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The Initiation of an Investigation *Proprio Motu* by
the Prosecutor of the ICC – A Reasonable Basis to
Proceed?

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1 Introduction

1.1 Background
In September 2013, a motion was put forward in the Parliament of Kenya, which proposed that Kenya should withdraw its membership of the International Criminal Court (ICC).¹ In October 2013, The Assembly of the African Union (AU) declared that the AU is concerned about the “ politicization and misuse of indictments against African leaders by the ICC”.² Another form of criticism is that the ICC is biased and only focuses its attention on the African continent, when there are other situations all over the world that merit investigations.³ In the preamble of the Rome Statute of the International Criminal Court (ICCSt) it is stated that the “most serious crimes of concern to the international community must not go unpunished”.⁴ The ICCSt has been in force for almost 12 years, and all situations in which the ICC has opened an investigation concern African States. Especially the statement by the AU assembly shows that the Prosecutor is not free from accusations of politically motivated decisions.

The debate on the risk of a politically motivated Prosecutor of the ICC is not new. The role of the Prosecutor in the ICC was intensively debated during the negotiations of the ICCSt; particularly whether the Prosecutor should have the power to initiate investigations proprio motu, i.e. on her own motion. The proponents of a proprio motu power for the Prosecutor argued that any prosecution in the ICC would depend on the political consideration of States or the UN Security Council (UNSC).⁵ The opponents argued that a Prosecutor who has the power to initiate an investigation proprio motu would lead to politicization of the ICC.⁶ The compromise that was agreed upon by the

⁵ ICCSt preamble para 4.
⁷ Ibid., p. 35.
delegates was that the Prosecutor would be granted *proprio motu* powers, but the decision to start an investigation would be subject to judicial review.\(^8\)

Following the post-election violence in the Republic of Kenya in 2007, the Prosecutor submitted a request for an authorization by the Pre-Trial Chamber to open an investigation in Kenya. This was the first time the Prosecutor had used her *proprio motu* powers in Article 15 ICCSt. These events once more stirred up the debate about the scope and limits of prosecutorial discretion in the ICCSt. Since the Prosecutor has the power to initiate an investigation on her own motion, any criticism that the ICC is biased or that the Prosecutor can make politically motivated decisions should be further examined. According to the Prosecutor of the ICC, the decision to open an investigation into a situation is guided by the legal criteria in the ICCSt.\(^9\) The statement is one example where the Prosecutor appears to reject the criticism that her decisions are based on political considerations. In other words, the question is if the decision by the Prosecutor to initiate an investigation *proprio motu* under Article 15 ICCSt is based on objective legal standards in the ICCSt.

### 1.2 Scope and Limits

The main focus of this thesis is to examine the Prosecutor’s initiation of an investigation *proprio motu* under Article 15 ICCSt. In order to do so, there are two main issues that need to be examined. The first issue concerns what the criteria are that governs the Prosecutor when she concludes that there is a reasonable basis to proceed with an investigation under Article 15 ICCSt. The second issue concerns to which extent the Prosecutor is able to exercise discretion when she concludes that there is a reasonable basis to proceed with an investigation. The concept of prosecutorial discretion is primarily linked with the discussion on whether or not the decision by the Prosecutor to open an investigation into a situation is based on legal objective standards within the statutory framework of the ICCSt. Consequently, this thesis attempts to answer the following question: what criteria must the Prosecutor consider in order to conclude that there is a reasonable basis to proceed with an investigation, and to what extent is the Prosecutor able to exercise discretion when she concludes that there is, or is not, a reasonable basis to proceed with an investigation?

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\(^8\) Danner, pp. 514-515.

Since this thesis focuses on the initiation of an investigation *proprio motu* by the Prosecutor, a referral of a situation by a state party or the UN Security Council (UNSC) will not be discussed, even if they share many similarities. Furthermore, a comparative analysis of the ICC and other international criminal tribunals is outside the scope of this thesis. A comparative analysis of the Prosecutor of the ICC and the Prosecutor in national legal systems is also outside the scope of this thesis. However, references to other international criminal tribunals will be made when it is appropriate for the discussion on Prosecutor’s role in the ICCSt. References will also be made to prosecutorial discretion in different national legal systems where it is deemed appropriate for the discussion on prosecutorial discretion in the ICCSt.

Many of the Prosecutor’s decisions during the pre-trial stage are or may be subject to a judicial review by the Chambers of the ICCSt. As a consequence, it is necessary to keep in mind that prosecutorial discretion is in one way restrained under Article 15 ICCSt. This is because the Prosecutor’s conclusion that there is a reasonable basis to proceed with an investigation is subject to a judicial review by the Pre-Trial Chamber. Since the focus will be on the decisions by the Prosecutor and prosecutorial discretion, an in-depth analysis of the judicial review and its functions is outside the scope of this thesis. A total separation is however not possible and it is therefore necessary to consider the judicial review in this thesis when prosecutorial discretion is examined.

1.3 Method

The method that is used in this thesis is the legal dogmatic method. In order to establish the applicable law, the ICCSt will primarily be examined. Other sources that will be examined are the ICC Rules of Procedure and Evidence and the various ICC Regulations in force.

The International Criminal Court is a relatively new international court. The cases addressing the main question of this thesis are few. In addition, any decisions by the Prosecutor addressing this matter are quite sparse. The Office of the Prosecutor (OTP) has however issued some relevant policy papers. Although the policy papers do not have the status of law, they will be used in this thesis as a reference when the main question is discussed. The policy papers are mainly used to highlight the Prosecutor’s interpretation of the Articles in the ICCSt.

10 See Article 21 ICCSt for the applicable law in the ICC.
The ICCSt is a treaty and is the product of negotiations and compromises. It is therefore still uncertain how some of the terms and criteria in the Rome Statute are to be interpreted. Some terms and criteria in the Articles of the ICCSt, which are relevant to the main question of this thesis, are on the outset uncertain. This uncertainty means that the applicable law can to a large extent be uncertain. Hypothetical examples and suggested interpretations found in literature will therefore be used in this thesis. As a consequence, to separate *de lege lata* from *de lege ferenda* can be difficult when the relevant Articles of the ICCSt are discussed. But when the interpretation of a term or criterion is uncertain, the discussion will be based on this uncertainty.

1.4 Disposition

The thesis is divided into two parts. Part I begins with a general discussion about the Prosecutor, the triggering of jurisdiction and the difference between a “situation” and a “case”. Thereafter, the initiation of an investigation *proprio motu* by the Prosecutor under Article 15 ICCSt is discussed. The preliminary examination is examined under this section. The statutory factors in Article 53(1)(a)-(c) ICCSt will also be discussed, which the Prosecutor is required to consider when she determines if there is a reasonable basis to proceed with an investigation.

Part II is divided into two sections. The first section examines whether the Prosecutor has a legal duty to seek authorization to open an investigation once the factors in Article 53(1)(a)-(c) ICCSt are met. Two different interpretations of Article 15 ICCSt will be discussed. A comparison with the Prosecutor in two national legal systems is made, as well as a discussion about the limited resources of the ICC. Thereafter, the preliminary examination regarding Iraq will be discussed. The second section focuses on the consequences of prosecutorial discretion under Article 53(1)(a)-(c) ICCSt. Under this section, the discussion concerns whether the factors in Article 53(1)(a)-(c) ICCSt represent legally objective standards. Prosecutorial discretion at the preliminary examination stage will also be discussed.
Part I

2 The Prosecutor of the ICC

2.1 The Triggering of Jurisdiction – A Situation-Specific Approach

The Prosecutor has the power to initiate an investigation *proprio motu* according to Article 15(1) ICCSt. In order for the ICC to exercise jurisdiction it must first be triggered.\(^\text{11}\) Before the Prosecutor’s right to initiate an investigation is analyzed, it is necessary to explain how the jurisdiction of the ICC is triggered. It is also crucial to explain in relation to what jurisdiction is triggered. There are three ways to trigger the jurisdiction under Article 13 ICCSt: referral by a state party, referral by the United Nations Security Council (UNSC) acting under Chapter VII of the UN Charter\(^\text{12}\) and the Prosecutor’s initiation of an investigation *proprio motu*. Common to all the trigger mechanisms is that the jurisdiction of the ICC is triggered in relation to a situation. Article 13(a)-(b) ICCSt stipulates that a State Party or the UNSC refers a situation to the Prosecutor. When the Prosecutor initiates an investigation *proprio motu* according to Article 15 ICCSt, it is therefore initiated in relation to a situation.\(^\text{13}\)

The concept of a situation is not in itself unfamiliar to other international criminal tribunals. The Nuremberg Charter\(^\text{14}\) establishes in Article 1 that the International Military Tribunal (IMT) is set up to try and punish the major war criminals of the European Axis. Therefore, it is the signatories of the Nuremberg Charter that establish the situation into which the Prosecutor then selects which cases to pursue.\(^\text{15}\) In Article 1 of the ICTY Statute\(^\text{16}\) it is established that the ICTY shall have the power to prosecute persons for certain crimes committed in the territory of the Former Yugoslavia since 1991. In Article 1 the ICTR Statute\(^\text{17}\) it is established that the ICTR shall have the power to prosecute persons responsible for certain crimes committed in the territory of Rwanda, and Rwandan citizens responsible for such crimes committed in the

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\(^\text{11}\) Cryer et al., p. 163.
\(^\text{12}\) The Charter of the United Nations, 26 June 1945, entered into force on 24 October 1945.
\(^\text{13}\) See Article 15(5) and (6) ICCSt which refer to a “situation”.
\(^\text{14}\) Charter of the International Military Tribunal (1945).
\(^\text{15}\) See Article 14 of the Nuremberg Charter.
\(^\text{17}\) Statute of the International Tribunal for Rwanda (1994).
neighbouring states, between 1 January 1994 and 31 December 1994. In the examples above it is either states or the UNSC that establishes what the situation is. The Prosecutor selects which cases to pursue, but the selection of cases must be made within the jurisdictional parameters set up by the Statute or Charter in question. For example, if the Prosecutor of the ICTR concludes that a crime has been committed in a neighbouring state, but a Rwandan citizen did not commit the crime, it would be outside the jurisdictional parameters of the situation.

The power of the Prosecutor to trigger the jurisdiction of the ICC is therefore a rather unique trait.\(^18\) A reason why the triggering of ICC’s jurisdiction is necessary is also that the ICC is not an *ad hoc* Tribunal. Both ICTY and ICTR are described as *ad hoc* Tribunals, which mean that they are established to deal with a situation that is already defined.\(^19\) In contrast, the ICCSt does not deal with situations that happened before the establishment of the ICC, but is a Court that may act in relation to situations that could happen in the future.

The Prosecutor of the ICC has the power to initiate an investigation into a situation, something that the Prosecutors of earlier tribunals could not do. However, the question is what the criteria are that direct the Prosecutor when she decides to open an investigation into a situation.

### 2.1.1 Jurisdiction and the Definition of a Situation

The Prosecutor of the ICC has the power to trigger the jurisdiction of the ICC and it is always triggered in relation to a situation. Since the jurisdiction of the Court cannot be triggered in relation to a specific case, there must be some factors that determine the difference between a situation and a case.

Before the difference between a situation and a case is discussed it is necessary to consider the boundaries of the jurisdiction of the ICC. The subject matter jurisdiction – i.e. the crimes over which ICC has jurisdiction – can be found in Articles 5-8 ICCSt. At present, the ICC has jurisdiction over the crime of genocide, crimes against humanity and war crimes.\(^20\) Territorial jurisdiction is defined in Article 12 ICCSt. Territorial

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\(^{18}\) Rastan, *Comment on Victor’s Justice & the Viability of Ex Ante Standards* (henceforth referred to as: Rastan 2010), p. 570.

\(^{19}\) Rastan 2010, p. 570.

\(^{20}\) Article 5(1)(a)-(c) ICCSt. The crime of aggression is not defined yet; see Article 5(2) ICCSt.
jurisdiction can be divided into two parts. 21 If a state is party to the ICCSt, the ICC may exercise jurisdiction if a crime is or has been committed in the territory of the state party. 22 If a state is not party to the ICCSt, the ICC may still exercise jurisdiction if the state accepts the jurisdiction of the ICC. 23 The territorial jurisdiction under Article 12 ICCSt is therefore limited to the territorial boundaries of a state party, or a state that has accepted the jurisdiction of the ICC. It should be noted that the ICC could exercise jurisdiction over a person who is a national of a state that is not party to the ICCSt. The nationality of a perpetrator makes no difference for the territorial jurisdiction under Article 12 ICCSt.

Personal jurisdiction is also found in Article 12 ICCSt. According to Article 12(2)(b) ICCSt, the ICC may exercise jurisdiction over persons who are accused for a crime and are nationals of a State party. It is therefore possible for the ICC to exercise jurisdiction if a person who is national of a State party has committed a crime, over which the ICC has jurisdiction, in a State that is not party to the ICCSt. Personal jurisdiction under Article 12(2)(b) ICCSt is also applicable when a State has accepted jurisdiction pursuant to Article 12(3) ICCSt. Temporal jurisdiction can be found in Article 11 ICCSt. The ICC may exercise jurisdiction if a crime has been committed after the entry into force of the ICCSt. 24 ICCSt entered into force on 1 of July 2002. ICC cannot exercise jurisdiction if a crime has been committed before this date. Temporal jurisdiction is also limited if a state becomes a party to ICCSt after the treaty entered into force. In that case, the ICC may exercise jurisdiction if a crime has been committed after the ICCSt entered into force for that State. 25 These Articles on jurisdiction can be described as forming the jurisdictional framework of the ICC. A situation must therefore fit into this jurisdictional framework.

