

JTMX
Handbook

**NOTES ON THE ICC: PROCEDURE,
PRECEDENTS, STANDARDS AND
POLICY. PRELIMINARY
EXAMINATIONS**



Jorge Peniche Baqueiro

Attribution-ShareAlike 4.0 International
(CC BY-SA 4.0)

Creative Commons – Attribution-ShareAlike
4.0 International – CC BY-SA 4.0



This working document provides an overview of the International Criminal Court's (ICC) rules and standards on preliminary examinations. It does not seek to cover exhaustively all matters related to the International Criminal Court's procedure and case law nor to be regarded as an introductory piece to the field of International Criminal Law. Instead, it has been crafted from a practitioner standpoint.

By gathering and summarizing in the same receptacle some annotations on statutory, policy, or case law matters in the intricate stage of Preliminary Examinations, it aims serve as a tool for civil society organisations and victims' groups which are placed under a certainly complex situation when weighing how to push for a meaningful and strategic engagement with the Office of the Prosecutor in this very initial

and intricate stage towards accountability for international crimes - but one that withholds significant power on whether a formal investigation for the crimes they denounce would be warranted .

The document focuses on the policy papers and guidelines produced under the concluded tenures of Prosecutors Moreno Ocampo (2003-2012) and Fatou Bensouda (2012-2021). In July 2021, Prosecutor Karim A.A. Khan took over on the role as Prosecutor of the International Criminal Court. Although no new policy papers on the matter have been issued under Prosecutor Khan, in September 2022 the Office issued a piece that is central to the topics that are addressed in this working document -“Documenting international crimes and human rights violations for accountability purposes: Guidelines for civil society organisations”-. This relevant piece should certainly be taken into consideration when assessing the content of this working document, since it could shed light on new factors and variables to bear in mind when engaging with the Office of the Prosecutor.

Table of Contents

I. Notes on the procedure before the Court _____	6
II. Notes on the Prosecutorial Policy of OTP _____	37
III. Notes by case (short briefs) _____	46
IV. Notes on relevant topics _____	47
V. Summary of Relevant Dispositions _____	52

I. Notes on the procedure before the Court

1. Preliminary Examinations¹

Based on statutory requirements this stage aims to assess whether a situation warrants investigation based on statutory requirements. It does not comprise yet jurisdictional decisions by any judicial body or chamber of the Court.

The preliminary examination of a situation by the Office may be initiated based on: (a) information sent by individuals or groups, States, intergovernmental or non-governmental organisations; (b) a referral from a State Party or the Security Council; or (c) a declaration accepting the exercise of jurisdiction by the Court under article 12(3) lodged by a State which is not a Party to the Statute.

Article 53(1)(a)-(c) of the Statute establishes the legal framework for a preliminary examination. It provides that the Prosecutor shall consider: jurisdiction (temporal, material, and either territorial or personal jurisdiction); admissibility (complementarity and gravity); and the interests of justice. The standard of proof for proceeding with an investigation into a situation under the Statute is “reasonable basis.”

¹ *The only statutory reference to this stage is provided by articles 15(6) and 42(1) of the Rome Statute.

The Policy Paper on Preliminary Examinations (2013) is based on the Statute, the Rules of Procedure and Evidence, the Court Regulations, the Regulations of the Office of the Prosecutor (OTP), the Office's prosecutorial strategy, and policy documents. All situations not manifestly outside the jurisdiction of the Court are subject to a preliminary examination. This assessment derives from the *proprio motu* powers vested in the OTP (Article 15 powers).

Jurisdiction. It relates to whether a crime within the jurisdiction of the Court has been or is being committed. It requires an assessment of temporal jurisdiction, material jurisdiction, and either territorial or personal jurisdiction².

Admissibility. It comprises complementarity and gravity.

Complementarity. Complementarity involves an examination of the existence of *relevant national proceedings concerning the potential cases being considered for investigation by the Office*. This will be done bearing in mind the Office's policy of focusing investigative efforts on those most responsible for the most severe crimes under the Court's jurisdiction. The Office will assess their genuineness where relevant domestic investigations or prosecutions exist.

