹⁰³⁵ Which orders the Prosecutor to provide to the PTC and the suspect, no later than 30 days before the hearing, with a detailed description of the charges.

¹⁰³⁶ Which details the information that shall be included in the DoCC, see footnote 952 above.

¹⁰³⁷ *Mbarushimana*, ICC-01/04-01/10-465-Red para. 81.

¹⁰³⁸ *Ibid* para. 82.

¹⁰³⁹ *Bemba*, ICC-01/05-01/08-424 para. 133.

¹⁰⁴⁰ *Ibid* para. 134.

¹⁰⁴¹ *Mbarushimana*, ICC-01/04-01/10-465-Red para. 82.

have been articulated in such vague terms that the Chamber has serious difficulties in determining, or could not determine at all, the factual ambit of a number of charges'.¹⁰⁴² In particular, the Chamber noted serious inconsistencies such as the listing of incidents in the charges without describing them in the factual allegations, the specification of conduct in the charges without clear correspondence to any described incident and the description of incidents without a corresponding charge.¹⁰⁴³ The Chamber stressed that pursuant to Article 67(1)(a) and Rule 121(3),¹⁰⁴⁴ 'the Prosecutor was obliged to produce a [DoCC] framing the charges in a coherent manner, providing sufficient detail of the factual allegations underlying each of the charges and supporting each of the factual allegations with sufficient evidence'.¹⁰⁴⁵ In the view of the Chamber, the Prosecutor's duty to provide sufficient factual details in the DoCC is a 'corollary of the right of the suspect to be clearly informed of the charges against him'.¹⁰⁴⁶ In order to properly defend himself against the charges, the suspect cannot be expected to 'go through voluminous evidence (...) in order to identify for himself the factual basis of the charges'.¹⁰⁴⁷

The Chamber was cognisant of the fact that in cases involving mass criminality to which the suspect is indirectly related, the Prosecutor may not be in the position to identify the precise number of victims, their identity, or the identity of the direct perpetrators and the means by which the crimes were committed.¹⁰⁴⁸ However, the Chamber noted that this does not absolve the Prosecutor from his duty to inform the suspect of the factual allegations underlying the charges against him.¹⁰⁴⁹ As such, the Chamber did not analyse a series of the incidents mentioned in the charges for which insufficient factual description was provided in the DoCC.¹⁰⁵⁰ With this approach, PTC I appears to have struck the right balance between the limited object and purpose of the confirmation hearing and the need to protect the rights of the suspects.

¹⁰⁴² Ibid para. 110.

¹⁰⁴³ Ibid paras 110, 182.

¹⁰⁴⁴ See footnotes 1033 and 1035 above.

¹⁰⁴⁵ *Mbarushimana*, ICC-01/04-01/10-465-Red para. 111.

¹⁰⁴⁶ Ibid para. 112.

¹⁰⁴⁷ Ibid.

¹⁰⁴⁸ Ibid.

¹⁰⁴⁹ Ibid.

¹⁰⁵⁰ Ibid paras 113-121.

Ruling on the appeal to the *Mbarushimana* DeCC, the AC reiterated that:

the confirmation of charges hearing exists to separate those cases and charges which should go to trial from those which should not (...) ensure the efficiency of judicial proceedings and to protect the right of persons by ensuring that cases and charges go to trial only when justified by sufficient evidence.¹⁰⁵¹

The confirmation is by its nature an evidentiary hearing in which the PTC is required to evaluate the evidence in order to determine whether it is sufficient to establish substantial grounds to believe.¹⁰⁵² Accordingly, in the view of the AC, the investigation should ‘largely be completed’ at the confirmation stage and ‘most of the evidence should therefore be available’ - it will be then up to the Prosecutor to submit this evidence to the PTC.¹⁰⁵³ However, stressing the limited purpose of the confirmation proceedings, the AC reiterated that the Prosecutor ‘must only produce sufficient evidence’; the PTC does not need to be convinced beyond reasonable doubt and the Prosecutor ‘need not submit more evidence than is necessary to meet the threshold’.¹⁰⁵⁴

Following a similar approach to that adopted in the *Mbarushimana* case, PTC II in the *Ruto et al.* case indicated that although the DoCC does not need to be exhaustive in the provision of information in support of the charge, it has to ‘provide a sufficiently clear picture’ of the facts underpinning the latter, particularly ‘in relation to the crimes, the dates and locations of their alleged commission.’¹⁰⁵⁵ As to the use of the word ‘including’ in the charges, the Chamber understood it as encompassing exclusively the incidents mentioned and stressed that such a formulation could not be used by the Prosecutor to expand the parameters of the case at trial.¹⁰⁵⁶ In the view of the Chamber, the degree

¹⁰⁵¹ *Mbarushimana*, ICC-01/04-01/10-514 para. 39.

¹⁰⁵² *Ibid.*

¹⁰⁵³ *Ibid.* para. 44 and footnote 89, referring to a previous decision (ICC-01/04-01/06-568, para. 54) in which the AC acknowledged that the Prosecutor may continue his investigation beyond the confirmation hearing, but stated that ‘ideally, it would be desirable for the investigation to be complete by the time of the confirmation hearing.’

¹⁰⁵⁴ *Ibid.* para. 47.

¹⁰⁵⁵ *Ruto et al.*, ICC-01/09-01/11-373 para. 98.