Consequently, the triggering of jurisdiction under Article 13 ICCSt is made in relation to a situation, and the jurisdictional framework of the ICC can be described as the outer boundary of any situation. The next question is then what the difference is between a situation and a case in the ICCSt. A description of the difference between a situation and a case can be found in a judgement delivered by the Pre-Trial Chamber.

21 The characteristics of a referral by the UNSC are outside the scope of this thesis and will not be examined.
22 Article 12(2)(a) ICCSt.
23 Article 12(2)-(3) ICCSt.
24 Article 11(1) ICCSt.
25 Article 11(2) ICCSt.
The Pre-Trial Chamber stated that “[s]ituations, which are generally defined in terms of temporal, territorial and in some cases personal parameters, […] entail the proceedings envisaged in the Statute to determine whether a particular situation should give rise to a criminal investigation as well as the investigation as such”.  

The temporal parameter defining a situation means that it needs to have a starting date and an ending date. According to Article 11(1) ICCSt, the earliest possible starting date is 1 July 2002. As for the ending date, it seems that it is determined by the time the referral is sent to the Prosecutor, or at the time the Prosecutor issues a request for an authorization to the Pre-Trial Chamber. When the Prosecutor sought to open an investigation into the situation in Kenya, the temporal scope of the investigation was limited to when the Prosecutor issued a request to the Pre-Trial Chamber. The territorial parameters defining a situation can also differ in practice. When the Central African Republic (CAR) issued a self-referral to the ICC, the situation concerned the whole territory in CAR. In contrast, the self-referral issued by Uganda referred to the situation in northern Uganda and not the entire territory of Uganda. This suggests that the territorial parameter of a situation can refer to the whole territory of a state or a smaller part of the territory of a state.

The Pre-Trial Chamber also stated that “[c]ases, which compromise specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects, entail the proceedings which take place after the issue of a warrant of arrest or a summon to appear” [emphasis added]. The issuance by the Pre-Trial Chamber of a warrant of arrest or summons to appear is found in Article 58 ICCSt. The Pre-Trial Chamber shall issue a warrant of arrest based on an application by the Prosecutor if “there are reasonable grounds to

30 Schabas 2010a, p. 299.
believe that the person has committed a crime within the jurisdiction of the Court\textsuperscript{32}. Furthermore, The Appeals Chamber has noted that the “defining elements of a concrete case […] are the individual and the alleged conduct.\textsuperscript{33} This suggests that a “case” would emerge after the issuance of a warrant of arrest, and that it must relate to a specific identified person and a specific crime. Compared to the more general parameters that define a situation, a case is not generally defined since it consists of a specific person and the alleged conduct by that person.

2.1.2 The Situation as a Safeguard

A situation is defined by temporal, territorial and sometimes personal parameters. But why is it that the triggering of jurisdiction is made in relation to a situation? One reason is that it is a safeguard against politically motivated investigations, and that it is a safeguard against politicization of the ICC in general.\textsuperscript{34} One example is the self-referral by Uganda, which referred to the situation concerning the Lord’s Resistance Army (LRA). The Prosecutor stated that an investigation covers all alleged crimes in the situation, which include crimes committed by persons who are not members of the LRA.\textsuperscript{35} The self-referred situation by Uganda could therefore not be defined so that the investigation would only concern one side to a conflict. Otherwise a government could, for example, define a self-referral so that it excludes the state’s government forces from a later investigation by the Prosecutor of the ICC.

A situation must also be defined so that it is not considered to be a case. The difference between a situation and a case is therefore important. The triggering of jurisdiction in relation to a situation therefore has the effect that a single person cannot be purposely targeted for investigation at this stage, since it would be a case and not a situation.\textsuperscript{36} Neither a referral by a state or the UNSC, nor an initiation of an investigation \textit{proprio motu} by the Prosecutor can single out and target one specific

\textsuperscript{32} Article 58(1)(a) ICCSt.
\textsuperscript{33} AC, Judgement 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”, ICC-01/09-02/11 OA, 30 August 2011, para 39.
\textsuperscript{34} See for example Olásolo, p. 100, Danner, pp. 513-514.
\textsuperscript{35} PTC II, Decision to Convene a Status Conference on the Investigation in the Situation in Uganda in Relation to the Application of Article 53, ICC-02/04-01/05, 2 December 2005, paras 4-5.
\textsuperscript{36} Olásolo, p. 100.
person at the situation stage. A recent example of this is a statement issued by the Parliament of Ukraine to the ICC. The statement concerns the acceptance of jurisdiction pursuant to Article 12(2)-(3) ICCSt, but the Parliament also wishes that the ICC should address the alleged criminal responsibility of the President of the Ukraine.\(^\text{37}\) Since the acceptance of jurisdiction must be made in relation to a situation, it is not possible to single out a specific person for prosecution at this stage of the proceedings. For example, the declaration made by Ukraine under Article 12(3) ICCSt does not mention anyone by name; only that Ukraine accepts the jurisdiction of the ICC.\(^\text{38}\)

The two examples above concern referrals by states.\(^\text{39}\) However, it does not matter which triggering mechanism is used, since the triggering of jurisdiction is always made in relation to a situation. This means that the Prosecutor cannot single out one side to a conflict, or a specific person, when she initiates an investigation \textit{proprio motu}. The safeguard applies to the Prosecutor as well.

3 Initiation of an Investigation Proprio Motu

3.1 The Preliminary Examination

Article 15(1) ICCSt stipulates that the Prosecutor may initiate an investigation \textit{proprio motu} on the basis of information on crimes within the jurisdiction of the ICC. It should be noted that Article 15(1) ICCSt does not mean that the Prosecutor may start a full investigation, but that she may initiate an investigation.\(^\text{40}\) Neither does the term “investigation” in Article 15(1) ICCSt correspond to the Prosecutor’s powers and duties during an investigation described in Article 54 ICCSt. In addition, the term “initiate an investigation” has different meanings in Article 15(1) ICCSt and Article 53(1) ICCSt.\(^\text{41}\) This is because the procedure under Article 15(1)-(2) ICCSt is referred to as a preliminary investigation.\(^\text{42}\) Therefore, the Prosecutor may initiate a preliminary examination of a situation on the basis of information on crimes within the jurisdiction


\(^{38}\) Declaration by Ukraine lodged under Article 12(3) of the Rome Statute, 9 April 2014.

\(^{39}\) See Articles 12(2)-(3), 14 ICCSt.

\(^{40}\) Article 15(3)-(4) ICCSt.

\(^{41}\) See for example Bergsmo & Kruger, in Triffterer, pp. 1067-1068.

\(^{42}\) Article 15(5)-(6) ICCSt. See also ICC OTP, Policy Paper on Preliminary Examinations, para 73.
of the ICC. When someone sends information to the Prosecutor, the Prosecutor is said to receive a communication. The Prosecutor’s right to initiate a preliminary examination must be based on information on alleged crimes and must therefore be based on alleged facts. The information that the Prosecutor receives can come from any source. The quality of the information is not in itself relevant. The information sent to the Prosecutor does not have to be a detailed investigation. The information can therefore concern a single crime allegedly committed by a single person.

Article 15(2) ICCSt stipulates that the Prosecutor shall analyze the seriousness of the information she has received. The Prosecutor is therefore obliged to analyze the seriousness of the information. However, a preliminary investigation of a situation does not start just because the Prosecutor has received information concerning alleged crimes. The Prosecutor received 10,352 communications between July 2002 and 31 October 2013, which shows that some kind of filtering mechanism might be needed. The process used by the Prosecutor consists of four phases. During the first phase, the Prosecutor analyzes the seriousness of the information received under Article 15(1)-(2) ICCSt and filters out the information that is manifestly outside the jurisdiction of the ICC. After the first phase, a preliminary examination of a situation may be initiated if the information does not concern a situation already under a preliminary examination or investigation. Phase 2-4 corresponds to the factors in Article 53(1)(a)-(c) ICCSt.

The preliminary examination is preliminary because an investigation into a situation has not yet started. The commencement of an investigation is subject to two requirements. First, the Prosecutor must conclude that there is a reasonable basis to proceed with an investigation. Second, the Prosecutor cannot start an investigation until

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43 ICC OTP, Annex to the “Paper on some policy issues before the Office of the Prosecutor”: Referrals and communications, section B.
44 Bergsmo & Pejic, in Triffterer, p. 586.
45 Bergsmo & Pejic, in Triffterer, p. 586.
46 ICC OTP, Annex to the “Paper on some policy issues before the Office of the Prosecutor”: Referrals and communications, section B.
47 Olásolo, p. 102.
48 ICC OTP, Policy Paper on Preliminary Examinations, para 75.
50 ICC OTP, Policy Paper on Preliminary Examinations, paras 77-84.
51 ICC OTP, Policy Paper on Preliminary Examinations, para 78.
the Pre-Trial Chamber authorizes the commencement of an investigation, i.e. the decision by the Prosecutor is subject to a judicial review.

3.1.1 Reasonable Basis to Proceed

Article 15(3) ICCSt stipulates that if the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, she shall request an authorization to open an investigation from the Pre-Trial Chamber. The Article itself does not explain what factors the Prosecutor has to consider in order to determine whether there is a reasonable basis to proceed with an investigation. The factors the Prosecutor is required to consider can be found under Article 53(1) ICCSt. The factors in Article 53(1)(a)-(c) ICCSt are jurisdiction, admissibility and the interests of justice.

It should be noted that the wording of Article 53(1) ICCSt is different compared to the wording of Article 15(3) ICCSt. According to Article 15(3) ICCSt, the Prosecutor shall not initiate an investigation unless she concludes that there is a reasonable basis to proceed. In contrast, Article 53(1) ICCSt stipulates that the Prosecutor shall initiate an investigation unless she determines that there is no reasonable basis to proceed. This is because Article 15 ICCSt relates to the initiation of an investigation proprio motu by the Prosecutor, while Article 53(1) ICCSt relates to the initiation of an investigation when a State Party or the UNSC refers a situation to the Prosecutor. However, the “reasonable basis”-test is the same in both Article 15(3) ICCSt and Article 53(1) ICCSt. Rule 48 of the Rules of Procedure and Evidence (RPE) stipulates that the Prosecutor shall consider the factors in Article 53(1)(a)-(c) ICCSt in order to determine whether there is a reasonable basis to proceed with an investigation under Article 15(3) ICCSt. In addition, Regulation 29(1) in the Regulations of the Prosecutor (RegP) stipulates that the Prosecutor shall consider the factors in Article 53(1)(a)-(c) ICCSt when “acting under Article 15(3) ICCSt or 53(1) ICCSt” [emphasis added].

The purpose of a preliminary examination is to gather enough information so that the Prosecutor can determine whether or not there is a reasonable basis to proceed with an investigation. Therefore, the factors in Article 53(1)(a)-(c) ICCSt are also the factors

54 ICC OTP, Annex to the “Paper on some policy issues before the Office of the Prosecutor”: Referrals and communications, section A.
55 Regulation 29(1) RegP.
56 Bergsmo & Kruger, in Triffterer, p. 1067.
that the Prosecutor shall consider during the preliminary examination.\textsuperscript{57} There is no requirement that the preliminary examination must come to an end within a specific period of time in the ICCSt or the RPE.\textsuperscript{58} This is necessary because a preliminary examination must be adjusted to each situation.\textsuperscript{59} The preliminary examination comes to an end when the Prosecutor is able to conclude whether or not there is a reasonable basis to proceed with an investigation. The Preliminary examination will therefore continue until the Prosecutor can reach such a conclusion based on the factors in Article 53(1)(a)-(c) ICCSt.

\textit{3.1.2 Authorization by the Pre-Trial Chamber}

The Prosecutor cannot start an investigation when she has concluded that there is a reasonable basis to proceed with an investigation under Article 15(3) ICCSt. The fear of a politicized and uncontrolled Prosecutor lead to a compromise during the negotiations of the ICCSt, which means that the Prosecutor’s conclusion under Article 15(3) ICCSt is subject to a judicial review.\textsuperscript{60} According to Article 15(4) ICCSt, the Pre-Trial Chamber must authorize the request by the Prosecutor to open an investigation. The Pre-Trial Chamber must conclude that there is a reasonable basis to proceed with an investigation and that the case seem to fall within the jurisdiction of the Court.\textsuperscript{61} Both the Prosecutor and the Pre-Trial Chamber applies the “reasonable basis” –test, but Rule 48 RPE only refers to Article 15(3) ICCSt. Rule 50 RPE, which relates to the procedure for authorization by the Pre-Trial Chamber, does not refer to the factors in Article 53(1)(a)-(c) ICCSt. However, the Pre-Trial Chamber has clarified that in order for the procedure under 15(4) ICCSt constitute a judicial review, it must also consider the factors in Article 53(1)(a)-(c) ICCSt.\textsuperscript{62} The factors in Article 53(1)(a)-(c) ICCSt will be discussed in more detail below.

\textsuperscript{57} ICC OTP, Policy Paper on Preliminary Examinations, paras 2, 5.
\textsuperscript{58} ICC OTP, Policy Paper on Preliminary Examinations, para 89.
\textsuperscript{59} ICC OTP, Policy Paper on Preliminary Examinations, para 89.
\textsuperscript{60} Danner, p. 515.
\textsuperscript{61} Article 15(4) ICCSt.
\textsuperscript{62} Kenya Article 15 case, paras 24-25.
4 Article 53(1)(a) – Jurisdiction

The first factor stipulates that the Prosecutor shall consider whether “the information available […] provides a reasonable basis to believe that a crime within the Jurisdiction of the Court has been or is being committed”. The Pre-Trial Chamber has noted that the evidentiary standard “a reasonable basis to believe” is the lowest standard in the ICCSt. In addition, the Prosecutor shall not only consider the subject-matter jurisdiction of the ICC. The question whether a crime has been committed within the jurisdiction of the ICC would include that the Prosecutor considers the other jurisdictional requirements in the ICCSt. When a preliminary examination is started, the Prosecutor will also examine whether the territorial or personal jurisdiction requirements are fulfilled in Article 12 ICCSt. The Policy Paper on preliminary examinations does not mention that the Prosecutor shall consider the temporal jurisdiction during the second phase. If the information that the Prosecutor has received is outside the temporal jurisdiction of the ICC, it may be that it is filtered out at an earlier stage. The Prosecutor’s aim at this stage is to determine if there are any potential cases within the situation. The concept of a potential case is examined under section 5.