Gravity. Gravity includes an assessment of the scale, nature, and manner of commission of the crimes and their impact, bearing in mind the potential cases that would be likely to arise from an investigation of the situation.

Interests of justice. The "interests of justice" are a countervailing consideration. The Office must assess whether, considering the gravity of the crime and the interests of victims, there are substantial reasons to believe that an investigation would not serve the interests of justice.

↓ Table 1. Criteria to assess in a Preliminary Examination. (Article 53.1 (a)-(c) requirements)

Preliminary examination activities are conducted in the same manner. Irrespective of whether the Office receives a referral from a State Party or the Security Council or acts based on information on crimes obtained pursuant to article 15. The Office does not enjoy full investigative powers at this stage.³ Article 15.2 governs the scope of powers available in this

² Which entails that the crime occurs on the territory, or by a national, of a State Party or a non-State Party that has lodged a declaration accepting the jurisdiction of the Court, or otherwise arises from a situation referred by the Security Council acting under Chapter VII of the Charter of the United Nations.

³ A notable exception is testimony collected by the Office at the seat of the Court pursuant to article 15(2), Statute; rule 104, RPE.

stage. No timelines or deadlines are provided in the Statute for bringing a preliminary examination to a close.

Where a referral is accompanied by supporting documentation that identifies potential perpetrators, the Office is not bound or constrained by the information contained therein when conducting investigations in order to determine whether specific persons should be charged.⁴ The same applies to any information received under article 15.

1.2. Expected outcome

The Prosecutor may decide either to (i) decline to initiate an investigation where the information fails to satisfy the factors set out in article 53(1) (a)-(c); (ii) continue to collect information on crimes and relevant national proceedings in order to establish a sufficient factual and legal basis to render a determination or (iii) to initiate an investigation, subject to judicial authorization as appropriate.

Articles 15(3), 42(1), 53(1) of the Statute provide that a judicial authorisation for the commencement of investigations is required where the Prosecutor wishes to proceed *proprio motu* under article 15, which requires the Pre-Trial Chamber to be satisfied that there is a reasonable basis to proceed; article 15(4), Statute.

During its preliminary examinations, the Office of the Prosecutor seeks to contribute to ending impunity by encouraging genuine national proceedings, and the prevention of crimes.

1.3. General principles that govern the assessment: independence, impartiality, objectivity

- **Independence:** The OTP shall act independently of instructions from any external source. Decisions shall not be influenced or altered by presumed or known wishes (Articles 14, 15, and 42 of the Statute).

⁴ Article 14(1)-(2), Statute. As the Statute indicates, the scope of the Prosecutor's investigation may encompass any crimes within the jurisdiction of the Court that are of relevance to the situation; articles 12, 13, 14(1), 15, 42(1), and 54(1)(a), Statute; rule 44(2), RPE.

- **Impartiality:** Flows from article 21(3) of the Statute. Does not mean an “equivalence of blame” or that the Office must necessarily prosecute all sides in order to balance-off perceptions of bias. Instead, it requires the Office to focus its efforts on those most responsible for the most serious crimes within the situation in a consistent manner (OTP, Policy Paper on Preliminary Examinations, 2013, para. 65).
- **Objectivity:** The Office will investigate incriminating and exonerating circumstances equally in order to establish the truth. (Article 54(1) of the Statute).

1.4. Standard of proof

Reasonable basis to proceed with an investigation based on available information. This standard has been interpreted as to a “sensible or reasonable justification for a belief that a crime falling within the jurisdiction of the Court ‘has been or is being committed’”. (*Situation in the Republic of Kenya, decision pursuant to article 15 of the Rome Statute on the Authorization of an Investigation in the Situation of the Republic of Kenya, 2010, para 35*).

1.5. Notes on the assessment of certain requirements

1.5.1. Subject-matter jurisdiction

The Office considers, on the basis of available information, the relevant underlying facts and factors relating to the crimes that appear to fall within the jurisdiction of the Court; contextual circumstances, such as the nexus to an armed conflict or to a widespread or systematic attack directed against a civilian population, or a manifest pattern of similar conduct directed at the destruction of a particular protected group or which could itself effect such destruction; alleged perpetrators, including the *de jure* and *de facto* role of the individual, group or institution and their link with the alleged crimes, and the mental element, to the extent discernible at this stage. (Policy Paper on Preliminary Examinations, 2013, para. 39).