¹⁰⁵⁶ *Ibid.* para. 99.

of specificity of the DoCC should refer to the ‘precise locations of the alleged incidents where crimes took place.’¹⁰⁵⁷

Applying for the first time Article 61(7)(c) in adjourning the hearing, PTC III in the *Bemba* case clarified that the nature of the determination under that provision was substantially different to that under sub-paragraphs (a) and (b), which refer to the PTC’s powers to confirm or decline to confirm the charges.¹⁰⁵⁸ A decision under sub-paragraphs (a) and (b) would be a decision on the merits of the case. However, under sub-paragraph (c), the Chamber is not in a position to take a decision on the merits and adjourns the hearing in order to overcome deficiencies concerning the evidence or the legal characterisation of the facts.¹⁰⁵⁹ In the view of PTC III, for a determination under sub-paragraph (c)(i) requesting the Prosecutor to provide further evidence or conduct further investigations, the submitted evidence, while failing to meet the required threshold, must not be ‘irrelevant and insufficient to a degree that merits declining to confirm the charges under article 61(7)(b)’.¹⁰⁶⁰

In the *Gbagbo* case, PTC I followed the *Bemba* interpretation of Article 61(7)(c)(i) and decided by Majority to adjourn the hearing requesting the Prosecutor to consider providing further evidence or conducting further investigations.¹⁰⁶¹ The Prosecutor had distinguished four incidents during which the crimes charged allegedly occurred from a total of 45 incidents, which together formed the attack against the civilian population that constituted the contextual element of the charged crimes against humanity.¹⁰⁶² In order to prove the occurrence of these 45 incidents, the Prosecutor relied extensively on reports from NGOs and the UN, as well as on press articles.¹⁰⁶³ The Majority of PTC I held that its duty was to evaluate whether there was sufficient evidence ‘for *each* of the “facts and circumstances” advanced by the Prosecutor in order to *satisfy all* of the legal elements of the crime(s) and mode(s) of liability

¹⁰⁵⁷ Ibid.

¹⁰⁵⁸ *Bemba*, ICC-01/05-01/08-388 para. 13.

¹⁰⁵⁹ Ibid paras 13-14.

¹⁰⁶⁰ Ibid para. 16.

¹⁰⁶¹ *Gbagbo*, ICC-02/11-01/11-432 paras 15, 44.

¹⁰⁶² Ibid para. 36.

¹⁰⁶³ Ibid.

charged.’¹⁰⁶⁴ In the Chamber’s view, the standard to scrutinize the evidence was the same for all factual allegations, whether they pertain to the crimes charged, contextual elements or the criminal responsibility of the suspect.¹⁰⁶⁵

Although it reiterated the PTC’s case law as to the existence of other factual information not central to the charges,¹⁰⁶⁶ the Majority did not give any examples of facts that would fall under this category. It did however specify that individual incidents identified as constituting an attack against the civilian population, ie supporting the contextual elements rather than the specific crimes charged, were part of the facts and circumstances that must be proven to the required threshold.¹⁰⁶⁷ In its view, contextual elements form part of the substantive merits of the case and are subject to the same evidentiary threshold applicable to all other facts.¹⁰⁶⁸ The Majority asserted that, although proof of incidents alleged to constitute the attack may be less specific than that of the crimes charged, it is still required to be sufficiently probative and specific.¹⁰⁶⁹ Accordingly, the evidence should include, for example, the identity of the perpetrators or information as to the group they belong to, in addition to the identity of the victims or information as to their real or perceived allegiance.¹⁰⁷⁰ As to the sufficiency of the evidence presented, the Majority was of the opinion that it ‘must assume that the Prosecutor has presented her strongest possible case based on a largely completed investigation.’¹⁰⁷¹ In its view, such an approach safeguards the rights of the defence by ensuring continuity in the presentation of the case (the suspect ‘should not be presented with a wholly different evidentiary case at trial’), and helps to avoid delay in the commencement of the trial.¹⁰⁷²

The assessment of PTC I’s Majority appears to be correct insofar as the Prosecutor is required to prove to the required threshold all facts and circumstances relevant to proving each element of the crimes charged, including

¹⁰⁶⁴ Ibid para. 19.

¹⁰⁶⁵ Ibid.

¹⁰⁶⁶ Ibid para. 20.

¹⁰⁶⁷ Ibid para. 21.

¹⁰⁶⁸ Ibid para. 22.

¹⁰⁶⁹ Ibid.

¹⁰⁷⁰ Ibid.

¹⁰⁷¹ Ibid para. 25.

¹⁰⁷² Ibid.

contextual elements. However, the Majority failed to find the right balance and to recognise the limited extent of the confirmation proceedings when: (i) requesting the Prosecutor provide exceedingly detailed information and evidence related to each individual attack;¹⁰⁷³ (ii) imposing upon him the obligation that the investigation should be largely completed at the time of the confirmation; and (iii) assuming that the Prosecutor will present for confirmation ‘her strongest possible case’. These requirements tend to envisage an effective duplication of the TC’s fact-finding role and appear to require proof beyond reasonable doubt, rather than the ‘substantial grounds to believe’ standard imposed by the Statute for the purpose of confirmation.

In her dissenting opinion, Judge Silvia Fernández expressed her disagreement with the Majority’s interpretation of the role of the PTC.¹⁰⁷⁴ In particular, she argued that regardless of the desirability of investigations being largely completed before confirmation, a policy objective could not be turned into a legal requirement without the necessary amendment of the legal framework.¹⁰⁷⁵ In her view, even where the Prosecutor has completed his investigations, there is no legal requirement for him to submit to the Chamber all his evidence or to present the strongest possible case.¹⁰⁷⁶ Indeed, the amount and quality of evidence presented at pre-trial may be different from that presented at trial. Judge Fernández correctly pointed out that the PTC does not have to evaluate whether it received the ‘strongest possible’ evidence, but solely whether it is satisfied that the evidence is sufficient to establish substantial grounds to believe.¹⁰⁷⁷

However, Judge Fernández was careful to insist that the PTC should nevertheless exercise its gatekeeping function with utmost prudence, avoiding

¹⁰⁷³ Ibid para. 44. For example, in order to decide on charges of crimes against humanity rather than war crimes, the Majority requested further evidence or investigations as to ‘the position(s), movements and activities of *all armed groups opposed* to the “pro-Gbagbo forces” (...) including information about confrontations between those and the “pro-Gbagbo forces”’. Further, in relation to ‘each of the incidents constituting the attack’, as opposed to solely the 4 incidents charged, the Chamber required ‘information as to the number of victims, the harm they suffered as well as their real or perceived political, ethnic, religious or national allegiance(s).’