4.1 Subject-Matter Jurisdiction

Whether or not there is a reasonable basis to believe that a crime within the jurisdiction of the ICC has been or is being committed, refers to the subject-matter jurisdiction of the ICC. The subject-matter jurisdiction is currently limited to genocide, crimes against humanity and war crimes. All crimes under the jurisdiction of the ICC have a threshold that the Prosecutor and the Pre-Trial Chamber must observe. For example, a person commits the crime of genocide if the person kills members of a national group with intent to destroy, in whole or in part, the national group in question.

63 Article 53(1)(a) ICCSt.
64 Kenya Article 15 case, para 27.
65 See for example Kenya Article 15 case, paras 36-39.
68 Articles 5-8 ICCSt.
69 Schabas, An Introduction to the International Criminal Court (henceforth referred to as: Schabas 2011), p. 94.
70 Article 6 ICCSt.
threshold for the crime of genocide is therefore the requirement of intent by the perpetrator to destroy, in whole or in part, the group.\textsuperscript{71}

In the Kenya Article 15 case, the majority of the Pre-Trial Chamber concluded that the Prosecutor had showed that there was a reasonable basis to believe that crimes against humanity had been committed in Kenya.\textsuperscript{72} One judge of the Pre-Trial Chamber disagreed with the majority’s authorization of the investigation in the situation of Kenya. The dissenting judge was not satisfied that there was a reasonable basis to proceed with an investigation, since he did not conclude that there was a reasonable basis to believe that the acts constituted crimes against humanity.\textsuperscript{73} In the dissenting opinion it is pointed out that the question is not whether, for example, the crime of murder has been committed, but whether or not the acts met the threshold of crimes against humanity in Article 7 ICCSt.\textsuperscript{74} Under Article 7(1) ICCSt, any of the acts that may constitute a crime against humanity must be “committed as part of a widespread or systematic attack against any civilian population”. Furthermore, the term “attack against any civilian population” is defined in Article 7(2)(a) ICCSt. It was mainly the dissenting judge’s interpretation of Article 7(2)(a) ICCSt which lead to his conclusion, since he did not see “the existence of an ‘organisation’ behind the violent acts”.\textsuperscript{75} The examination by the Pre-Trial Chamber under Article 53(1)(a) ICCSt, and the threshold of the different crimes under the jurisdiction of the ICC is arguably a constraint on the discretion of the Prosecutor.\textsuperscript{76} Especially since the jurisdiction of the ICC – and in particular the subject-matter jurisdiction – must be established before the other factors in Article 53(1)(b)-(c) ICCSt are examined.\textsuperscript{77}

\textsuperscript{71} Schabas 2011, p. 94.
\textsuperscript{72} Kenya Article 15 case, para 73.
\textsuperscript{73} Kenya Article 15 case, Dissenting opinion, para 4.
\textsuperscript{74} Kenya Article 15 case, Dissenting opinion, para 72.
\textsuperscript{75} Kenya Article 15 case, Dissenting opinion, paras 4, 150.
\textsuperscript{76} Schabas 2011, p. 94.
\textsuperscript{77} See for example ICC OTP, response to communications received concerning Venezuela, pp. 2-4.
5 Article 53(1)(b) – Admissibility

5.1 Introduction
Since both a State party to the ICCSt and the ICC may claim to have jurisdiction, it is necessary to use a method to determine which court will exercise jurisdiction.78 ICC is complementary to national criminal jurisdictions.79 This means that the state has primary jurisdiction over a crime under Articles 6-8 ICCSt and a case is inadmissible before the ICC unless certain provisions in the ICCSt are fulfilled.80

Article 53(1)(b) ICCSt stipulates that the Prosecutor shall consider whether the case is or would be admissible under Article 17 ICCSt. One problem is that there seems to be a lack of coherence between Articles 15 and 53(1)(b) ICCSt. This is because Article 15 ICCSt is linked to a “situation” while Articles 53(1)(b) and 17 ICCSt stipulate that the admissibility assessment is made in relation to a “case”. As stated above, the concepts of a situation and a case have different meanings in ICCSt. Therefore it seems rather strange that the Prosecutor has to consider the admissibility of a case before an investigation in a situation has even started. This uncertainty has resulted in a discussion in literature on how Article 17 ICCSt should be applied at the situation stage.81 What is certain is that the Prosecutor and the Pre-Trial Chamber have to assess admissibility at this stage. The question is how the admissibility assessment is carried out at the situation stage.

Fortunately, the Pre-Trial Chamber addressed this question for the first time when the Prosecutor sought to open an investigation into the situation in Kenya. Currently the Pre-Trial Chamber has authorized the start of an investigation in two situations pursuant to Article 15(4) ICCSt, namely the situations in Kenya and Côte d'Ivoire.82 The Pre-Trial Chamber delivered its first Article 15 case when it authorized the commencement of investigation into the situation of Kenya.

78 Schabas 2011, p. 187.
79 Article 1 ICCSt.
80 See for example Article 17 ICCSt.
81 See Olásolo & Carnero-Rojo, pp. 395-396.
82 Kenya Article 15 case. See also PTC III, Decision Pursuant to Article 15 of the Rome Statute in the Authorization of an investigation in the Republic of Côte d'Ivoire, ICC-02/11, 3 October 2011 (henceforth referred to as: Côte d'Ivoire Article 15 case).
5.2 The Admissibility of a Potential Case

The Pre-Trial Chamber noted that admissibility at the situation stage should be assessed against certain criteria defining one or more potential cases within the context of a situation.\(^{83}\) The criteria forming the parameters of a potential case are defined as “(i) the groups of persons involved that are likely to be the focus of an investigation for the purpose of shaping the future case(s) and (ii) the crimes within the jurisdiction of the court allegedly committed during the incidents that are likely to be the focus of an investigation for the purpose of shaping the future case(s)”.\(^{84}\) The admissibility assessment under Article 17 ICCSt is therefore not made in relation to the situation as such, but in relation to one or more potential cases within the situation. A potential case is not a “case” as such since an investigation has not been officially opened. The investigative powers of the Prosecutor are limited during the preliminary examination and the potential case is more like a case hypothesis.\(^{85}\)

5.2.1 Complementarity

As noted above, the admissibility of a situation should be assessed in relation to a potential case. As for the complementarity assessment in Article 17(1)(a)-(b) ICCSt, the Pre-Trial Chamber made a reference to a decision by the Appeals Chamber concerning the admissibility of a case.\(^{86}\) In short, inaction on the part of a state that has jurisdiction renders the case admissible before the ICC under Article 17(1)(a)-(b) ICCSt.\(^{87}\) Only if the state that has jurisdiction is investigating or prosecuting, or has done so, does the question of unwillingness or inability arise.\(^{88}\) The Pre-Trial Chamber applied the same test at the situation stage and found that Kenya was inactive which rendered the potential cases admissible before the ICC.\(^{89}\) This means that the complementarity test is divided into two parts. Firstly, if the State that has jurisdiction in a situation has not initiated an investigation in relation to any potential cases at all, the potential cases within the situation are admissible under Article 17(1)(a)-(b) ICCSt. Secondly, only if

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\(^{83}\) Kenya Article 15 case, paras 48 & 50.

\(^{84}\) Kenya Article 15 case, para 50.

\(^{85}\) Rastan, *What is a Case for the Purpose of the Rome Statute?* (Henceforth referred to as: Rastan 2008), p. 441.

\(^{86}\) Kenya Article 15 case, para 53.

\(^{87}\) AC, Judgement on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of June 2009 on the Admissibility of the Case, ICC-01/04-01/07-1497, para 78.

\(^{88}\) Ibid., para 78.

\(^{89}\) Kenya Article 15 case, paras 53-54.
the state that has jurisdiction is investigating, or has investigated, the potential cases within the situation is it necessary to assess if the State is genuinely unwilling or unable to investigate the potential cases. The Pre-Trial Chamber did not consider whether or not Kenya was genuinely unwilling or unable to investigate since Kenya was found to be inactive, and thus the Pre-Trial Chamber never considered that issue.

There is a reason why the Pre-Trial Chamber did not consider genuine unwillingness or inability on the part of Kenya in its judgement. Local courts in Kenya were granted jurisdiction over international crimes through a parliamentary Act in December 2008 and any prosecution into the post-election violence concerning crimes under Articles 6-8 ICCSt would constitute a breach of the principle of non-retroactivity in criminal law.\textsuperscript{90} Therefore, the Kenyan courts had for example jurisdiction over the crime of murder, but not jurisdiction over crimes against humanity in Article 7 ICCSt. A proposal to establish a Special Tribunal for Kenya that would have jurisdiction over the post-election violence was not successful.\textsuperscript{91} This would explain why the Pre-Trial Chamber could come to its conclusion without further examination of the issue. Since any investigations into the post-election violence were not possible in Kenyan national law, Kenya was inactive. There is still an unresolved issue though. The question is what criteria the Prosecutor uses in order to establish that the potential cases are admissible under Article 17(1)(a)-(b) ICCSt when the State is not inactive. Since the Pre-Trial Chamber stated that the admissibility assessment at the situation stage is made in relation to one or more potential cases, complementarity must be assessed in the light of the potential case.\textsuperscript{92}

The Prosecutor must therefore show that the State that has jurisdiction is genuinely unwilling or unable to investigate the potential case or cases within the situation. In order to do so, the Prosecutor must choose which national proceedings that need to be reviewed by the Pre-Trial Chamber. One limitation is obviously that the review must concern crimes under the subject-matter jurisdiction of the ICC. But it is not possible to review every investigation in a State that relates to crimes within the jurisdiction of the ICC; the review of national proceedings needs to be narrowed down even further.\textsuperscript{93} A

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\begin{itemize}
\item \textsuperscript{90} Alai & Mue, p. 1225.
\item \textsuperscript{91} Alai & Mue, pp. 1224-1226. See also Kenya Article 15 case, para 183.
\item \textsuperscript{92} Kenya Article 15 case, para 182.
\item \textsuperscript{93} Olásolo & Carnero-Rojo, p. 413.
\end{itemize}

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way of limiting the national proceedings that should be reviewed by the Pre-Trial Chamber is to look at Article 17(1)(d) ICCSt and the notion of sufficient gravity.

5.2.2 Gravity

The Pre-Trial Chamber also considered the gravity assessment under Article 17(1)(d) ICCSt in the Kenya Article 15 case. The gravity assessment in the light of the first criterion defining a potential case “involves a generic assessment of whether such groups of persons that are likely to form the object of an investigation capture those who may bear the greatest responsibility for the alleged crimes committed”.94 The question is if this statement by the Pre-Trial Chamber imposes any limitations on the Prosecutor. As deGuzman points out, it seems that the gravity assessment relates to a certain kind of perpetrators.95

If the gravity assessment of a potential case within the situation relates to a certain kind of perpetrators, i.e. those who may bear the greatest responsibility, it could mean that gravity is interpreted differently compared to a case delivered by the Appeals Chamber. Although the case that was delivered by the Appeals Chamber concerned the application for warrants of arrest pursuant to Article 58 ICCSt – and therefore concerns the admissibility of a case – the interpretation of Article 17(1)(d) ICCSt is discussed. The Appeals Chamber noted that an interpretation of Article 17(1)(d) ICCSt that means that the ICC only deals with the highest-ranking perpetrators – the most senior leaders suspected of being most responsible – could obstruct the deterrence effect of the ICC.96 This interpretation would mean that all other categories of perpetrators could not be brought before the ICC.97 The Appeals Chamber also noted that the deterrence effect is maximized if an interpretation of Article 17(1)(d) ICCSt does not prevent a certain kind of perpetrators to be brought before the ICC.98 Partially because of this, the Appeals Chamber rejected the interpretation of Article 17(1)(d) ICCSt made by the Pre-Trial

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94 Kenya Article 15 case, para 60.
95 deGuzman, *The International Criminal Court’s Gravity jurisprudence at Ten* (henceforth referred to as: deGuzman 2013), p. 482.
96 AC, Judgement on the Prosecutor’s appeal against the Pre-Trial Chamber I entitled “Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58”, ICC-01/04-169, 13 July 2006, para 73.
97 Ibid., para 73.
98 Ibid., para 73.
Chamber, but the Appeals Chamber did not explain how Article 17(1)(d) ICCSt should be interpreted.\textsuperscript{99}

A comparison between the two cases suggests that Article 17(1)(d) ICCSt should be interpreted differently when the gravity assessment is made in relation to a potential case within the context of a situation and, at a later stage, in relation to a case. If the object of an investigation should capture the persons who may bear the greatest responsibility for the alleged crimes, the question is if this imposes a limitation on prosecutorial discretion. One argument is that even if the gravity assessment at the situation stage has to include those who may bear the greatest responsibility, it does not stop the Prosecutor from including those who are less responsible when the Pre-Trial Chamber has authorized the investigation.\textsuperscript{100} In contrast, the interpretation of Article 17(1)(d) ICCSt that was rejected by the Appeals Chamber would have the effect that certain categories of perpetrators could not be brought before the ICC. This is not the effect of the Kenya Article 15 case, but it may still impose a limitation on the Prosecutor. deGuzman argues that this is a limitation and if the Prosecutor cannot include those who may bear the greatest responsibility in the situation, for example if the leaders have died, the Pre-Trial Chamber may not authorize the investigation.\textsuperscript{101} In the Kenya Article 15 case, the Pre-Trial Chamber noted that the material presented by the Prosecutor referred to persons of high-ranking positions and that, among other things, they had allegedly planned and financed the violence.\textsuperscript{102} The argument put forward by deGuzman suggests that if the Prosecutor had not been able to include those persons of high-ranking positions, the Pre-Trial Chamber might not have authorized the commencement of an investigation. However, it does not seem necessary that the person needs to have a high-ranking position, only that the person is one of those who may bear the greatest responsibility for an alleged crime. A person who may bear the greatest responsibility for an alleged crime is not necessarily equivalent to a person with a high-ranking position in, for example, a rebel group.