1.5.2. Admissibility

In line with its prosecutorial strategy, the Office will assess complementarity and gravity in relation to the most serious crimes alleged to have been committed and those most responsible for those crimes. (*Situation in the Republic of Kenya, Request for authorization of an investigation pursuant to Article 15, 2009, paras. 55 and 78; Situation of the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 2010, para. 50*).

The Statute does not stipulate any mandatory sequence in the consideration of complementarity and gravity. The Prosecutor must be satisfied as to admissibility on both aspects before proceeding. In determining whether to open an investigation, article 53(1)(b) requires the Office to consider whether “the case is or would be admissible under article 17”. However, at the preliminary examination, there is not yet a case, as understood to comprise a set of incidents, suspects, and conduct. (*Lubanga, Decision on the Prosecutor’s Application for Warrant of Arrest, 2006, para. 21, 31, 38*).

Therefore, the consideration of admissibility under a preliminary examination will consider potential cases that could be identified in the course of the preliminary examination based on the information available and that would likely arise from an investigation into the situation. (*Situation in the Republic of Kenya, Request for authorization of an investigation under Article 15, 2009, paras. 51 and 107; Situation in the Republic of Kenya, Decision Pursuant to Article 15..., 2010, paras. 50, 182 and 188*).

Pre-Trial Chambers have held, in the context of their decisions on the Prosecutor's applications for authorisation to open an investigation into the Situation in the Republic of Kenya and the Situation in the Republic of Côte d'Ivoire, that “admissibility at the situation phase should be assessed against certain criteria defining a ‘potential case.’”⁵

⁵ Such as (i) the groups of persons involved that are likely to be the focus of an investigation for the purpose of shaping the future case(s); and (ii) the crimes within the jurisdiction of the Court allegedly committed during the incidents that are likely to be the focus of an investigation for the purpose of shaping the future case(s). ICC-01/09-19-Corr, para. 50. See also Decision on Kenya, para. 182 and 188; Situation in the Republic of Côte d'Ivoire, Corrigendum to “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire”, ICC-02/11-14-Corr (3 October 2011), paras. 190-191 and 202-204.

The identification of such potential cases is without prejudice to such individual criminal responsibility as may be attributed as a result of subsequent investigations. The assessment is, by definition, preliminary in nature, conducted for the specific purpose of preliminary examinations, and is not binding for future admissibility determinations or the subsequent conduct of investigations.

i. Complementarity

This assessment is **case-specific**. And it relates to whether genuine investigations and prosecutions have been or are being conducted in the State concerned regarding the case(s) identified by the Office.

In line with the wording of articles 18(1) and 19(2)(b), the complementary principle extends to any State which has jurisdictional competence over a case and applies irrespective of whether that State is a Party to the Statute.

An admissibility test does not amount to a judgement or reflection on the national justice system as a whole. An otherwise functioning judiciary could not be investigating or prosecuting the relevant case(s), and it could be the other way around; the determining factor is the absence of relevant proceedings.

↓ Table 2. Stages of assessment concerning complementarity

1. Empirical question: Whether there are or have been any relevant national investigations or prosecutions. [Articles 17(1)(a) “being investigated or prosecuted”]; 17(1)(b) “has been investigated”; 17(1)(c) “tried”]. The absence of national proceedings, **domestic inactivity**, is sufficient to make the case admissible. (Katanga, 2009, para 78)⁶

Thus, the question of unwillingness or inability does not arise and the Office does not need to consider the other factors set out in article 17. Further, the Court has established that this assessment cannot be undertaken on the basis of hypothetical national proceedings that may or may not take place in the future. Consequently, the assessment must be based on the concrete facts as they exist at the time (Kony, 2009, paras. 49-52)⁷

Formula: the examination must assess whether the national proceedings encompass the same persons for the same conduct as that which forms the basis of the proceedings before the Court.⁸

In Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi (2013), the Pre-Trial Chamber I stated this formula as follows: “for the Chamber to be satisfied that the domestic investigation

covers the same 'case' as that before the Court, it must be demonstrated that: a) the person subject to the domestic proceedings is the same person against whom proceedings before the Court are being conducted; and b) the conduct that is subject to the national investigation is substantially the same conduct that is alleged in the proceedings before the Court [...]. The determination of what is 'substantially the same conduct as alleged in the proceedings before the Court' will vary according to the concrete facts and circumstance of the case and, therefore, requires a case-by-case analysis."