¹⁰⁷⁴ *The Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-432-Anx-Corr Dissenting Opinion of Judge Silvia Fernández de Gurmendi to the Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute Pre-Trial Chamber I, 3 June 2013.

¹⁰⁷⁵ Ibid para. 15.

¹⁰⁷⁶ Ibid para. 17.

¹⁰⁷⁷ Ibid para. 21.

an expansive interpretation of its role, which is unsupported by law and may affect the entire architecture of the Court's procedural system.¹⁰⁷⁸ In her view, the PTC does not have the power to shape the factual allegations of the charges or to request the Prosecutor to reframe the charges and adapt them to the Chamber's understanding of the case.¹⁰⁷⁹ In particular, she stressed that it 'is for the Prosecutor and not for the Chamber to select her case and its factual parameters. The Pre-Trial Chamber is not an investigative chamber and does not have the mandate to direct the investigations of the Prosecutor'.¹⁰⁸⁰ Although Judge Fernández is correct in that the PTC is not an investigative chamber and does not have the power to direct the Prosecutor's investigation (as argued throughout this work), the PTC's role goes beyond the mere validation of the Prosecutor's framing of cases. In exercising judicial control of the Prosecutor's selection of cases the PTC is entitled to guide, if not to direct, the Prosecutor's selection of cases and to ensure transparency in the Court's decision-making.

In its Judgment on the appeal, the AC, while confirming the Majority decision,¹⁰⁸¹ stressed that Articles 67(1)(a) and 61(3), Rule 121(3) and Regulation 52¹⁰⁸² in fact do not distinguish between 'material facts' and 'subsidiary facts'.¹⁰⁸³ It also emphasised that in its prior jurisprudence it had not determined how narrowly or broadly the term 'facts and circumstances described in the charges' should be understood.¹⁰⁸⁴ Without clarifying the matter, the AC simply stated that 'it is for the Prosecutor to plead the facts relevant to establishing the legal elements and for the Pre-Trial Chamber to determine whether those facts, if proven to the required threshold, establish the legal elements'.¹⁰⁸⁵ Regrettably, PTC I did not grant the appeal as to the issue of the interpretation and application of the standard of proof of 'substantial grounds to believe' under Article 61(7).¹⁰⁸⁶ As such, the AC declined

¹⁰⁷⁸ Ibid para. 26.

¹⁰⁷⁹ Ibid para. 50.

¹⁰⁸⁰ Ibid para. 51.

¹⁰⁸¹ *The Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-572 Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 June 2013 entitled 'Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute' Appeals Chamber, 16 December 2013 para. 67.

¹⁰⁸² For the provisions see footnotes 1032 to 1036 above.

¹⁰⁸³ *Gbagbo*, ICC-02/11-01/11-572 paras 36-37.

¹⁰⁸⁴ Ibid para. 37.

¹⁰⁸⁵ Ibid para. 47.

¹⁰⁸⁶ Ibid paras 60-61.

to express its view as to whether investigations have to be largely completed at the confirmation stage and whether the Prosecutor should present all his evidence or the strongest possible case at confirmation.¹⁰⁸⁷

The Majority of PTC I, differently composed, eventually confirmed the charges against Gbagbo.¹⁰⁸⁸ In her dissenting opinion, Judge Christine Van den Wyngaert expressed the view that the ‘charges should only be confirmed if the evidence has a realistic chance of supporting a conviction beyond reasonable doubt.’¹⁰⁸⁹ Although acknowledging that the standard of proof for confirmation is lower, she was of the view that, when it is clear that ‘even if the available evidence is taken at its highest, there is a substantial doubt that this will be enough to support a conviction, there is no point in confirming the charges.’¹⁰⁹⁰ This approach appears to disregard the different role of the PTC and TC and the substantially different character of the assessment that each Chamber is called upon to perform at different stages of proceedings. Requesting that the evidence submitted at the pre-trial stage be sufficient to support a conviction is to effectively require proof beyond reasonable doubt at the pre-trial stage. It disregards the fact that pursuant to Article 61(5), which allows the Prosecutor to support each charge with ‘sufficient’ evidence and rely on documentary or summary evidence, the evidentiary rules at confirmation are more relaxed than those for trial and the Prosecutor is therefore likely still to bring the majority of his evidence to support a conviction at trial.

6.4 The PTC’s role in the legal characterisation of the facts

As was stressed by PTC I in the *Banda & Jerbo* case, the delimiting power of the PTC *vis-à-vis* the Trial Chamber is restricted to the factual as opposed to the legal elements of the charges, since ‘the Trial Chamber is vested with

¹⁰⁸⁷ Ibid para. 65.

¹⁰⁸⁸ *Gbagbo*, ICC-02/11-01/11-656-Red 131.

¹⁰⁸⁹ *The Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-656-Anx Dissenting Opinion of Judge Christine Van den Wyngaert to the Decision on the confirmation of charges against Laurent Gbagbo Pre-Trial Chamber I, 12 June 2014 para. 4.