As for the second criterion, the Pre-Trial Chamber stated that the assessment of the gravity of the crimes follows a quantitative and qualitative approach.\textsuperscript{103} The quantitative

\textsuperscript{99} deGuzman 2013, p. 480.
\textsuperscript{100} deGuzman 2013, p. 483.
\textsuperscript{101} deGuzman 2013, p. 483.
\textsuperscript{102} Kenya Article 15 case, para 198.
\textsuperscript{103} Kenya Article 15 case, para 61.
approach relates to the number of victims.\textsuperscript{104} The qualitative approach relates to some qualitative factors that make the commission of the crime grave.\textsuperscript{105} In sum, these qualitative factors are the scale, nature, manner of commission, and impact of the crime that has been allegedly committed.\textsuperscript{106} These factors can also be found in Regulation 29(2) Regulations of the Prosecutor (RegP). Here one might ask whether the qualitative factors offer any guidance to, or impose a limitation on, the Prosecutor.

Whether or not the qualitative factors should have an inherent weight is not discussed in the Pre-Trial Chamber’s decision. In Regulation 29 RegP it is only clarified that the Prosecutor shall consider them. Should, for example, the nature of the alleged crime be interpreted to have an inherently higher value than the impact of another alleged crime? What is problematic is that the assessment under Article 17(1)(d) ICCSt concerns if the crime is of sufficient gravity. One could argue that a crime against humanity always fulfils the gravity threshold. If the number of victims is the same concerning two different crimes against humanity, the question is how the Prosecutor would be able to conclude that one crime is graver than the other. However, since the gravity assessment consists of a quantitative approach and a qualitative approach, it suggests that the qualitative approach consists of factors with no inherent weight. The wording of regulation 29(2) RegP also suggests that the factors have no inherent weight, only that the Prosecutor shall consider the factors. One commentator notes that the qualitative factors are very flexible and that most cases would therefore satisfy the gravity threshold in Article 17(1)(d) ICCSt.\textsuperscript{107} The same is probably true for the gravity assessment of the potential cases in a situation. Another commentator argues that these factors are too broad and offers so much flexibility for the Prosecutor that they do not really offer any guidance at all.\textsuperscript{108} When the Prosecutor assesses the gravity of any potential cases in the situation, it is probably not difficult for her to show that an alleged crime at least fulfils one of the qualitative factors.

\textsuperscript{104} PTC I, Prosecutor v. Bahar Idriss Abu Garda, Decision on the Confirmation of Charges, ICC-02/05-02/09, 8 February 2010, para 31.
\textsuperscript{105} Kenya Article 15 case, para 62.
\textsuperscript{106} Kenya Article 15 case, para 62.
\textsuperscript{107} deGuzman 2013, p. 484.
\textsuperscript{108} Olásolo & Carnero-Rojo, p. 416.
6 Article 53(1)(c) – Interests of Justice

The last factor the Prosecutor shall consider in order to determine whether there is a reasonable basis to proceed with an investigation is found in Article 53(1)(c) ICCSt. It stipulates that the Prosecutor shall consider whether “taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice”.109

Unlike Article 53(1)(a)-(b) ICCSt, Article 53(1)(c) ICCSt is not structured as a positive requirement.110 Even if the Prosecutor is satisfied that the criteria of jurisdiction and admissibility are fulfilled, she can decide to not open an investigation if she concludes that the investigation would not serve the interests of justice. Therefore, Article 53(1)(c) ICCSt is only considered if the previous factors in Article 53(1)(a)-(b) ICCSt are fulfilled.111 It should be noted that the Prosecutor is only required to establish that the commencement of an investigation would not serve the interests of justice.112 In other words, the Prosecutor does not have to provide any reasons for why an investigation actually would be in the interests of justice.

Article 53(1)(c) ICCSt is very vague. The term “interests of justice” can be found in several other Articles in ICCSt and Rules in RPE.113 However, the term “interests of justice” is not defined in either ICCSt or RPE. A definition of the term is not found in the travaux préparatoires either.114 The Prosecutor is however required to consider the two sub-factors in Article 53(1)(c) ICCSt. First, the Prosecutor is required to take into account the gravity of the crime. The gravity of the crime is also part of the admissibility assessment under Article 53(1)(b) ICCSt. Second, the Prosecutor is required to take into account the interests of victims. It is possible to consider the interests of victims in two ways. One interpretation is that the Prosecutor’s decision to open an investigation is equivalent to the interests of victims.115 Another interpretation suggests that it may also be in the interests of victims that the Prosecutor does not open

109 Article 53(1)(c) ICCSt.
111 ICC OTP, Policy Paper on the Interests of Justice, p. 3.
112 Kenya Article 15 case, para 63.
113 See for example Articles 55(2)(c), 61(2) and 65(4) ICCSt, Rules 69 and 100 RPE.
114 Lepard, p. 562, King, p. 106.
115 Bergsma & Kruger, in Triffterer, p. 1071.
an investigation. However, the wording of Article 53(1)(c) ICCSt suggests that the interests of victims correspond to the Prosecutor’s decision to open an investigation. This is because the Prosecutor shall take into account the interests of victims and if “there are nevertheless substantial reasons to believe that an investigation would not serve the interests of justice”[emphasis added]. The Prosecutor’s interpretation is that “the interests of victims will generally weigh in favour of prosecution”. The Prosecutor’s position seems to be that a decision to open an investigation is not always in the interests of the victims, but it is not explained where the line is drawn. How the term will be interpreted in relation to a concrete situation is therefore not certain.

6.1 The Possibility of a Judicial Review

If the Prosecutor concludes that an investigation would not be in the interests of justice under Article 53(1)(c) ICCSt, her decision may be subject to a judicial review. If the Prosecutor concludes that there is no reasonable basis to proceed with an investigation, and her decision is based only on Article 53(1)(c) ICCSt, she is required to inform the Pre-Trial Chamber.[119] The Pre-Trial Chamber is not required to review the decision by the Prosecutor, but it may do so on its own initiative.[120] The Pre-Trial Chamber must decide to review the decision by the Prosecutor within 180 days after the Prosecutor notified the Pre-Trial Chamber.[121] If the Pre-Trial Chamber reviews the decision by the Prosecutor there are two possible outcomes. The Pre-Trial Chamber may confirm the Prosecutor’s decision, which means that the Prosecutor does not open an investigation.[122] If the Pre-Trial Chamber does not confirm the decision by the Prosecutor, she is required to proceed with an investigation.[123] The Prosecutor’s broad discretion under Article 53(1)(c) ICCSt is therefore in one way restricted, since the Pre-Trial Chamber also has the opportunity to interpret the Article in question. It is also possible that the Prosecutor is forced to open an investigation in a situation even if she has concluded that it would not serve the interests of justice.

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[117] Article 53(1)(c) ICCSt.
[119] Article 53(1) ICCSt, see also Rule 105(4) RPE.
[120] Article 53(3)(b) ICCSt.
[121] Rule 109 RPE.
[122] Article 53(3)(b) ICCSt.
[123] Article 53(3)(b) ICCSt and rule 110 RPE.
An example where the Prosecutor’s and the Judges’ interpretation of Article 53(1)(c) ICCSt may differ is if it is applied to the post-apartheid situation in South Africa. In South Africa, a truth and reconciliation commission (TRC) was set up which could offer amnesty to a person appearing before it, as an alternative to prosecuting the person for e.g. the crime against humanity of apartheid. It is possible that the Prosecutor concludes that an investigation would not be in the interests of justice, while the Pre-Trial Chamber does not confirm the decision by the Prosecutor. A situation under the jurisdiction of the ICC, which is similar to the post-apartheid situation in South Africa, might arise in the future. The example relates to how Article 53(1)(c) ICCSt should be interpreted, which will be discussed below.

6.2 Interests of Justice – Ambiguity and Uncertainty

The absence of a definition of the term “interests of justice” has the effect that the Prosecutor’s discretion under Article 53(1)(c) ICCSt is very broad. However, the decision by the Prosecutor under Article 53(1)(c) ICCSt cannot be arbitrary and is not an “escape clause”. It is therefore difficult to determine when the Prosecutor would conclude that an investigation does not serve the interests of justice according to Article 53(1)(c) ICCSt. It is also difficult because it is not certain what criteria the Prosecutor would use in order to reach that conclusion. The term is not defined because an agreement could not be reached during the negotiations of the ICCSt. Basically, it was debated whether prosecution should always trump amnesties and the establishment of a TRC, or if amnesties and the establishment of a TRC could be accepted as an alternative to prosecution. That is why the term is ambiguous and it is therefore up to the Prosecutor and the Judges to interpret it. One could argue that there should be alternatives to prosecution in the ICC. The difficulty lies in trying to formulate a legal test in, for example, Article 53(1)(c) ICCSt, which is sufficiently clear and at the same time does not produce unacceptable results. What those unacceptable results are may of

125 See for example Webb, p. 318, Lovat, p. 276.
126 Bergsmo & Kruger, in Triffterer, p. 1072.
127 Robinson, p. 483.
128 Robinson, p. 483.
129 Robinson, p. 483.
course differ, which is most likely why the States could not come to an agreement during the negotiations.

This ambiguity also leads to uncertainty regarding how broadly, or narrowly, the term should be interpreted. The question is what does “justice” under Article 53(1)(c) ICCSt stand for or consist of. The question is difficult since it is a “notoriously malleable term”.\textsuperscript{130} A narrow interpretation suggests that “justice” only includes criminal justice or retributive justice.\textsuperscript{131} A broader interpretation suggests that it not only includes criminal or retributive justice, but also other forms of justice.\textsuperscript{132} In a policy paper issued by the OTP it is stated that the Prosecutor interprets the term in the broader sense.\textsuperscript{133} However, the policy paper describes how the OTP interprets the term.\textsuperscript{134} This suggests that it is still uncertain how the Pre-Trial Chamber would interpret the term if it decides to review the decision by the Prosecutor according to Article 53(3)(b) ICCSt. There are also examples in literature of those who support a narrow interpretation.\textsuperscript{135}

A truth commission can roughly be described as representing another form of justice than criminal justice since a person who appears before a truth commission is not prosecuted.\textsuperscript{136} If the interests of justice is interpreted broadly, one question is if the Prosecutor can consider that a State, for example, has set up a truth commission as an alternative to prosecuting perpetrators. In the preamble of the ICCSt it is stated that the “most serious crimes of concern to the international community as a whole must not go unpunished”.\textsuperscript{137} Surprisingly as it may seem, Article 53(1)(c) ICCSt could therefore be interpreted in a broad sense, suggesting that the term not only includes criminal justice. However, Robinson argues that the purpose of the ICC does not necessarily go against an alternative to prosecution such as a TRC.\textsuperscript{138} He argues that the main rule for the ICC is to prioritize prosecution, but an exception can be made when a state prosecutes the perpetrators who are most responsible for crimes and the other perpetrators appear

\textsuperscript{130} Lepard, p. 561.
\textsuperscript{131} Robinson, p. 488, See also ICC OTP, Policy Paper on the Interests of Justice, p. 8.
\textsuperscript{132} ICC OTP, Policy Paper on the Interests of Justice, p. 8.
\textsuperscript{133} ICC OTP, Policy Paper on the Interests of Justice, p. 8 and footnote 13.
\textsuperscript{134} ICC OTP, Policy Paper on the Interests of Justice, p. 1.
\textsuperscript{135} See for example the discussion on the interpretation by the Human Rights Watch, in Lovat, pp. 278-280.
\textsuperscript{136} King, p. 105.
\textsuperscript{137} ICCSt preamble, para 4.
\textsuperscript{138} Robinson, p. 504.
before a truth commission. In that case, the Prosecutor may conclude that an investigation would not serve the interests of justice. However, the State and the Prosecutor of the ICC may not necessarily agree who the most responsible persons are. Even if the state does not prosecute a single person who allegedly has committed a crime, it might still be possible in some exceptional cases that an investigation would not serve the interests of justice.

Another example of uncertainty is how the Prosecutor interprets Article 53(1)(c) ICCSt. In the policy paper it is noted that there is a presumption that the Prosecutor will proceed with an investigation and that Article 53(1)(c) ICCSt only applies in exceptional circumstances. According to the Prosecutor, this presumption is based on a fairly recently developed trend which means that states has a duty to prosecute certain international crimes. Furthermore, the policy paper makes a distinction between the interests of justice and the interests of peace. This distinction means that the interests of peace are to be considered by other institutions than the OTP. This distinction between justice and peace can be criticized. One argument against this is that the Prosecutor does not necessarily consider the consequences for peace in a situation when she considers the interests of justice under Article 53(1)(c) ICCSt. For example, there might be a risk that the Prosecutor’s decision to open an investigation increases the risk of an escalation of violence in the situation. It is possible for the Prosecutor to consider both the interests of justice and the interests of peace, but it is not how the Prosecutor interprets Article 53(1)(c) ICCSt. One question would then be how these two interests would be balanced against each other, and if the Prosecutor’s decision to open an investigation should have priority over the interests for peace.