Inactivity in relation to a particular case may result from several factors, including the absence of an adequate legislative framework; the existence of laws that serve as a bar to domestic proceedings (such as amnesties, immunities, or statutes of limitation); the deliberate focus of proceedings on low-level or marginal perpetrators despite evidence on those more responsible; or other, more general issues related to the lack of political will or judicial capacity.

2. Where there are or have been national investigations or prosecutions, the Office shall examine whether such proceedings relate to potential cases being examined by the Office and, in particular, whether the focus in those most responsible for the most serious crimes committed. Once this requirement is met, the next assessment asks whether such national proceedings are vitiated by an **unwillingness or inability** to genuinely carry out the proceedings.

In Prosecutor v. Saif Al- Islam Gaddafi and Abdullah Al-Senussi (2013), the Pre-trial Chamber I observed "the evidence related, inter alia, to the appropriateness of the investigative measures, the amount and type of resources allocated to the investigation, as well as the scope of the investigative powers of the persons in charge of the investigation, which are significant to the question of whether there is no situation of "inactivity" at the national level are also relevant indicators of the State's willingness and ability genuinely to carry out the concerned proceedings" (para 210).

3. Unwillingness or inability.

3.1. Unwillingness. [Article 17(2)]. The Office shall consider whether (a) the proceedings were or are being undertaken for the purpose of shielding the person concerned from criminal responsibility for crimes within the ICC jurisdiction,⁹ (b) there has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice,¹⁰ and (c) the proceedings were or are not conducted independently or impartially and in a manner consistent with an intent to bring the person concerned to justice. In so doing, the Office may consider a number of factors.¹¹

Respect for principles of due process may be assessed in light of the provision of article 67 of the Statute (Rights of the Accused) as well as of the principles of due process recognised by international law as elaborated in relevant international instruments and customary international law. (OTP. Policy Paper on Preliminary Examinations, 2013, para. 55)

3.2 Inability. For the purpose of assessing inability to investigate or prosecute genuinely in the context of a particular case, the Office will consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to collect the necessary evidence and testimony, unable to obtain the accused, or is otherwise unable to carry out its proceedings.

Recall that to actually reach to this stage of assessment, a relevant procedure must have been identified. Where no procedure is available, the complementarity test should be deemed fulfilled on the basis of inactivity.¹²

- **Core threshold: genuineness.** When assessing unwillingness and inability, the Office considers whether any or a combination of the factors above impact on the proceedings to such an extent as to vitiate their genuineness (OTP. Policy Paper on Preliminary Examinations, 2013, p. 59).
- **Core principle: timing and changing circumstances.** The complementarity assessment is made on the basis of the underlying facts as they exist at the time of the determination and is subject to revision based on a change of circumstances. (Regulation 29(4) of the Regulation of the Office of the Prosecutor; *Katanga and Ngudjolo*, 2009, para. 56).¹³

6 Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07-1497, 25 September 2009, para. 78.

7 Prosecutor v. Joseph Kony et al., Decision on the admissibility of the case under article 19(1) of the statute, ICC-02/04-01/05-377, 10 March 2009, paras. 49-52.