¹⁰⁹⁰ Ibid.

unrestricted powers to retain, modify or otherwise amend the legal characterisation of the facts and circumstances appearing in the charges.¹⁰⁹¹

Arguably learning from the *Lubanga* experience discussed in Section 6.3.1 above, in the *Katanga* case the Prosecutor submitted that the crimes charged were committed ‘irrespective of whether the conflict was characterised as non-international or international.’¹⁰⁹² Consequently, the Prosecutor charged all the conduct constituting a war crime as relating to either international or, in the alternative, non-international armed conflict.¹⁰⁹³ However, after analysing the evidence, PTC I was satisfied that, during the relevant time, the armed conflict was of an ‘international’ character.¹⁰⁹⁴ Accordingly, it considered, for the purposes of confirmation, only the offences charged in connection with an international armed conflict.¹⁰⁹⁵ The Chamber neither entered into an analysis of the relevant facts nor confirmed or declined to confirm the charges submitted alternatively in relation to the ‘non-international’ characterisation of the conflict. This restrictive approach adopted by PTC I caused unnecessary delays in the subsequent proceedings. At trial, the nature of the conflict was contested and evidence was submitted in that regard. Eventually, after analysing the evidence,¹⁰⁹⁶ TC II reached the conclusion that, at the time relevant to the charges, the conflict was ‘non-international’.¹⁰⁹⁷ Since PTC I had only confirmed the charges as to the international armed conflict, TC II had to use Regulation 55 in order to change the legal characterisation of the facts.¹⁰⁹⁸

Similarly, the Prosecutor charged Germain Katanga and Mathieu Ngudjolo as co-perpetrators under Article 25(3)(a) and, in the alternative, for ordering the commission of crimes under Article 25(3)(b).¹⁰⁹⁹ In the view of PTC I, a finding as principals to the crimes ‘renders moot further questions of accessorial liability.’¹¹⁰⁰ Given that it was satisfied that there were substantial grounds to

¹⁰⁹¹ *Banda and Jerbo*, ICC-02/05-03/09-121-Corr-Red para. 35.

¹⁰⁹² *Katanga and Ngudjolo*, ICC-01/04-01/07-717 para. 15.

¹⁰⁹³ *Ibid* paras 21, 23-24, 26, 28-32.

¹⁰⁹⁴ *Ibid* para. 240.

¹⁰⁹⁵ *Ibid* para. 243.

¹⁰⁹⁶ *Katanga*, ICC-01/04-01/07-3436 paras 1198-1228.

¹⁰⁹⁷ *Ibid* para. 1229.

¹⁰⁹⁸ *Ibid* para. 1230.

¹⁰⁹⁹ *Katanga and Ngudjolo*, ICC-01/04-01/07-717 paras 469-470.

¹¹⁰⁰ *Ibid* para. 471.

believe that the suspects committed the crimes jointly through other persons within the meaning of Article 25(3)(a),¹¹⁰¹ it confirmed the charges under that mode of liability and declined even to examine the facts relevant to the alternative mode of liability charged. Once again, this course of action brought complications and further litigation at trial. TC II eventually acquitted Mathieu Ngudjolo because his responsibility as a co-perpetrator was not proven beyond reasonable doubt at trial.¹¹⁰² Similarly, TC II was of the view that the responsibility of Germain Katanga under Article 25(3)(a) was not demonstrated.¹¹⁰³ It then decided to re-characterise the mode of participation pursuant to Regulation 55¹¹⁰⁴ and eventually convicted Katanga for his responsibility under Article 25(3)(d) for some of the crimes charged.¹¹⁰⁵

As illustrated, the restrictive approach adopted by PTC I does not appear to be entirely appropriate for a finding at the pre-trial stage. Although the PTC's assessment as to the legal characterisation of the facts does not formally bind the TC, the latter's freedom to adjust the characterisation is limited in practice where the PTC fails to assess facts relevant to alternative charges or modes of liability. Since the TC may only rely for the purposes of re-characterisation on 'facts and circumstances described in the charges', it cannot draw on facts pleaded in the DoCC in the alternative where these are not carried forward into the DeCC. As discussed above, although judicial scrutiny of the charges is an essential feature of the Court's architecture, the PTC's assessment of the evidence at the pre-trial stage is necessarily limited and provisional. It therefore seems most appropriate that - provided the evidence submitted at pre-trial supports alternative findings at the required threshold - the PTC should confirm charges in the alternative and leave it to the TC, when assessing the totality of the evidence of the case, to determine the proper legal characterisation of the facts that may be proven beyond reasonable doubt.

¹¹⁰¹ Ibid paras 574-576.

¹¹⁰² *The Prosecutor v. Mathieu Ngudjolo*, ICC-01/04-02/12-3-tENG Judgment pursuant to article 74 of the Statute Trial Chamber II, 18 December 2012 paras 490-503.

¹¹⁰³ *Katanga*, ICC-01/04-01/07-3436 para. 1420.

¹¹⁰⁴ Ibid paras 1422-1479.

¹¹⁰⁵ Ibid 709-710.