This is not an in-depth discussion about the term “interests of justice”. The purpose of the two examples is to show that the term is not defined and is ambiguous. The ambiguity creates uncertainty, which means that the Prosecutor’s discretion not to open an investigation is potentially very broad.

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140 See discussion under section 5.2.2.
141 Robinson, pp. 495-498.
142 ICC OTP, Policy Paper on the Interests of Justice, p. 3.
143 ICC OTP, Policy Paper on the Interests of Justice, p. 3.
145 King, p. 108.
146 Schabas 2010a, pp. 665-666.
Part II

7 A Legal Duty to Open an Investigation?

7.1 Introduction
In the Kenya Article 15 case, the Pre-Trial Chamber noted that the judicial review under Article 15(4) ICCSt prevents the ICC from proceeding with politically motivated investigations. At the same time it can also be said that the Prosecutor will have to “choose from many meritorious complaints the appropriate ones for international intervention, rather than to weed out weak or frivolous ones.” In other words, the issue might not be that the Prosecutor seeks to proceed with a politically motivated investigation, but that the Prosecutor has a wide array of situations to choose from that merit investigation.

The examination above describes the procedure up to the point when the Prosecutor concludes that there is a reasonable basis to proceed with an investigation. In this section, the examination also concerns the procedure under Article 15 ICCSt, but the question is whether the Prosecutor has a legal duty to proceed with an investigation. It should be clarified that the discussion under this section is not about the scope and limits of prosecutorial discretion under Article 53(1)(a)-(c) ICCSt. Under this section it is presumed that the Prosecutor has concluded that the factors in Article 53(1)(a)-(c) ICCSt are fulfilled. The question under this section is whether the Prosecutor may decline to seek an authorization to open an investigation pursuant to Article 15(3) ICCSt, even though she has concluded that there is a reasonable basis to proceed with an investigation.

7.2 The Prosecutor in National Legal Systems
The scope and limits of prosecutorial discretion differ depending on which national legal system is analyzed. Under this section two different views on the Prosecutor’s discretion will be described in a few words.

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147 Kenya Article 15 case, para 32.
148 Arbour, p. 213.
Under German law, the Prosecutor is guided by the principle of mandatory investigation and prosecution (“Legalitätsprinzip” or “the principle of legality”).\textsuperscript{149} According to this principle, the Prosecutor must initiate a criminal investigation once the evidentiary standard is met.\textsuperscript{150} Since the Prosecutor has a monopoly on prosecution under German law, this principle acts as a safeguard against arbitrary decisions by the Prosecutor.\textsuperscript{151} The discretion of the Prosecutor under German law does not allow the Prosecutor to refrain from an investigation or prosecution once criteria for initiating an investigation are met.\textsuperscript{152} The discretion of the Prosecutor is also restricted when it comes to the determination of whether the criteria are met.\textsuperscript{153}

In other national legal systems, for example in the United States of America, the Prosecutor’s decision making is directed by the principle of opportunity.\textsuperscript{154} According to this principle, the Prosecutor has discretion not to proceed with an investigation or prosecution even if there is a reasonable basis to believe (or which applicable evidentiary standard is used) that a crime has been committed.\textsuperscript{155} This principle can be said to act as a safeguard against a mechanical approach to the decision making of the Prosecutor.\textsuperscript{156} Compared with the principle of legality, the principle of opportunity means that prosecution is not mandatory by law even if the applicable evidentiary standard is met.

It should be noted that there are exceptions to the principle of legality in the national legal systems in which it is the main rule.\textsuperscript{157} The same can be said about the principle of opportunity. For example, a number of decisions by the European Court of Human Rights (ECtHR) obligate State parties to investigate and prosecute in murder cases.\textsuperscript{158} As a consequence, this would to an extent limit the discretion of the Prosecutor where the principle of opportunity is the main rule. The point is that the Prosecutor’s decision making is not necessarily directed by only one of the two principles, but in a general sense the scope of prosecutorial discretion differs. These two principles – the principle

\textsuperscript{149} Bohlander, p. 69.
\textsuperscript{150} Bohlander, p. 69.
\textsuperscript{151} Bohlander, pp. 25, 69.
\textsuperscript{152} Bohlander, p. 69.
\textsuperscript{153} Bohlander, p. 69.
\textsuperscript{154} Olásolo, p. 112. Olásolo uses the term “political discretion” instead of “the principle of opportunity”.
\textsuperscript{155} Olásolo, p. 112.
\textsuperscript{156} Webb, p. 312.
\textsuperscript{157} Webb, pp. 310-311.
\textsuperscript{158} Safferling et al., pp. 62-63.
of legality and the principle of opportunity – will be used as a point of reference when the discretion of the Prosecutor of the ICC is discussed below.

7.3 Different Interpretations of Article 15

Article 15 ICCSt can be described as being ambiguous when it comes to the discretion of the Prosecutor. On the one hand, Article 15(1) ICCSt stipulates that the Prosecutor may initiate investigations proprio motu. On the other hand, Article 15(3) ICCSt stipulates that when the Prosecutor concludes that there is a reasonable basis to proceed, the Prosecutor shall submit a request for authorization of an investigation. As noted above, the procedure under Article 15(1)-(2) ICCSt is referred to as a preliminary examination because an investigation has not yet started.

deGuzman argues that Article 15 ICCSt can be interpreted so that it includes an examination stage between the receiving of a communication and the conclusion that there is a reasonable basis to proceed with an investigation. This intermediate examination means that when the Prosecutor receives a communication, she can decide not to actually conclude that there is a reasonable basis to proceed with an investigation if the potential cases in a situation are relatively less serious than other potential cases. This is because a duty for the Prosecutor to seek authorization would mean that it is not the Prosecutor who triggers the jurisdiction, but the person or organisation who sends the communication. This interpretation seems to suggest that during the intermediate examination, the Prosecutor compares the potential cases in one situation with the potential cases in another situation. The Prosecutor should then conclude that there is a reasonable basis to proceed with an investigation in the situation in which the potential cases are relatively graver. The Prosecutor is however not required to reach a conclusion that there is a reasonable basis to proceed in the other situation in which the potential cases are less grave.

As noted above, the preliminary examination will continue until the Prosecutor is able to conclude whether or not there is a reasonable basis to proceed with an investigation. This interpretation of Article 15 ICCSt seems to suggest that the

159 deGuzman, Gravity and the Legitimacy of the International Criminal Court (Henceforth referred to as: deGuzman 2009), p. 1411.
160 deGuzman 2009, p. 1411.
161 deGuzman 2009, p. 1411.
162 deGuzman 2009, pp. 1410-1411.
Prosecutor is not obliged to close the preliminary examination even if the Prosecutor is able to conclude that there is, or is not, a reasonable basis to proceed with an investigation. One issue with this interpretation is that Article 15(3) ICCSt stipulates that the Prosecutor shall seek an authorization from the Pre-Trial Chamber when she concludes that there is a reasonable basis to proceed with an investigation. Schabas argues that the interpretation of Article 15 ICCSt, which means that the Prosecutor is required to seek authorization the moment the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, is not a realistic interpretation.\textsuperscript{163} However, it is doubtful that the Prosecutor actually is compelled to open an investigation based on the information alone. When the Prosecutor receives information concerning any alleged crimes, a preliminary examination is not initiated at once. It is the Prosecutor who analyzes the seriousness of the information she has received, and that analysis is conducted according to the factors in Article 53(1)(a)-(c) ICCSt. The information itself does not oblige the Prosecutor to trigger the jurisdiction and to open a preliminary examination of a situation; it is the Prosecutor’s analysis of the information that may lead to the initiation of a preliminary examination.\textsuperscript{164}

On the other hand, both Goldston and Rastan argue that when the Prosecutor initiates a preliminary investigation according to Article 15(1) ICCSt and concludes that there is a reasonable basis to proceed under Article 15(3) ICCSt, the Prosecutor shall request an authorization.\textsuperscript{165} This means that the decision by the Prosecutor is governed by the criteria in Article 53(1)(a)-(c) ICCSt and if the criteria are met, the Prosecutor is obliged to seek an authorization to open an investigation.

These two interpretations of Article 15 ICCSt cannot both be right. The interpretation by deGuzman has the effect that the Prosecutor does not have to seek an authorization to open an investigation despite that the criteria in Article 53(1)(a)-(c) ICCSt are fulfilled. The other interpretation by Goldston and Rastan has the effect that the Prosecutors decision is guided by the factors in Article 53(1)(a)-(c) ICCSt and if they are fulfilled the Prosecutor has a duty to seek authorization to open an investigation. The main issue seems to be whether the Prosecutor can decide not to open an investigation despite that Article 53(1)(a)-(c) ICCSt are fulfilled. Both interpretations

\textsuperscript{163} Schabas, \textit{The International Criminal Court: Struggling to Find its Way} (henceforth referred to as: Schabas 2012), p. 257.
\textsuperscript{164} See Knoops, pp. 7-8.
\textsuperscript{165} See Goldston, pp. 390-392, Rastan 2010, pp. 597-598.
refer to the notion of sufficient gravity, but gravity seems to be used differently. Article 17(1)(d) ICCSt stipulates that a case is inadmissible if it is not of sufficient gravity. As Pre-Trial Chamber states, admissibility at the situation stage should be assessed against criteria defining a potential case.\(^{166}\) Therefore, the potential cases must meet the gravity threshold stipulated in Article 17(1)(d) ICCSt, not the situation as such. Relative gravity\(^{167}\) is the notion that the Prosecutor has discretion to choose among the situations and potential cases that meet the threshold in Article 17(1)(d) ICCSt, and may proceed to open an investigation in the situation that is relatively graver than the other.\(^{168}\) Relative gravity can therefore in part be described as an admissibility assessment where the gravity of one situation is assessed in the light of another situation. Relative gravity should then be used as a filtering tool when there is several situations which merit investigation.

These two interpretations of Article 15(3) ICCSt seem to be similar to the two principles that guide the Prosecutor in national legal systems. The similarity relates to prosecutorial discretion and whether the Prosecutor of the ICC is legally obliged to seek an authorization under Article 15(3) ICCSt once the factors in Article 53(1)(a)-(c) ICCSt are met. If the ICC Prosecutor’s decision under Article 15(3) ICCSt is guided by the principle of legality, she does not have discretion to choose whether to seek authorization or not. According to this principle, the Prosecutor is legally obliged to seek authorization. If the ICC Prosecutor’s decision under Article 15(3) ICCSt is guided by the principle of opportunity, she has discretion to choose whether or not to seek authorization to open an investigation. In turn, relative gravity would then be an instrument that guides the Prosecutor when she exercises discretion according to the principle of opportunity.

### 7.3.1 Limited Resources

A plain reading of Article 15 ICCSt does point to the conclusion that the Prosecutor has a duty to request for an authorization to open an investigation once the factors in Article 53(1)(a)-(c) ICCSt are fulfilled. The other interpretation of Article 15 ICCSt – that the Prosecutor has discretion not to open an investigation despite that the factors in Article

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\(^{166}\) Kenya Article 15 case, paras 48, 50.

\(^{167}\) The concept “relative gravity” is used by deGuzman; the same term will be used in this thesis, see deGuzman 2009, p. 1403.

\(^{168}\) deGuzman 2009, p. 1403.
The limited resources of the ICC mean that it is not possible for the Prosecutor to investigate every situation that is admissible.\textsuperscript{169} The former Prosecutor of the ICC has brought up this issue, asking whether the Prosecutor must “initiate an investigation in all situations that appear to fall within the jurisdiction of the Court? Or, should the Prosecutor select amongst them the most grave and urgent situations within the limits of his resources?” The former Prosecutor also stated that a so-called resource driven approach would mean that the Prosecutor focuses on the worst crimes and investigates two or three situations each year.\textsuperscript{170} A resource driven approach would then suggest that the Prosecutor would not investigate every situation that fulfils the factors in Article 53(1) (a)-(c) ICCSt. In contrast, the former Prosecutor also discusses a so-called case specific approach. A case specific approach would suggest that the Prosecutor opens an investigation into every situation, even those that are of relatively lesser gravity.\textsuperscript{171} These statements by the former Prosecutor show that the ICC must act within the limits of its resources. They also suggest that the resources available to the ICC could be a factor the Prosecutor must consider when she decides to open an investigation into a situation.

\textit{7.3.2 The Preliminary Examination Concerning Iraq}

The question is then if the Prosecutor uses any of these two interpretations when deciding whether or not to open an investigation. The Prosecutor decided not to seek an authorization to open an investigation in Iraq. Since Iraq is not a State Party to the ICCSt and has not lodged a declaration accepting the jurisdiction of the ICC according to Article 12(3) ICCSt, the situation concerned British nationals. The Prosecutor stated that the selection of situations is made in accordance with the criteria stipulated in Article 53 ICCSt.\textsuperscript{172} The Prosecutor also stated that the “number of potential victims of crimes within the jurisdiction of the Court in this situation […] was of a different order

\textsuperscript{170} Statement by Luis Moreno-Ocampo, Informal meeting of Legal Advisors of Ministries of Foreign Affairs, New York, 24 October 2005, p. 8.
\textsuperscript{171} Ibid., p. 9.
\textsuperscript{172} Ibid., p. 8.
\textsuperscript{173} ICC OTP, Response to Communications Concerning Iraq, 9 February 2006, p. 8.
than the number of victims found in other situations under investigation”.\textsuperscript{174} Furthermore, the Prosecutor stated that the “situation did not appear to meet the required threshold of the [ICCSt]”.\textsuperscript{175}

Schabas states that the reasons given by the Prosecutor seems to confuse the difference between a situation and a case.\textsuperscript{176} However, by using the reasoning of the Pre-Trial Chamber in the Kenya Article 15 case, one could argue that the admissibility assessment at the situation stage should be made in relation to a potential case. If the number of potential victims – and the alleged crimes of the perpetrators – did not meet the threshold in Article 17(1)(d) ICCSt, the potential cases would not be admissible. Since the object of the admissibility assessment at this stage is the potential case, the reasoning by the Prosecutor could be in line with the interpretation that the Prosecutor shall seek authorization to open an investigation when the factors in Article 53(1)(a)-(c) ICCSt are met.