8 (i) Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", ICC-01/09-01/11-307, 30 August 2011, paras. 1, 47; (ii) Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohammed Hussein Ali, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute;" ICC-01/09-02/11-274, 30 August 2011, paras. 1, 46. (iii) See also Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, "Decision on the Admissibility of the Case Against Abdullah Al-Senussi," ICC-01/11-01/11-466-Red, 11 October 2013, para. 66: "for the Chamber to be satisfied that the domestic investigation covers the same 'case' as that before the Court, it must be demonstrated that: a) the person subject to the domestic proceedings is the same person against whom proceedings before the Court are being conducted, and b) the conduct that is subject to the national investigation is substantially the same conduct that is alleged in the proceedings before the Court. The determination of what is 'substantially the same conduct as alleged in the proceedings before the Court' will vary according to the concrete facts and circumstance of the case and, therefore, requires a case-by-case analysis."

9 *Policy Paper on Preliminary Examinations*, 2013. "Intent to shield a person from criminal responsibility may be assessed in light of such indicators as, manifestly insufficient steps in the investigation or prosecution; deviations from established practices and procedures; ignoring evidence or giving it insufficient weight; intimidation of victims, witnesses or judicial personnel irreconcilability of findings with evidence tendered; manifest inadequacies in charging and modes of liability in relation to the gravity of the alleged conduct as the purported role of the accused; mistaken judicial findings arising from mistake identification, flawed forensic examination, failures of disclosure, fabricate evidence, manipulated or coerced statements, and/or undue admission or non-admission of evidence; lack of resources allocated to the proceedings at hand as compared with overall capacities; and refusal to provide information or to cooperate with the ICC." Para. 51.

10 Unjustified delays in the proceedings at hand may be assessed in light of indicators such as the pace of investigative steps and proceedings; whether the delay in the proceedings can be objectively justified in the circumstances; and whether there is evidence of a lack of intent to bring the person(s) concerned to justice. *Id.* Para. 52.

11 (i) Independence in the proceedings at hand may be assessed in light of such indicators as, inter alia, the alleged involvement of the State apparatus, including those departments responsible for law and order, in the commission of the alleged crimes; the constitutional role and powers vested in the different institutions of the criminal justice system; the extent to which appointment and dismissal of investigators, prosecutors and judges affect the due process in the case; the application of a regime of immunity and jurisdictional privileges for alleged perpetrators belonging to governmental institutions; political interference in the investigation, prosecution or trial; recourse to extra-judicial bodies; and corruption of investigators, prosecutors and judges.

(ii) Impartiality in the proceedings at hand may be assessed in light of such indicators as, inter alia, connections between the suspected perpetrators and competent authorities responsible for the investigation, prosecution, or adjudication of the crimes as well as public statements, awards, sanctions, promotions or demotions, deployments, dismissals or reprisals in relation to investigative, prosecutorial or judicial personnel concerned. *Id.* Para 53-54.

12 In conducting its evaluation, the Office may consider, inter alia, the ability of the competent authorities to exercise their judicial powers in the territory concerned; the absence of conditions of security for witnesses, investigators, prosecutors and judges or the lack of adequate protection systems; the absence of the required legislative framework to prosecute the same conduct or forms of responsibility; the lack of adequate resources for effective investigations and prosecutions; as well as violations of fundamental rights of the accused. *Id.* 57.

ii. Gravity. (Article 17(1)(d))

Although every event that falls within the subject-matter jurisdiction scope of the ICC is grave, article 17(1)(d) requires the Court to assess, as an admissibility threshold, whether a case is of **sufficient gravity** to justify further action by the Court.

At the preliminary examination stage, the Office assess the gravity of **each potential case** that would likely arise from an investigation of the situation.¹⁴ The assessment of gravity includes both **quantitative and qualitative** considerations.

Article 29(2) of the Regulations of the Office of the Prosecutor stipulates the factors that guide the Office's assessment: scale, nature, manner of commission of the crimes and their impact.¹⁵

↓ Table 3. Dissecting the gravity requirement

Scale	Number of direct and indirect victims, the extent of damage caused by the crimes, particularly bodily or psychological, caused to the victims and their families. Geographical or temporal spread, <i>i.e.</i> high intensity of crimes over a brief period or low intensity of crimes over an extended period.
Nature	Specific elements of each offence, such as killings, rapes, and other crimes involving sexual or gender violence and crimes committed against children, persecution, or the imposition of conditions of life on a group calculated to bring about its destruction.
Manner	Means employed to execute the crime, the degree of participation and intent of the perpetrator (if discernible), and the extent to which the crimes were systematic or result from a plan or organised policy or otherwise resulted from the abuse of power or official capacity. Elements of particular cruelty, including (i) vulnerability of victims, (ii) discrimination, or (iii) the use of rape and sexual violence as a means of destroying groups.
Impact	The sufferings endured by the victims and their increased vulnerability; by terror subsequently instilled, or the social, economic, and environmental damage inflicted on the affected communities.