In the *Bemba* case, PTC III was of the view that a determination to adjourn the hearing and ask the Prosecutor to consider amending a charge under Article 61(7)(c)(ii), which allows the PTC to adjourn the hearing and request the Prosecutor to consider amending a charge because the evidence submitted appears to establish a different crime, is subject to a lower evidentiary threshold than a decision to confirm the charges, to decline to confirm the charges, or to adjourn and request the Prosecutor to provide further evidence or to conduct further investigations under sub-paragraphs (a), (b) and (c)(i). As such, an in-depth analysis of the evidence is not warranted when applying Article 61(7)(c)(ii),¹¹⁰⁶ it being sufficient for the Chamber to ‘make a *prima facie* finding that it has doubts as to the legal characterisation of the facts’ as reflected in the DoCC.¹¹⁰⁷

PTC III noted that, even where the PTC decides to exercise its powers under Article 61(7)(c)(ii), the wording of the provision affords the Prosecutor discretion to decide whether or not to amend the relevant charge.¹¹⁰⁸ In the view of the Chamber, its responsibilities ‘lie in exerting judicial oversight during the pre-trial proceedings’, it being the Prosecutor’s responsibility ‘to build and shape the case according to his statutory mandate pursuant to article 54(1)(a)’,¹¹⁰⁹ which provides that, in order to establish the truth, the Prosecutor should extend the investigation to cover all facts and circumstances. The Chamber was of course correct in pointing out that even if requested by the Chamber to ‘consider’ amending a charge, the Prosecutor is not obligated to do so. However, as previously stressed, that should not prevent the PTC from exercising the full extent of their powers. Their judicial oversight should guide the Prosecutor’s building and shaping of cases, ensuring transparency and guaranteeing that those who may be affected by the Prosecutor’s choices can properly exercise their rights under the Statute.

As to the notion of a ‘different crime’ included in Article 61(7)(c)(ii), PTC III understood it to relate to both the crime as defined in Articles 6 to 8 as well as

¹¹⁰⁶ *Bemba*, ICC-01/05-01/08-388 paras 17-25, the Chamber basing its conclusion on the use of the word ‘appears’ in Article 61(7)(c)(ii).

¹¹⁰⁷ *Ibid* para. 25.

¹¹⁰⁸ *Ibid* para. 38.

¹¹⁰⁹ *Ibid* para. 39.

the mode of liability established in Articles 25 and 28.¹¹¹⁰ In light of a series of submissions made by the parties and participants, the Chamber was of the view that ‘the legal characterisation of the facts of the case may amount to a different mode of liability under article 28 of the Statute.’¹¹¹¹ Consequently, it adjourned the hearing and requested the Prosecutor to consider so amending the charges as to the mode of liability under Article 28.¹¹¹² Following the adjournment, the Prosecutor charged Bemba as a co-perpetrator under Article 25(3)(a) and, in the alternative under Article 28(a) or (b).¹¹¹³

Based on its assessment of the evidence, PTC II found that the threshold required to confirm the charges under Article 25(3)(a) had not been met.¹¹¹⁴ It then considered the alternative mode of responsibility charged,¹¹¹⁵ reaching the conclusion that there was sufficient evidence to establish substantial grounds to believe that Bemba was criminally responsible under Article 28(a).¹¹¹⁶ However, further difficulties were presented in the case at trial since PTC II, having been satisfied that the suspect ‘knew’ that the forces were committing or about to commit the crimes under discussion, did not choose to examine in the alternative the construction of knowledge on the basis that ‘owing to the circumstances at the time, [he] should have known’.¹¹¹⁷ TC III again relied upon Regulation 55 at trial and gave notice to the parties and participants that, in its trial decision it might modify the legal characterisation of the facts so as to consider, in the same mode of responsibility, the alternate form of knowledge contained in Article 28(a)(i) of the Statute.¹¹¹⁸

In the *Abu Garda* and *Banda & Jerbo* cases, the Prosecutor attempted to broaden the charges by averring that, although he had charged the suspects as co-perpetrators or as indirect co-perpetrators under Article 25(3)(a), he did so

¹¹¹⁰ Ibid para. 26.

¹¹¹¹ Ibid para. 46.

¹¹¹² Ibid para. 49.

¹¹¹³ *Bemba*, ICC-01/05-01/08-424 para. 341.

¹¹¹⁴ Ibid paras 344-401.

¹¹¹⁵ Ibid para. 403.

¹¹¹⁶ Ibid paras 444-501.

¹¹¹⁷ Ibid paras 478-489.

¹¹¹⁸ *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-2324 Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court Trial Chamber III, 21 September 2012 para. 5.

‘without excluding any other applicable mode of liability’.¹¹¹⁹ Based on Article 67(1)(a), Rule 121(1) and Regulation 52(c),¹¹²⁰ PTC I did not allow such broad charging and analysed only the modes of liability specifically charged.¹¹²¹

As discussed in Section 5.4.2 above, in the *Ruto* case PTC II dismissed the Prosecutor’s attempt to bring charges based on alternative modes of liability at the time of the issuance of the summons to appear.¹¹²² A similar approach was followed at the confirmation of charges hearing.¹¹²³ Learning from previous experiences, TC V(a) gave early notice pursuant to Regulation 55 of the possibility that the charges against Ruto may be subject to change to accord with Article 25(3)(b), (c) or (d), which deal with different forms of participation as accessory to a crime.¹¹²⁴

In a significant change of approach, in the *Ntaganda* case PTC I accepted that the Prosecutor might generally charge in the alternative and confirmed alternative modes of liability.¹¹²⁵ The Chamber stressed that at the confirmation stage the PTC is ‘not called upon to engage in a fully-fledged trial and to decide on the guilt or innocence of the person charged. Rather, the mandate of the Pre-Trial Chamber is to determine which cases should proceed to trial.’¹¹²⁶ Accordingly, it considered that at pre-trial, it might confirm alternative charges so long as each of the charges is supported by sufficient evidence to establish substantial grounds to believe.¹¹²⁷

The same approach was followed in the *Gbagbo* case, in which the Majority of PTC I also confirmed alternative modes of liability.¹¹²⁸ The Chamber

¹¹¹⁹ *The Prosecutor v. Bahar Idriss Abu Garda*, ICC-02/05-02/09-91-Red Prosecution’s Document Containing the Charges Submitted Pursuant to Article 61(3) of the Statute Office of the Prosecutor, 24 September 2009 para. 117.