Even so, the Prosecutor also stated that the potential victims in Iraq were not as many as compared to other situations under investigation by the Prosecutor. If it is true that the Prosecutor shall seek authorization to open an investigation when the factors in Article 53(1)(a)-(c) ICCSt are met, it is not necessary to make a comparison with other situations currently under investigation by the Prosecutor. This is because the admissibility assessment under Article 53(1)(b) ICCSt is not made in relation to the situation as such, but in relation to a potential case within the situation. If the gravity assessment at this stage concerns a potential case, there is no room to also consider the gravity of a certain situation compared to other situations. This seems to suggest that the Prosecutor also to some extent considered relative gravity when deciding not to seek authorization to open an investigation.\textsuperscript{177}

The statement about the required threshold in the ICCSt is also confusing. Since it can be suggested that the Prosecutor both focuses on the gravity threshold in Article 17(1)(d) ICCSt and the concept of relative gravity, it is difficult to determine which one the Prosecutor based his decision on. However, it can be even more confusing, since it seems that there is a third way the Prosecutor interprets gravity in Article 17(1)(d) ICCSt. The Prosecutor has also stated that all crimes under ICCSt are grave but since

\textsuperscript{174} ICC OTP, Response to Communications Concerning Iraq, 9 February 2006, p. 9.
\textsuperscript{175} ICC OTP, Response to Communications Concerning Iraq, 9 February 2006, p. 9.
\textsuperscript{176} Schabas 2010b, p. 546.
\textsuperscript{177} See deGuzman 2009, pp. 1432-1433.
gravity is also a question of admissibility, it could be seen to “reflect the wish of our founders that the ICC should focus on the gravest situations”.\footnote{178 ICC OTP, Statement by Luis Moreno-Ocampo, Informal meeting of Legal Advisors of Ministries of Foreign Affairs, New York, 24 October 2005, pp. 8-9.} This would then mean that the gravity threshold in Article 17(1)(d) ICCSt does not only contain a threshold, but can be interpreted to include some form of direction. However it is difficult to determine what the former Prosecutor actually means by this statement. There are no references to the \textit{travaux préparatoires} and that any States expressed such a wish during the negotiations of the ICCSt. One option might be to look at the preamble paragraph four and that the most serious crimes of concern to the international community must not go unpunished. But the preamble refers to “crimes” and does not necessarily imply that the Prosecutor should focus on the gravest situations. Furthermore, Article 17(1)(d) ICCSt stipulates that a case must be of sufficient gravity. The admissibility assessment concerns a case, or a potential case during the preliminary examination. If the potential cases in two different situations meet the gravity threshold, would then the admissibility assessment under Article 17(1)(d) ICCSt imply that the gravest situation should be prioritized? The conclusion is arguably difficult to reach if it is based only on the wording of Article 17(1)(d) ICCSt. Especially since it is not explained how the Prosecutor reached this conclusion based on anything else than Article 17(1)(d) ICCSt.

7.3.3 \textit{Implications After the Kenya Article 15 Case}

Before the Kenya Article 15 case it seemed to be unclear how the admissibility assessment should be made at this stage. For example, the Pre-Trial Chamber noted that the gravity assessment made by the Prosecutor in the submission concerned the gravity of the situation as a whole.\footnote{179 Kenya Article 15 case, para 189.} The judgement can be described as having a case-specific approach in respect of the admissibility assessment; especially since both the complementarity assessment and gravity assessment were based on judgements concerning the admissibility of a case.

The question is if this means that the interpretation of Article 15 ICCSt to any extent has been clarified. The Policy Paper on Preliminary Examinations\footnote{180 ICC OTP, Policy Paper on Preliminary Examinations, was made public in November 2013.} was made public in November 2013 and refers to this issue. In the policy paper it is clarified that if the Prosecutor concludes that there is a reasonable basis to proceed with an investigation
under Article 15(3) ICCSt, the Prosecutor has a legal duty to open an investigation.\(^{181}\) The policy paper also makes it clear that the factors in Article 53(1)(a)-(c) ICCSt are the only statutory factors that the Prosecutor shall consider when determining whether there is a reasonable basis to proceed with an investigation.\(^{182}\) Furthermore, the admissibility assessment concerns the potential case within the context of a situation.\(^{183}\) The Policy Paper on Preliminary examinations seems to suggest that the concept of relative gravity should not be considered when the Prosecutor determines whether there is a reasonable basis to proceed with an investigation or not. If the only statutory factors that shall be considered are the ones in Article 53(1) ICCSt – and Article 53(1) ICCSt is interpreted in the same way as the Pre-Trial Chamber did in the Kenya Article 15 case – there is no room to also consider the relative gravity of a situation. In other words, there is no room for such discretion if the Prosecutor has a legal duty to open an investigation once the criteria in Article 53(1)(a)-(c) ICCSt are met. Such discretion would not be in line with the wording of Article 15(3) ICCSt.

The door might not be entirely closed when it comes to some form of general gravity assessment of the situation as a whole. In the Côte d'Ivoire Article 15 case, the Pre-Trial Chamber noted that the gravity assessment “should be conducted in a general sense, as regards the entire situation, but also against the backdrop of the potential case(s) within the context of a situation”.\(^{184}\) However, The Pre-Trial Chamber did not explain what the gravity assessment of the entire situation includes. It can either be a gravity assessment of a situation that does not include a comparison with other situations, i.e. it is not a relative gravity assessment but rather an assessment of whether or not the gravity threshold has been met. Or it can be a gravity assessment of the situation that includes a comparison with the gravity of other situations, making it a relative gravity assessment. Still, when the Pre-Trial Chamber examines gravity under Article 17(1)(d) ICCSt, it does refer to Article 17(1)(d) ICCSt as a safeguard and a threshold.\(^{185}\) This suggests that Article 17(1)(d) ICCSt concerns whether or not the threshold has been met in relation to the situation, and does not include a relative gravity assessment.

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\(^{182}\) ICC OTP, Policy Paper on Preliminary Examinations, paras 5, 11.
\(^{183}\) ICC OTP, Policy Paper on Preliminary Examinations, paras 46, 59.
\(^{184}\) Côte d'Ivoire Article 15 case, para 202.
\(^{185}\) Côte d'Ivoire Article 15 case, para 201.
7.4 A Legal Duty to Investigate – Possible Consequences

The interpretation of Article 15(3) ICCSt, which means that the Prosecutor has a legal duty to seek an authorization once the factors in Article 53(1)(a)-(c) ICCSt, are fulfilled, cannot be separated from the fact that the ICC must operate within the limits of its economical resources. A hypothetical example can be used to demonstrate this. Suppose that the Prosecutor has received information pursuant to Article 15(1) ICCSt concerning two different situations. According to Article 15(2) ICCSt, the Prosecutor shall analyze the seriousness of the information received in relation to the two situations. Two preliminary examinations are opened and the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in both situations according to Article 15(3) ICCSt. According to this interpretation, the Prosecutor has a duty to seek an authorization from the Pre-Trial Chamber to start an investigation into both situations. However, suppose that due to economical constraints it is only possible for the Prosecutor to conduct an effective investigation if she focuses on only one situation. In other words, it is not feasible that the Prosecutor can effectively investigate any alleged crimes in both situations at the same time. The question is then if there are any methods available for the Prosecutor to solve the problem that are in line with this interpretation of Article 15(3) ICCSt.

One suggestion is that the Prosecutor can use Article 15(1)-(2) ICCSt and the fact that there is no time limit for when a preliminary examination must come to an end. This would mean that the Prosecutor seeks authorization to open an investigation in only one situation and declines to seek an authorization for the other investigation. However this solution is not acceptable. First, if the Prosecutor has concluded that there is a reasonable basis to proceed, she shall seek an authorization from the Pre-Trial Chamber. This solution would go against the wording of Article 15(3) ICCSt and the currently discussed interpretation of Article 15 ICCSt. Second, even if there is no time limit for when a preliminary examination must come to an end, there must reasonably be some time limit for when the Prosecutor must conclude whether or not there is a reasonable basis to proceed with an investigation. A preliminary examination cannot be conducted forever since it would probably constitute an abuse of prosecutorial power.\footnote{Olásolo, p. 124.}

Third, even if it were possible to use the preliminary examination as a prioritizing tool,
the question would then be on what grounds the Prosecutor concludes that an investigation should be opened in one situation and not in the other. Once again the discussion would concern whether the Prosecutor has discretion even if the criteria in Article 53(1)(a)-(c) ICCSt are fulfilled. If both situations fulfil the factors in Article 53(1)(a)-(c) ICCSt, then there must be some other criteria that guide the Prosecutor to conclude that one investigation into a situation must be prioritized over another. One could arguably suggest that one such criterion should be relative gravity.

Another suggestion is that the Prosecutor seeks authorization to open investigations into both situations. If the Pre-Trial Chamber authorizes the commencement of two investigations pursuant to Article 15(4) ICCSt, the problem still exists that the Prosecutor cannot effectively conduct investigations into two situations at the same time. This would be in line with the currently discussed interpretation of Article 15 ICCSt, but it also creates potential problems. First, since the ICC is a permanent international criminal court, it is difficult to make any predictions on whether any other situations might arise in the future. Since the Prosecutor has been authorized to open investigations in two situations, but can only conduct an effective investigation into one situation, there is a potential risk that any later investigations will overburden the Prosecutor. For example, the OTP stated in 2012 that the existing cases under investigation by the Prosecutor prevented the opening of a full investigation in Côte d'Ivoire. This statement implicates that the limited economical resources already restrain the work of the Prosecutor. The risk is therefore that the economical resources are insufficient and hinders the Prosecutor from conducting an investigation effectively.

A duty to seek authorization once the factors in Article 53(1)(a)-(c) ICCSt are fulfilled has the effect that the procedure under Article 15(3) ICCSt is more certain. But if there is a risk that investigations will overburden the Prosecutor it is not certain that an investigation will be conducted effectively, or that an investigation will be conducted at all. A legal duty to seek authorization to open an investigation seems to have the effect that the initial problem of selection is brought up at a later stage in the procedure laid down in ICCSt. Obviously it cannot remove the problem.

Second, even if the Prosecutor has been authorized to commence an investigation into the two situations, could the Prosecutor use any criteria to determine which

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187 Article 1 ICCSt.
investigation should be prioritized? This suggestion is similar to the example that the exclusion of a time limit for when a preliminary examination must come to an end could be used as a prioritizing tool. The effect would arguably be the same since the question is what criteria the Prosecutor would use in order to determine which investigation should have priority. There seems to be no guidance in ICCSt or RPE on this matter. One solution could be that the investigations are ordered according to which date the investigation was opened.

Another suggestion could be that the Prosecutor would initially prioritize the situations according to the gravity of the potential case or cases within the context of each specific situation. However, this is not a satisfactory solution either. As it has been noted above, the gravity assessment of potential cases consists of a quantitative and a qualitative approach. The qualitative factors – the scale, nature, manner of commission, and impact of the crime – are arguably so flexible that they cannot offer any real guidance in determining which potential cases should be the object of an investigation. To use the qualitative factors and compare the different investigations with each other would be even more problematic. Besides, this suggestion is similar to the notion of relative gravity. Relative gravity is used as a prioritizing tool during the preliminary examination stage by comparing the relative gravity of situations, meaning that the graver situation would have priority. Comparing investigations in situations by using the gravity of potential cases within the context of a situation would arguably impose the same problems. Therefore, this suggestion also has the effect that the initial problem of selection is brought up at a later stage in the procedure laid down in the ICCSt.

To sum up, it seems that the issue of selection is certainly not solved by the currently discussed interpretation of Article 15 ICCSt. That the Prosecutor has a duty to seek authorization to commence an investigation pursuant to Article 15(3) ICCSt once the factors in Article 53(1)(a)-(c) ICCSt are fulfilled, could potentially have the effect that investigations would overburden the Prosecutor. If the Prosecutor cannot effectively investigate two or more situations at the same time due to economical constraints, the issue of selection still remains: what criteria would the Prosecutor use in order to select which situations that should be investigated? This interpretation of Article 15 ICCSt is not in itself a solution, and the question is also if a legal duty to investigate addresses the problem of selectivity.
The analysis up to this point seems to suggest that the Prosecutor has a legal duty to open an investigation once the criteria in Article 53(1)(a)-(c) ICCSt are met. However, even if Article 15(3) ICCSt stipulates that the Prosecutor shall seek authorization from the Pre-Trial Chamber when there is a reasonable basis to proceed, the factors in Article 53(1) ICCSt can still grant the Prosecutor discretion. As noted above, the former Prosecutor of the ICC has stated that the decision to open an investigation is based on legal criteria. This view – that the decisions by the Prosecutor are based on law and do not involve political considerations – can also be found in other materials. For example, The Prosecutor has also stated that the decision to initiate an investigation into a situation is guided by the legal criteria in the ICCSt. Furthermore, the current Prosecutor has stated that the preliminary examination is conducted in accordance with “clear and sound legal criteria established by the [ICCSt]”.