1.4.5. *Interests of justice*

The interests of justice are only considered where the requirements of jurisdiction and admissibility (complementarity and gravity) are met. The Prosecutor is not required to establish that an investigation serves the interests of justice. Rather, the Office will proceed **unless** there are specific circumstances that provide **substantial reasons** to believe that the interests of justice are not served by an investigation at that time. This legal requirement has been addressed by the Office of the Prosecutor in a specific policy paper (2007).

The policy paper on the interests of justice emphasize three things: (1) the Prosecutor's discretion under Article 53(1)(c) and 53(2)(c) is exceptional in its nature and that there is a presumption in favour of investigation or prosecution wherever the criteria on jurisdiction and admissibility have been met; (2) the criteria for its exercise will be guided by the purposes of the Statute, namely, the prevention of serious crimes of concern of the international community through ending impunity, and (3) that there is a difference between the concepts of the interests of justice and the interests of peace and that the latter falls within the mandate of institutions other than the OTP (Policy Paper on the Interests of Justice, 2007, intro).

The Prosecutor is obliged to inform the Pre-Trial Chamber of any decision not to investigate or not to prosecute based solely on Articles 53 (1)(c) or 53(2)(c). The Pre-Trial Chamber may choose to review such a decision which will then only be effective if confirmed by the Chamber. The phrase "in the interests of justice" appears in several places in the ICC Statute and Rules of Procedure and Evidence, but is never defined.¹⁶ Reviews of the preparatory works on the treaty also offer no significant elucidation.

¹³ Regulation 29(4), Regulations of the Office of the Prosecutor; Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07-1497, 25 September 2009, para. 56.

¹⁴ ICC-01/09-19-Corr, paras. 50 and 188; ICC-02/11-14-Corr, paras. 202-204.

¹⁵ See in concurrence Prosecutor v. Abu Garda, Decision on the Confirmation of Charges, ICC-02/05-02/09-243-Red, 8 February 2010, paras. 31; ICC-01/09-19-Corr, para. 188; ICC-02/11-14-Corr, paras. 203-204.

¹⁶ See for example Articles 55(2)(c), 65(4) and 67(1)(d), as well as rules 69, 73, 82, 100, 136 and 185. These provisions tend to deal with matters closely related to the rights of the accused or of victims in the course of investigations or trial. They may provide some guidance for the way in which the phrase should be understood in the context of Article 53.

The text and purpose of the Rome Statute clearly favour the pursuit of investigations and cases when those investigations and cases are admissible and the relevant standard of proof can be satisfied. The interpretation and application of the interests of justice test may lie in the first instance with the Prosecutor, but is subject to review and judicial determination by the Pre Trial Chamber.

The Policy Paper on the Interests of Justice (2007) discuss the scope of some of the factors the Prosecutor should consider when weighing this element: the gravity of the crime, the interest of victims, the particular circumstances of the accused, other justice mechanisms at the local level, peace process.

1.4.6. Bottom line concerning “other justice mechanisms” and “peace processes”

- *Other justice mechanisms.* There is a need to integrated different approaches. There is a theory and practice in designing comprehensive strategies to combat impunity: Updated Principles vs Impunity, broad participation, consultations and national consultations.
- *Peace processes.* While the interests of justice concept is broader than criminal justice in a narrow sense, it must be interpreted in accordance with the objects and purpose of the Statute. It cannot be conceived as to embrace all issues related to peace and security.
- In 2003, the OPT stated that in situations where ICC is involved, comprehensive solutions addressing humanitarian, security, political, development, and justice elements will be necessary and that while the OTP will work constructively with them it will pursue its own judicial mandate independently. Is this an interpretation that satisfies the Statute's reasonable reading, object, and purpose?