¹¹²⁰ For the content of the provisions see footnotes 1033, 1035 and 1036 above.

¹¹²¹ *Abu Garda*, ICC-02/05-02/09-243-Red para. 158; *Banda and Jerbo*, ICC-02/05-03/09-121-Corr-Red para. 124.

¹¹²² *Ruto et al.*, ICC-01/09-01/11-01 para. 36.

¹¹²³ *Ruto et al.*, ICC-01/09-01/11-373 paras 284-285.

¹¹²⁴ *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-1122 Decision on Applications for Notice of Possibility of Variation of Legal Characterisation Trial Chamber V(A), 12 December 2013.

¹¹²⁵ *Ntaganda*, ICC-01/04-02/06-309 paras 97-100.

¹¹²⁶ *Ibid* para. 100.

¹¹²⁷ *Ibid*.

¹¹²⁸ *Gbagbo*, ICC-02/11-01/11-656-Red paras 230-259 and 278. PTC I confirmed Gbagbo’s responsibility under Article 25(3)(a), (b) or (d). However, it declined to confirm the alternative

acknowledged that this more flexible approach was built upon the past experience of the Court and was intended to reduce further delays at trial and provide early notice to the defence of the different legal characterisations that may be considered at trial.¹¹²⁹ The Chamber nevertheless stressed that alternative characterisations would only be confirmed when satisfactorily established by the evidence at the required threshold for confirmation, in order for the TC to determine whether any of the confirmed legal characterisations are established to the applicable standard of proof at trial.¹¹³⁰ It remains to be seen if this new approach adopted by the PTC actually serves to expedite proceedings. There is certainly the risk that it may lead to uncertainties and further delays in the proceedings as the parties may engage in lengthy submissions and discussions of evidence relevant to each and every mode of liability, in the hope that at least one - or none - will be proven beyond reasonable doubt.

6.5 Conclusions

The confirmation of charges hearing is one of the key novelties of the new system of international criminal justice created by the Statute. It essentially involves entrusting a collegial chamber of three judges with the responsibility of providing judicial control over the Prosecutor's selection of cases for prosecution in order to ensure that only cases supported by sufficient evidence are committed to trial.

As the analysis of the Court's jurisprudence illustrates, however, there exist two clearly conflicting approaches to the role of the PTC at the pre-trial stage and to the object and purpose of the confirmation proceedings. Some argue that the Prosecutor's independence, as the cornerstone of the Court's jurisdiction, is paramount. For them, the PTC should not restrict in any way the Prosecutor's discretionary power to select cases for prosecution. The role of the PTC at the

charge brought by the Prosecutor under Article 28 for lack of sufficient evidence, see *ibid* paras. 260-265. Judge Christine Van den Wyngaert dissented since in her view there was no sufficient evidence to confirm the charges under Article 25(3)(a), (b) and (d), but would have confirmed some of the charges on the basis of Article 28, see *Gbagbo*, ICC-02/11-01/11-656-Anx.

¹¹²⁹ *Gbagbo*, ICC-02/11-01/11-656-Red para. 228.

¹¹³⁰ *Ibid* para. 227.

confirmation proceedings should be limited to a summary review of the charges brought by the Prosecutor in light of the evidence submitted and to decide whether or not the evidentiary threshold has been satisfied. At the other end of the spectrum, others see the confirmation proceedings as a fully-fledged evidentiary hearing, a step created in order to prevent trials from concluding in acquittals. For them, the PTC should only commit a case to trial when wholly convinced that the evidence is sufficient to secure a conviction. Neither of these approaches properly reflects the spirit of the Statute or the object and purpose of the confirmation of charges.

The confirmation of charges hearing has been created as the first stage of the adversarial debate. It was devised in order to give the Prosecutor the chance to present his initial picture of the case, to put the suspect on notice and allow him to react and contest wholly unfounded accusations, and to give the victims the opportunity to present their views and concerns. All parties and participants are afforded the opportunity to present their version of the events. Based on such submissions, the PTC decides whether and to what extent the ‘snapshot’ it received from the parties and participants deserves to be explored further. Only in case of a positive determination by the PTC will a full adversarial debate and detailed analysis of the facts and evidence at trial be warranted.

In accordance with the Statute, the Prosecutor is independent and has discretion to select cases and charges for prosecution - the PTC cannot charge a suspect by itself nor alter the charges brought by Prosecutor. At the same time however, the Prosecutor and the Chambers have been entrusted with ‘finding the truth’ not merely with attempting to secure a conviction or otherwise determining whether the Prosecutor has sufficiently substantiated his allegations. Accordingly, the PTC does not have to follow the Prosecutor’s characterisation of the factual and legal scope of the cases for prosecution, and, in effect, ignore what is brought to their attention during the hearing. The PTC should exercise meaningful judicial control over the Prosecutor’s selection of cases. Where it is convinced that the Prosecutor has failed to properly capture the extent of the criminality in a case, it should not hesitate to use the full extent of its powers under the Statute and, at this early stage of the proceedings, request the

Prosecutor to consider providing further evidence, conducting further investigations or amending charges. Similarly, where warranted, the PTC should demand from the Prosecutor more transparent decision-making, insisting on clarifications as to whether and why he may have decided not to prosecute certain conduct and reviewing such decisions when applicable. At the same time, the PTC should keep in mind that its assessment of the facts and evidence is necessarily limited and provisional. Accordingly, it should not impinge upon the TC's capacity to freely assess the facts of the case and should recognise the essential difference between the functions of the PTC and the TC.