The factors in Article 53(1)(a)-(c) ICCSt suggests that the discretion of the Prosecutor differ depending on which criterion is used. For example, the terms interests of justice and gravity are not defined in ICCSt or RPE. Furthermore, the policy paper on the interests of justice concerns how the Prosecutor understands the term. The consequences of a broad discretion in some of the factors in Article 53(1)(a)-(c) ICCSt will be discussed under this section. One of the issues of broad discretion is whether the criteria in Article 53(1)(a)-(c) ICCSt are all legal criteria, or if any criteria also may include political considerations.

8.1 Factors in Article 53(1)(a)-(c)

The extent of prosecutorial discretion may vary in different national legal systems, depending on whether the Prosecutor is guided by the principle of legality or the principle of opportunity. Whether or not the Prosecutor in a national legal system has discretionary powers to choose whom to prosecute, it is in general presumed that all serious crimes against the person will be prosecuted. The two principles in domestic

189 Cryer et al., p. 444.
192 ICC OTP, Speech of Mrs Fatou Bensouda, Abuja, Nigeria, 24 February 2014, p. 3.
193 Schabas 2010b, p. 542.
legal systems are however difficult to compare with prosecutorial discretion in ICC. For example, the ICC shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern. At the same time, a case is inadmissible if it is not of sufficient gravity. Also, even if the gravity threshold is met in Article 17(1)(d) ICCSt, the Prosecutor may conclude that an investigation would not serve the interests of justice under Article 53(1)(c) ICCSt. One could argue that it may be difficult to visualize a situation where a national Prosecutor would not open any investigations concerning several alleged murders because the crimes are not of sufficient gravity or that it would not be in the interests of justice. A comparison with national legal systems is also difficult since it is generally not expected that every perpetrator of a serious international crime will be prosecuted in an international criminal tribunal. One example is the situation in Rwanda, over which the ICTR has jurisdiction, which involved tens of thousands of perpetrators. The sheer number of alleged crimes in the situation of Rwanda means that it would not be possible to try every alleged perpetrator in the ICTR.

Many Articles in ICCSt do stem from either the common law or the civil law tradition. It was not uncommon that different domestic legal traditions were used as the basis for different arguments during the negotiations of the ICC. On a general note, Prosecutors (and Judges) have different functions in the two legal traditions. However, because it is difficult to compare the procedure in the ICC with national legal systems, an Article in the ICCSt is not necessarily interpreted in the same way as the rule in domestic law from which it originates. The procedural law of the ICC may be based on both common law and civil law, but it can be described as being unique because of its international features. One example of this international feature is that the ICC cannot enforce its own decisions or judgements. State Parties have an obligation to cooperate with the ICC, but it is still the State Party that enforces any

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194 See Articles 1 and 5 ICCSt.
195 See Article 17(1)(d) ICCSt.
196 Schabas 2010b, p. 542.
197 Jallow, p. 150.
198 Jallow, p. 150.
199 See discussion in Ambos, pp. 5-10.
200 Interview with Hakan Friman, 6 May 2014, the views expressed in the interview are solely his own and do not reflect those of the Swedish Government or the Swedish Ministry of Justice.
201 Bibas & Burke-White, p. 695.
202 See for example Mégret, pp. 58-60. See also Bibas & Burke-White, pp. 693-696.
decision by the ICC.\textsuperscript{203} A consequence of the international aspect is that a solution that works in national legal systems, for example the two different principles that guide the Prosecutor, might not work in the ICC. The international features of the ICC do not only have an effect on separate Articles in the ICCSt, since the international features arguably shapes the procedural law of the ICC on a holistic level. That is why an Article in the ICCSt cannot necessarily be interpreted in the same way as a rule in domestic law. Therefore, it is also necessary to consider what consequences a suggested interpretation of an Article in the ICCSt has for the procedural law of the ICC on the whole. For example, the consequences of the suggested interpretation of Article 15(3) ICCSt should also be evaluated in light of the factors in Article 53(1)(a)-(c) ICCSt, which will be made below.

\textbf{8.2 Gravity and the Interests of Justice}

One author has suggested that the factors in Article 53(1)(a)-(c) ICCSt also can be examined using the principle of legality and the principle of opportunity.\textsuperscript{204} Since the terms gravity and the interests of justice are not defined in ICCSt or RPE, the idea is that those two terms are similar to the principle of opportunity.\textsuperscript{205} The similarity seems to be that the Prosecutor’s discretion as such is not limited by a definition, and if it existed it would restrict the Prosecutor when she exercises discretion. As Olásolo puts it: “the organ entrusted with it has the power to define, and re-define, the ultimate political goals that directs its analysis of the convenience of carrying out a certain activity.”\textsuperscript{206} This statement can be compared to the question of whether the interests of justice should be interpreted broadly or narrowly. As noted above, it is uncertain how Article 53(1)(c) ICCSt should be interpreted in this respect. However, the question also concerns whether the Prosecutor’s discretion can be described as being very broad, or if it is in fact unlimited. For example, Olásolo states that the Prosecutor’s discretion is unlimited, while Lovat states that the Prosecutor has a significant scope of discretion.\textsuperscript{207} It is especially the notion of unlimited discretion that can be evaluated in light of the suggestion that the decisions by the Prosecutor are not only based on law. Therefore,

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{203} See Article 86 ICCSt.
\item \textsuperscript{204} Olásolo, pp. 132-136.
\item \textsuperscript{205} Olásolo, pp. 135-136.
\item \textsuperscript{206} Olásolo, p. 111.
\item \textsuperscript{207} Olásolo pp. 136-141, Lovat, p. 276.
\end{itemize}
\end{footnotesize}
whether the Prosecutor’s discretion is very broad or unlimited will be used as two different concepts in this discussion.

There are also some principles in the ICCSt that the Prosecutor observes during the preliminary examination. These are the principles of independence, objectivity and impartiality. The principle of independence can be found Article 42 ICCSt. The Prosecutor shall act independently as a separate organ of the ICC and a member of the OTP shall not seek or act on instructions from any external source. The principle of independence also means that the Prosecutor must not make decisions based on any known or presumed wishes of any other party. States, NGOs or other organs of the ICC must not indirectly influence the preliminary examination. The principle of objectivity can be found in Article 54(1) ICCSt and states that the Prosecutor shall investigate incriminating and exonerating circumstances equally in order to establish the truth. The principle is also relevant for the preliminary examination, which, among other things, means that the Prosecutor uses a standardized method of analysis. Lastly, the principle of impartiality is derived from Article 21(3) ICCSt. This principle means that the methods and criteria that are used during the preliminary examination are the same regardless of which states or persons it might relate to.

These principles are observed by the Prosecutor during the preliminary examination according to the policy paper, and are therefore relevant for the factors in Article 53(1)(a)-(c) ICCSt. In general, the principles seem to represent an objective, standardized approach to the decision-making during the preliminary examination. For example, geographical balance is not a criterion the Prosecutor uses when she determines if an investigation should be opened into a situation.

8.2.1 A Limitless Discretion?
A selective approach to criminal proceedings also opens up for criticism, e.g. that the decision by the Prosecutor to initiate an investigation or not is based on political considerations. Such criticism, or allegations of political bias, needs to be separated

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209 Article 42(1) ICCSt.
211 ICC OTP, Policy Paper on Preliminary Examinations, paras 30, 32.
from an actual analysis of whether any Articles in the ICCSt opens up for prosecutorial discretion which is not based on legal criteria. Since not every crime can be investigated or prosecuted by the ICC, selection is necessary. As a consequence, not everybody will be pleased regardless of what the decision of the Prosecutor is.215 Another thing, which must be separated from an analysis of whether ICCSt opens up for prosecutorial discretion that is not entirely based on legal criteria, is that the Prosecutor’s decisions in themselves have consequences on a political level.216

The boundaries of prosecutorial discretion regarding gravity and the interests of justice are difficult to assess because of the absence of definitions in the ICCSt and RPE. One commentator argues that the term gravity makes the Prosecutor’s decisions look more judicial than they actually are, and that the issue of selection cannot be explained by only referring to the use of legal criteria.217 Another commentator argues that the terms gravity and interests of justice could turn the Prosecutor into a policy maker.218 For example, it is the legislating State parties that should address if the interests of justice under Article 53(1)(c) ICCSt should be interpreted in a broad or narrow sense, since it is a policy choice that the Prosecutor should not make.219 Another commentator argues that the sub-factors in Article 53(1)(c) ICCSt – the gravity of the crime and the interests of victims – suggest that the Prosecutor’s discretion is not so broad that it is unlimited.220 The wording of Article 53(1) ICCSt also means that the Prosecutor is required to consider these sub-factors. Even though gravity is not defined in ICCSt, there are qualitative factors in Regulation 29(2) RegP that the Prosecutor shall consider when she assesses the gravity of the alleged crimes.221 If the decisions by the Prosecutor are based on political considerations, one commentator argues that it would be necessary to show how and why the decisions by the Prosecutor to open an investigation contradict the factors in Article 53(1)(a)-(c) ICCSt.222

One question is whether a wide discretion actually leads to decisions that are based in whole or in part on political considerations. The Prosecutor’s discretion concerning gravity and the interests of justice is arguably very wide. However, there are reasons for

216 Rastan 2010, p. 599.
217 Schabas 2010b, pp. 548-549.
218 Olásolo, pp. 136-137, 141. See also supra note 197.
219 Olásolo, pp. 141, 146-147.
220 Stahn, p. 717.
221 See also Kenya Article 15 case, paras 61-62.
222 Rastan 2010, p. 575.
having prosecutorial discretion. It can be said to have its basis in the need for a selective approach to criminal proceedings rather than an automatic approach.\textsuperscript{223} One reason has to do with the potential reach of the jurisdiction of the ICC. Something that international criminal tribunals have in common is that they have been established after a very large number of atrocities have been committed and subsequently have potential jurisdiction over a vast number of cases.\textsuperscript{224} The ICC is a permanent international criminal tribunal and the jurisdiction over the crimes listed in the ICCSt has potentially a global reach.\textsuperscript{225} Another reason is that the ICC has limited resources. Since the ICC potentially has jurisdiction over a large number of cases, it would not be possible to investigate and prosecute every alleged crime due to economical constraints.\textsuperscript{226} Even in a single situation it is not necessarily feasible that every perpetrator will be prosecuted due to the many potential cases.

In literature it has been suggested that the Prosecutor develops prosecutorial guidelines or standards in order to deal with the uncertainty concerning her discretion.\textsuperscript{227} As a consequence, the Prosecutor would limit her own discretion by developing such guidelines.\textsuperscript{228} It should be noted that guidelines created by the Prosecutor does not have the status of law according to the ICCSt. Article 21 ICCSt – which deals with the applicable law – does not mention guidelines as such. One reason for developing guidelines is that the Prosecutor’s decisions can be compared with the published guidelines, which would promote a uniform method for decision-making.\textsuperscript{229} However, guidelines cannot be too specific or too flexible.\textsuperscript{230} If the guidelines are too specific, the Prosecutor could limit her own discretion to such an extent that discretion cannot be exercised when it is actually necessary. If the guidelines are too flexible, one could argue that the guidelines offer no guidance at all because of the lack of any certainty. The OTP has published a number of policy papers. The OTP has published a policy paper in which the Prosecutor’s understanding of the interests of justice is explained.\textsuperscript{231} The OTP has also published a policy paper that explains how the

\textsuperscript{223} Jallow, p. 145.
\textsuperscript{224} Brubacher, p. 75.
\textsuperscript{225} See Articles 1, 5, 12(1)-(2) and 13(b) ICCSt.
\textsuperscript{226} Brubacher, p. 76.
\textsuperscript{227} See for example Danner, pp. 541-542.
\textsuperscript{228} Greenawalt, p. 651.
\textsuperscript{229} Danner, p. 541.
\textsuperscript{230} Danner, p. 550.
Prosecutor will conduct a preliminary examination pursuant to the ICCSt. An example of a cautious approach is that it is mentioned in the Policy Paper on the Interests of Justice that the Prosecutor “will not speculate on abstract scenarios”. This is most likely because each situation over which the ICC can exercise jurisdiction is unique.

Another aspect of prosecutorial discretion is that it is not possible to separate the role of the Prosecutor from the role of the Chambers. Under Article 15(3)-(4) ICCSt, authorization by the Pre-Trial Chamber is required when the Prosecutor concludes that there is a reasonable basis to proceed with an investigation. Furthermore, when the Prosecutor concludes that there is not a reasonable basis to proceed with an investigation, and the decision is based only on Article 53(1)(c) ICCSt, the Pre-Trial Chamber may review the decision by the Prosecutor according to Article 53(3)(b) ICCSt. One argument is that the decisions by the Chambers might restrict and clarify the Prosecutor’s discretion. The Pre-Trial Chamber’s interpretation of the factors in Article 53(1)(a)-(c) ICCSt could then limit and clarify the Prosecutor’s possibilities to interpret the same factors. For example, the uncertainty surrounding the gravity assessment at the situation stage under Article 17(1)(d) ICCSt was, to some extent, clarified in the Kenya Article 15 case. However, the problem of flexibility and certainty is also present here; any legal test formulated by the Pre-Trial Chamber must consider this problem. One example of an interpretation that is arguably too rigid – in relation to a case – is the Pre-Trial’s interpretation of gravity under Article 17(1)(d) ICCSt, which was rejected by the Appeals Chamber. The distinctive nature of each situation over which the ICC has jurisdiction is again something that may complicate the issue of flexibility and certainty.