Conduct of preliminary examinations

Once a situation has been identified for preliminary examination the Office will consider in accordance with the factors set out in article 53(1) (a)-(c) whether: (a) the information available provides a reasonable basis to believe that a crime within the jurisdiction of the Court is being

committed, (b) the case is or would be admissible under article 17 and (c) and investigation would serve the interests of justice.

Three points of entry: (i) communications (information of crimes provided by individuals or groups, States, inter-governmental or non-governmental organizations, or other reliable sources; (ii) referrals from State parties or the Security Council and (iii) declarations accepting jurisdiction by States that are not a Party to the Statute.

↓ Table 4. Points of entry for the opening of an investigation

Point of entry	Scope	Treatment
Communications (<i>motu proprio</i>)	Statutory parameters: territorial or active jurisdiction.	Does not lead to the start of a preliminary examination. The first step is to filter out communications that are manifestly outside the jurisdiction of the Court.
Declaration	Statutory parameter: territorial or active jurisdiction by the States that accepted jurisdiction.	It leads to opening a preliminary examination. Which doesn't mean that will eventually equal to opening an investigation. The documents are subject to assessment in the preliminary examination.
Referral	Security Council can broaden the statutory parameters.	It leads to opening a preliminary examination. Which doesn't mean that will eventually equal to opening an investigation. The documents are subject to assessment in the preliminary examination.

↓ Table 5. The procedure in the preliminary examination (4 phases)

Phase	Goal or purpose	Activities and outcomes
<p>1 (filtering out information)</p>	<p>The purpose is to analyse and verify the seriousness of the information received, filter out information on crimes that are outside the jurisdiction of the Court and identify those that appear to fall within the jurisdiction of the Court.</p> <p>The initial assessment distinguishes between a) matters which are manifestly outside the jurisdiction of the Court; b) a situation already under preliminary examination; c) a situation already under investigation or forming the basis of a prosecution; or d) matters which are neither manifestly outside the jurisdiction of the Court nor related to situations already under preliminary examination, investigation or the basis of a prosecution and therefore warrant further analysis.</p>	<p>Initial assessment of all the information received under article 15 (communications).</p> <ul style="list-style-type: none"> Communications deemed to be manifestly outside the Court's jurisdiction may be revisited in light of new information or circumstances, such as a change in the jurisdictional situation. Communications deemed to require further analysis will be the subject of a dedicated analytical report which will assess whether the alleged crimes appear to fall within the jurisdiction of the Court and therefore warrant proceeding to the next phase. <p>Such communications shall be analysed in combination with open source information such as reports from the United Nations, nongovernmental organisations, and other reliable sources for corroboration purposes.</p>
<p>2 (formal commencement of a preliminary examination on a given situation)</p>	<p><i>Subject-matter assessment.</i> It focuses on whether the preconditions to the exercise of jurisdiction under article 12 are satisfied and whether there is a reasonable basis to believe that the alleged crimes fall within the subject-matter jurisdiction of the Court.</p> <p>It involves all article 15 communications that were not rejected in Phase 1, and information coming from referrals (State parties and the SC) and declarations or jurisdiction.</p> <p>Potential cases. Phase 2 analysis entails a thorough factual and legal assessment of the crimes allegedly committed in the situation at hand with a view to identifying the potential cases falling within the jurisdiction of the Court.</p>	<p>Article 5 Report. Phase 2 leads to the submission of an 'Article 5 report' to the Prosecutor, in reference to the material jurisdiction of the Court as defined in article 5 of the Statute.</p>