As illustrated in this Chapter, the confirmation proceedings are a key feature of the Court's architecture and a fundamental expression of the PTC's gatekeeping function. The confirmation proceedings are necessary to avoid wholly unfounded allegations and focus the Court's efforts and resources upon the cases for which there is substantial evidence going beyond mere suspicion. At the same time, the confirmation proceedings ensure respect for the rights of the suspects and victims and guarantee the fairness and effectiveness of the Court's proceedings as a whole.

Conclusion

The PTC, designed to be the Court's gatekeeper, has been empowered by the Court's legal framework to provide an essential counter-balance to the significant discretionary powers of the Prosecutor. It was created in order to ensure the legality of the Prosecutor's actions through the judicial review of his most critical discretionary decisions. By way of that judicial control, the PTC is meant to examine the rationale behind those decisions in order to guarantee that the Prosecutor's exercise of discretion is not abusive or the result of improper political pressures. This is necessary to safeguard the legitimacy of the institution as a whole and to protect the rights of those that can be affected by the Court's investigations and prosecutions.

Against the background of the high level of criticism that the Court received in its early days - accusing it of partiality and arbitrariness - this research was aimed at determining whether there is systematic evidence to support the argument that the PTC is empowered to provide an essential counter-balance to the significant discretionary powers of the Prosecutor. The research question was then formulated in terms of whether the Court's legal framework actually enables the PTC to guarantee the independence and legitimacy of the Court effectively.

In principle, save for one critical limitation discussed below, the powers that the Court's legal framework grant to the PTC provide it with sufficient tools to serve as the Court's gatekeeper. However, a systematic evaluation of the way in which those powers have been applied in the Court's jurisprudence reveals that the PTC's judges have adopted a rather cautious approach to their role, showing reluctance to firmly scrutinise the Prosecutor's policy decisions. These deficiencies, both in the Court's design and practice, explain in part why the criticisms have not diminished but rather persisted through the years, with the Court as yet unable to affirm its independence from power politics.

As regards the critical deficiency in the Court's design, this arises because the Statute does not bestow a supervisory role on the PTC over the Prosecutor's power to initiate an investigation following a referral by a State Party or the

UNSC. This threatens the delicate balance of power more generally achieved in the Statute, risking the introduction of inappropriate political influence over the function of the institution and jeopardising the independence and impartiality of the Court.

With regard to the situations in Sudan and Libya the UNSC has, as discussed in Chapter 4, successfully imposed on the Court personal and temporal limitations to the scope of the situation to be investigated, which were in clear violation of the Statute, thereby undermining the Court's autonomy. The Prosecutor did not object to the referrals or its limitations, raising serious doubts as to his capacity to prevent the Council's attempts to interfere with the Court.

Similarly, the Prosecutor has not been able to 'resist the temptation' presented by 'highly cooperative' self-referring States. Although, as argued, self-referrals are a legal and suitable way of triggering the Court's jurisdiction, the safeguards provided by the Statute in order to minimize the risks that they entail are insufficient. In particular, the power granted to the Prosecutor to reject frivolous or politically motivated referrals and to define the scope of the situation to investigate may be meaningless if, in practice, the Prosecutor is too eager to initiate cases and secure cooperation from States. A close examination of the first three situations triggered by interested States supports this view. In Chapter 4, for example, it is discussed how, in the situation in Uganda, some ten years after the referral only one case has been initiated and only against the LRA's leaders, despite the Prosecutor's apparent assurance that all parties to the conflict would be investigated. Similarly, in the situations in the DRC and the CAR the Prosecutor has targeted only rebel groups and not governmental forces. Although the rebels have not been targeted without justification, when proceedings are only initiated against those that may be recognised as enemies of the governments that referred the situations to the Court, the credibility and legitimacy of the institution is necessarily at stake.

An amendment to the Statute in this regard would mean that the PTC could independently assess the legality of the referrals, thereby ensuring that the Prosecutor's decision to open an investigation is a legitimate exercise of his powers under the Statute and not the result of undue political influence. As

such, an amendment of the Statute is suggested in order to extend the PTC's powers under Article 15(3) and (4) to all triggering proceedings under Article 13. Pursuant to that reform, the PTC should be given the function of reviewing the Prosecutor's positive assessment that there is a reasonable basis to proceed with an investigation, assessing the legality of the referrals and determining the extent of the situation of crisis to be investigated by the Prosecutor.

As argued in Chapter 4, the fact that the PTC is given a role in reviewing the Prosecutor's positive assessment as to the need to open an investigation will not, in itself, exclude the risk of selective prosecutions. As noted with regard to *proprio motu* investigations, in spite of the role given to the PTC by the Statute, the different PTCs have so far failed to properly determine the contextual scope of the situations they authorise the Prosecutor to investigate. This deficiency has the risk of undermining the rationale behind the authorisation procedure itself. In effect, without a concrete definition of the material scope of the situation to be investigated, there is uncertainty as to the cases the Prosecutor may focus on and a significant risk that he may concentrate on cases totally unrelated to the situation of crisis the PTC had in mind when authorising the commencement of the investigation.

Accordingly, as argued in Chapters 4 and 5, the PTC's review process should be complemented by the adoption of a proactive stance demanding more transparent decision-making within the OTP and facilitating public scrutiny of its activities. To this end, the PTC should make use of its powers under Regulation 48 in relation to Articles 54(1)(a) and 53(3)(b) and Rule 110. The resulting requirement for the Prosecutor to explain the concrete reasons for not proceeding against certain individuals, groups or crimes will encourage his efforts to investigate fully and discourage attempts to dissuade him from proceeding - or not - for political reasons. It would, moreover, further encourage genuine national proceedings and cooperation with the Prosecutor and the Court, as any lack of State cooperation would also be exposed to public scrutiny.