These two examples do suggest that the Prosecutor’s discretion is not as such unlimited. Especially the concept of a judicial review suggests that prosecutorial discretion is in a way controlled by the Judges. These two possible restraints on

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235 Rastan 2010, p. 598 and footnote 99 in the article.
236 Kenya Article 15 case, paras 59-61.
237 Greenawalt, p. 659.
238 AC, Judgement on the Prosecutor’s appeal against the Pre-Trial Chamber I entitled “Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58”, ICC-01/04-169, 13 July 2006, paras 73-76.
Prosecutorial discretion could be used to answer some of the questions concerning the scope and limits of prosecutorial discretion at the preliminary examination stage. What is clear is that the Prosecutor only considers the factors in Article 53(1)(a)-(c) ICCSt in order to determine if there is a reasonable basis to proceed with an investigation.\textsuperscript{239} The issue of selection must therefore have its basis in those factors. One commentator argues that since gravity and the interests of justice opens up for prosecutorial discretion, the Prosecutor could restrict her own discretion through guidelines, or the Chambers could restrict and clarify the Prosecutor’s discretion through judgements.\textsuperscript{240} Guidelines and judgements are then tools that could clarify how the Prosecutor should exercise her broad discretion under Articles 17(1)(d) and 53(1)(c) ICCSt.

The argument seems to be that guidelines and judgements can clarify how to apply an unclear and ambiguous Article in ICCSt. One could argue that if it is unclear how a legal provision should be interpreted, it does not mean that the application of a legal provision is based on political considerations. For example, the general principles that the Prosecutor shall consider during the preliminary examination do suggest that each situation should be examined separately and on its own merits. In other words, situations are examined according to an objective standardized approach and the Prosecutor does not take into consideration where she has previously opened investigations. Such a standardized approach, in combination with the Prosecutor’s and the Judges’ ability to clarify and limit prosecutorial discretion, means that the factors in Article 53(1)(a)-(c) ICCSt represent legal objective criteria. It should be noted that the possibility of a politically motivated decision by the Prosecutor to open an investigation is not in itself mitigated just because the factors in Article 53(1)(a)-(c) ICCSt represent legal criteria. Broad prosecutorial discretion may open up for exploitation, but the judicial review of the Pre-Trial Chamber is a safeguard against this.

8.2.2 Prosecutorial Discretion as a Necessity
The proposed argument is that guidelines and judgements can clarify the exercise of prosecutorial discretion. One could therefore argue that the Prosecutor’s exercise of discretion under Articles 17(1)(d) and 53(1)(c) ICCSt does not lead to decisions that are based on political considerations. Prosecutorial discretion represents the idea that the Prosecutor can make

\textsuperscript{239} ICC OTP, Policy Paper on Preliminary Examinations, paras 5 and 11.
\textsuperscript{240} Rastan 2010, p. 598, and footnote 99 in the article.
decisions autonomously. In addition, Goldston states that prosecutorial discretion means that the Prosecutor must apply her judgement when she makes a decision. Prosecutorial discretion then seems to reflect the issue that a legal provision cannot always give clear answers. When an Article provides for discretion, and the Prosecutor subsequently makes a decision based on judgement, she does not apply the law in a mechanical way. This distinction between a mechanical approach and a flexible approach to law based on judgement is essential. For example, the term “interests of justice” is used in several domestic legal systems because a legal provision cannot always give a clear answer. If it is always clear when and how a legal provision shall be applied, it can be applied in a mechanical way. But not every legal provision can or should be applied in a mechanical way, which is why prosecutorial discretion can be a necessary element when the law is applied. If legal certainty means that Articles 17(1)(d) and 53(1)(c) ICCSt are applied in a mechanical way, it is not a viable solution. Flexibility should not be sacrificed for total legal certainty. Naturally, if prosecutorial discretion means that the Prosecutor makes decisions that are based on her judgement, absolute legal certainty can never be achieved. In turn, when the Prosecutor exercises discretion it is not always entirely clear what the decision by the Prosecutor will be.

One commentator has suggested that the state parties to the ICCSt should address the policy issues under Article 53(1)(c) ICCSt and either amend the RPE or delete Article 53(1)(c) ICCSt. If the state parties clarify when an investigation is not in the interests of justice – i.e. when alternative justice mechanisms and amnesties could be an alternative to prosecution – Article 53(1)(c) ICCSt could be amended to address the policy choices made by the state parties. Some objections can be raised to this proposal. First, the drafters of the ICCSt could not agree on a specific test for when an investigation is not in the interests of justice. If the drafters of the ICCSt could not agree on a specific test then, one could argue that they would not be able to agree now. Second, opening up negotiations in order to amend Article 53(1)(c) ICCSt creates the risk that a vast array of other amendments to the ICCSt would be suggested. Since the drafters could not agree on a test for when an investigation is not in the interests of

242 Goldston, p. 403.
243 Schabas, 2010a, p. 663.
244 Olášolo, p. 147.
245 Olášolo, pp. 145-146.
246 Robinson, p. 483.
justice under Article 53(1)(c) ICCSt, it is up to the Prosecutor and the Judges of the ICC to interpret the Article.\textsuperscript{247} Third, it is difficult to determine how the policy choice should be formulated. To start with, it is not certain that the State Parties can come up with a better solution than the Prosecutor and the Judges of the ICC. Another issue is the risk that the policy choice made by the State Parties is either too rigid or too flexible. The policy choice made by the State Parties would most likely not have the effect that the Prosecutor is not able to exercise discretion. The difficulty is to formulate a policy choice that narrows and directs the Prosecutor’s exercise of discretion under Article 53(1)(c) ICCSt in a balanced way. The same problems would arguably be present if the State Parties would amend and narrow down Article 17(1)(d) ICCSt. A counter argument is that it is not automatically easier for the Prosecutor and the Judges of the ICC to narrow down the broad discretion in Articles 53(1)(c) and 17(1)(d) ICCSt. But this does not necessarily mean that the vagueness and ambiguity of Articles 53(1)(c) and 17(1)(d) ICCSt cannot be clarified by guidelines from the Prosecutor and judgements delivered by the Chambers, as discussed above.

One reason why prosecutorial discretion is necessary in the ICC is because the Prosecutor has the power to trigger the jurisdiction of the ICC. As noted above, jurisdiction is always triggered in relation to a situation. In short, the uniqueness, size and complexity of a situation combined with the limited resources of the ICC means that prosecutorial discretion is necessary. Therefore, the issue is not if the Prosecutor should be able to exercise discretion. The question is rather how the Prosecutor will or should exercise discretion under Articles 17(1)(d) and 53(1)(c) ICCSt. Whether or not the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, she must arguably be able to show how she reached that conclusion. In other words, it should be clear how she exercised prosecutorial discretion. That is why the Prosecutor’s decision not to seek an authorization for an investigation in Iraq is difficult to analyze. The Prosecutor could have reached the decision based on relative gravity, the gravity of the potential cases within the situation, or both. A solution is that the decision by the Prosecutor is compared with pre-determined criterions or standards that demonstrate to some degree how the Prosecutor exercises her discretion. For example, if it were clear that the Prosecutor did not open an investigation in Iraq because the potential cases did not meet the gravity threshold, the discussion on that

\textsuperscript{247} Robinson, p. 483.
decision would concern whether the potential cases did, or did not, meet the gravity threshold. This is however not possible, because it is not certain how the Prosecutor interpreted and applied “gravity”. Subsequently, it is not certain how the Prosecutor exercised discretion. Something very interesting is therefore that the Prosecutor has decided to re-open the preliminary examination of the situation in Iraq.\(^{248}\) It will not only be interesting to compare the upcoming decision by the Prosecutor concerning Iraq with the decision from 2006. It will also be interesting to analyze the upcoming decision in light of the Policy Paper on Preliminary Examinations. The Policy paper can then be used as a model to which the Prosecutor’s decision is compared. The policy paper does not define the interests of justice or gravity, but it clarifies the method that the Prosecutor uses during the preliminary examination. Since the Prosecutor’s discretion is very broad under Articles 53(1)(c) and 17(1)(d) ICCSt, it is important that the Prosecutor shows how she exercises her discretion.

Another reason why prosecutorial discretion is necessary under Articles 17(1)(d) and 53(1)(c) ICCSt has to do with the interpretation of Article 15(3) ICCSt. As noted above, the interpretation of Article 15(3) ICCSt means that the Prosecutor has a legal duty to seek authorization from the Pre-Trial Chamber to open an investigation, once the factors in Article 53(1)(a)-(c) ICCSt are met. Since the Prosecutor has a legal duty to open an investigation, she cannot exercise discretion under Article 15(3) ICCSt. As noted above, a legal duty to open an investigation may also overburden the Prosecutor with too many investigations. A solution is then that the Prosecutor exercises discretion at an earlier stage. The only factors the Prosecutor shall consider when she determines if there is a reasonable basis to proceed with an investigation are the factors in Article 53(1)(a)-(c) ICCSt.\(^{249}\) Consequently, these factors are then considered during the preliminary examination. This means that the Prosecutor can only address the issue of selection and prioritization when she exercises discretion under Articles 17(1)(d) and 53(1)(c) ICCSt during the preliminary examination. How the issue of selection will be addressed is difficult to determine since the interpretation of Articles 17(1)(d) and 53(1)(c) ICCSt is still uncertain. In addition, the Prosecutor should address the issue of selection at the

\(^{248}\) ICC OTP, Press Release, Prosecutor of the International Criminal Court, Fatou Bensouda, re-opens the preliminary examination of the situation in Iraq, 13 May 2014, last viewed 14 May 2014.

\(^{249}\) ICC OTP, Policy Paper on Preliminary Examinations, paras 5 and 11.
earliest stage possible in order to maximize the effective use of time and resources.\textsuperscript{250} Therefore, it seems that prosecutorial discretion is essential during the preliminary examination stage since the Prosecutor cannot exercise discretion under Article 15(3) ICCSt. Again, the issue is not whether the Prosecutor should be able to exercise discretion, but rather how she exercises discretion. Although prosecutorial discretion under Articles 17(1)(d) and 53(1)(c) ICCSt is very broad, the Prosecutor and the Judges of the ICC can reduce the uncertainty surrounding these Articles.

To summarize, the Prosecutor only considers the factors in Article 53(1)(a)-(c) ICCSt in order to determine if there is a reasonable basis to proceed with an investigation. The Prosecutor has a legal duty to seek an authorization for the commencement of an investigation once she concludes that the factors are fulfilled. In turn, The Prosecutor cannot exercise discretion under Article 15(3) ICCSt once the factors in Article 53(1)(a)-(c) ICCSt are fulfilled. As a consequence, prosecutorial discretion under Articles 17(1)(d) and 53(1)(c) ICCSt is necessary in order to address the issue of selection. The factors in Article 53(1)(a)-(c) ICCSt represent legal criteria, but the scope of prosecutorial discretion is still uncertain. It is therefore necessary to be aware of this uncertainty when an attempt is made to answer to the question in the introductory chapter. But an acknowledgment of this uncertainty also means that the Prosecutor and the Judges of the ICC can clarify the scope of prosecutorial discretion in the future. The question in the introductory chapter is relevant today, and will most certainly continue to be relevant in the future.

9 Concluding Remarks

On a general note, the examination of the Prosecutor’s initiation of an investigation \textit{proprio motu} demonstrates that there are still many questions that need answers. When the Prosecutor opens a preliminary investigation, the factors in Article 53(1)(a)-(c) ICCSt determines whether or not there is a reasonable basis to proceed with an investigation under Article 15(3) ICCSt. There are some issues that have been clarified. Jurisdiction and admissibility in Article 53(1)(a)-(b) ICCSt are assessed in relation to potential cases within the situation. The assessment is therefore not made in relation to

\textsuperscript{250} Interview with Hakan Friman, 6 May 2014, the views expressed in the interview are solely his own and do not reflect those of the Swedish Government or the Swedish Ministry of Justice.
the situation as such. Furthermore, the suggested interpretation of Article 15(3) ICCSt means that the Prosecutor has a legal duty to open an investigation once the factors in Article 53(1)(a)-(c) ICCSt are fulfilled. Since the admissibility assessment is made in relation to potential cases, Article 53(1)(b) ICCSt does not open up for a relative gravity assessment, which means that the relative gravity of situations are assessed and determines if there is a reasonable basis to proceed with an investigation. A legal duty to open an investigation cannot be separated from the fact that the ICC must operate within the limits of its economical resources. The issue of selection does not disappear if the Prosecutor cannot effectively conduct two or more investigations at the same time. The Prosecutor can therefore only address this problem during the preliminary examination. Since the factors in Article 53(1)(a)-(c) ICCSt are the only factors the Prosecutor shall consider in order to determine if there is a reasonable basis to proceed with an investigation, wide prosecutorial discretion is a necessary component to address the issue of selection.

Regarding prosecutorial discretion, the main issue is not that the prosecutor actually is able to exercise discretion but rather how the Prosecutor should exercise discretion. As a consequence, it is necessary that an examination of the Prosecutor’s initiation of an investigation proprio motu also include an examination of how the Prosecutor exercises discretion. This is because it is not enough to establish what factors the Prosecutor shall consider in order to conclude that there is a reasonable basis to proceed with an investigation, since the interpretation of gravity and the interests of justice is not entirely clear. The prosecutor cannot exercise discretion under Article 15(3) ICCSt if the factors in Article 53(1)(a)-(c) ICCSt are fulfilled. However, both gravity in Article 17(1)(d) ICCSt and the interests of justice in Article 53(1)(c) ICCSt lack a definition and opens up for wide prosecutorial discretion. The Prosecutor must then be able to show how she exercises prosecutorial discretion when she makes decisions. The OTP has published some Policy papers, which to some extent clarifies how the Prosecutor conducts a preliminary examination and the Prosecutor’s understanding of the factors in Article 53(1)(a)-(c) ICCSt. Furthermore, the Pre-Trial Chamber has also to some extent clarified how the factors in Article 53(1)(a)-(c) ICCSt should be interpreted. Prosecutorial discretion is wide under Articles 17(1)(d) and 53(1)(c) ICCSt, but it is not unlimited. The uncertainty that still exists surrounding the Prosecutor’s exercise of discretion shows that the ICC has to address this issue in the future.
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