From a broader perspective, the need to encourage the adoption of a more proactive role by the PTC highlights the main problem of application of the PTC's gatekeeping function: the PTC's reluctance to firmly scrutinise the

Prosecutor's exercise of discretion. As systematically explored throughout this thesis, the Prosecutor has been tasked with investigating and prosecuting cases in a highly political environment but lacks enforcement powers. Therefore, he is highly dependent on international cooperation and resources, a state of affairs that may leave him especially susceptible to political pressures. As a consequence, there is a concrete risk that the Court may become politicised or be used as an instrument of victor's justice. The adoption of a proactive and firm role by the PTC in scrutinising whether the Prosecutor's actions are a legitimate exercise of his discretion will not only encourage a more transparent decision-making process within the OTP, but will also urge cooperation and genuine investigations and prosecutions at the national level, therefore minimising the risk of the Court's political instrumentalisation.

In line with its role, the PTC should be more prepared to make politically difficult decisions. Indeed, while operating within the legal framework of the Statute, it should be responsive to the specific demands of the different scenarios it faces. For instance, as stressed in Chapter 3, when determining the scope of the highly sensitive issues of complementarity, gravity and the interests of justice, judges should exercise their supervisory role by carefully balancing the need to apply uniform criteria - applying impartially the same general rule to all those who are alike, without prejudice, special interests or caprice and thereby ensuring legal certainty - against the need to identify when different cases should be treated differently. When a situation or case warrants a different interpretation, it has been argued that the PTC should resort to the flexibility purposely included by the drafters of the Statute and be ready to depart from previously devised tests or interpretations, all the while ensuring that the context, objects and purposes of the Statute are respected.

Similarly, it has been demonstrated that the PTC should avoid the promotion of formal or procedural legitimacy at the cost of substantive justice. The approach to victims' participation at the situation stage of the proceedings is a clear example in which formalism has so far prevailed over substance. As emphasised in Chapter 5, although an important part of the PTC's efforts and resources were devoted for some years to facilitating victims' 'participation' during the

investigation stage, the limited practical role they have so far played has not resulted in any concrete advantages for either the victims themselves or for the Court's fact-finding and truth-searching mandate. Victims' participation during the investigation of crimes has remained formal and has in fact represented nothing more than their 'symbolic' recognition. Victims have not been granted a meaningful right to present or to have their 'views and concerns' considered, while the PTC has missed the opportunity to 'profit' from their 'privileged' position as regards evidence and information.

In the same vein, although specifically authorised by the Statute, the PTC has been reluctant to interfere during the stage of the investigation and monitor the Prosecutor's work. Considering the length of the proceedings before the Court thus far, the allegations of witness tampering in the *Bemba* and *Kenya* cases, and the serious difficulties in prosecuting high-level officials such as Presidents Al Bashir and Kenyatta, the PTC should re-assess its approach as soon as possible. In this respect, it is suggested that the PTC rely upon Regulation 48 more readily to request from the Prosecutor information and documents that may allow the PTC to exercise its powers under Articles 53(3)(b), 56(3)(a) and 57(3)(c).

Lastly, proceedings under Articles 58 and 61 - the issuance of warrants or summonses and confirmation of charges - are key features of the Court's architecture and fundamental expressions of the PTC's gatekeeping function. They are necessary to avoid wholly unfounded allegations and to focus the Court's efforts and resources upon the cases for which there is substantial evidence of wrongdoing beyond mere suspicion. At the same time, they ensure respect for the rights of the suspects and victims and guarantee fairness and effectiveness in the Court's proceedings as a whole. As such, in Chapters 5 and 6 it is argued that the PTC should exercise meaningful judicial control over the Prosecutor's selection of cases. When the PTC is convinced that the Prosecutor has failed to properly capture the extent of the criminality of a given case, it should not hesitate to use the full extent of its powers under the Statute. Similarly, if warranted, the PTC should demand from the Prosecutor more transparent decision-making by requiring clarification as to whether and why he

has decided not to prosecute certain conduct and by reviewing such decisions when appropriate.

The PTC should indeed be less reluctant to perform its role in the way intended, particularly taking into account that its reticence so far has brought undesired consequences. For example, issues that should have been clearly addressed at that pre-trial stage (like the nature and scope of the charges brought by the Prosecutor) have created complications at trial and perceptions of selective prosecutions have been allowed to develop. It is argued that, for as long as the PTC boldly embraces its full powers, the ICC will function smoothly and strengthen its reputation as a fair and impartial means by which to obtain international criminal justice.

At the same time, the PTC's judges should always keep in mind that the drafters of the Statute conceived of them as the ultimate pre-trial arbiters of the controversial choices inherent in international criminal justice and as guarantors of the Court's institutional equilibrium. The PTC's judicial review of the Prosecutor's discretion cannot be adequately exercised from the perspective of a formalist legalistic approach to the judicial function, as complied with when applying a literal interpretation of the Court's legal framework and providing procedural legitimacy. The PTC should rather actively exercise its role ensuring that the ultimate values embodied in the Statute are respected. It is incumbent upon the judges of the PTC, charged with determining the concrete scope of the principles and values embodied in the Statute, to confidently and assertively police the operative distinction between law and politics within the context of the system of international criminal justice created by the Statute and, in so doing, to ensure the Court's impartiality, independence and legitimacy.

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