	The Office may further gather information on relevant national proceedings if such information is available at this stage	
3	<p>Phase 3 focuses on the admissibility of potential cases in terms of complementarity and gravity pursuant to article 17.</p> <p>The Office will also continue to collect information on subject-matter jurisdiction, in particular when new or ongoing crimes are alleged to have been committed within the situation.</p>	<p>Article 17 Report. Phase 3 leads to the submission of an 'Article 17 report' to the Prosecutor, in reference to the admissibility issues as defined in article 17 of the Statute.</p>
4	<p>Phase 4 examines the interests of justice and also provides the final basis to determine whether to move forward with an investigation.</p> <p>The Article 53(1) Report must contain a statement of facts indicating, at a minimum: (i) the places of the alleged commission of the crimes; (ii) the time or time period of the alleged commission of crimes, (iii) and the personas involved or (iv) a description of the persons or groups of persons involved (Regulations of the Court, 49).</p> <p>The identification of facts is preliminary in nature. And it is not binding for the purpose of future investigations and may change at a later stage, depending on the development of the evidentiary trail and future case hypotheses (Situation in Kenya, 2010, Decision Pursuant to Article 15 para 50; Regulations of the Office of the Prosecutor 33-35).</p>	<p>Article 53(1) Report. Provides the basis for the Prosecutor to determine whether to initiate an investigation in accordance with article 53(1)</p> <p>The Article 53(1) Report will indicate an initial legal characterisation of the alleged crimes.</p>

1.5. Powers of the Office of the Prosecutor in this stage

- Receiving testimony in the Court
- Cannot invoke Statute-Part 9 forms of cooperation
- Based on article 15, the OTP can send requests of information

to sources for the purpose of analysing the seriousness of the information received.

- Field missions in order to consult with the competent national authorities, affected communities, and other stakeholders (civil society organizations).

1.6. Termination of the Preliminary Examination

- There is no rule governing the duration of a Preliminary Examination, once is opened.
- The Prosecutor must continue the examination until the information provides clarity on whether or not a reasonable basis for an investigation exists. This involves (i) gathering and analysing information on alleged crimes committed on an ongoing basis when such crimes are committed with high frequency and or when new eruptions of violence occur and (ii) assessing the genuineness of relevant proceedings over a long period of time.

↓ Table 6. Powers of Review by the Pre-Trial Chamber under the investigation stage (opening an investigation and moving forward with a prosecution stage)

Open an investigation phase		
Decision not to open an investigation	Assessment	Power of review
Article 53(1)(a) or (b)	Jurisdiction and admissibility threshold	It is not necessary to inform the PTC. It is not subject to review motu proprio by PTC
Article 53(1)(c)	Interest of justice threshold. Factors: the gravity of crimes and the interests of victims	It must be informed to the PTC. Then the PTC can decide whether to subject it to review
<p>***In this whole stage: At the request of the State making a referral under article 14 or the Security Council under article 13, paragraph (b), the Pre-Trial Chamber may review a decision of the Prosecutor under paragraph 1 not to proceed and may request the Prosecutor to reconsider that decision.</p>		

Move forward with prosecution

Article 53(2)(a) or (b)	Sufficiency of legal and factual basis to seek a warrant or a summons and admissibility	It must be informed to the PTC. Not subject to review <i>motu proprio</i> by the PTC.
Article 53(2)(c)	Interests of justice threshold. Factors: the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime.	It must be informed to the PTC. Subject to review <i>motu proprio</i> by the PTC

*****In this whole stage:** At the request of the State making a referral under article 14 or the Security Council under article 13, paragraph (b), the Pre-Trial Chamber may review a decision of the Prosecutor under paragraph 1 not to proceed and may request the Prosecutor to reconsider that decision.

2. Investigation (Pre-trial stage)

The three points of entry are (i) Motu Proprio investigation (requires judicial authorization); (ii) Referral by State or SC and (iii) Declaration for ad-hoc jurisdiction. The three points of entry have to go –necessarily– through a Preliminary Examination assessment. However, once the investigation has been launched the power of judicial review works differently depending on the “trigger” of the Court’s jurisdiction.

The Investigation Phase of a situation at the Court is concluded when the Prosecutor has been granted warrants or summonses under article 58 for the totality of cases in that situation to be prosecuted (thus defining the “Prosecutorial Programme”). (Policy Paper on Situation Completion, 2021). The scope of the situation to carry out an investigation is usually described in broad terms by relevant (i) geographic, (ii) temporal, (iii) material and/or (iv) personal parameters, and the Prosecutor may pursue all lines of inquiry or cases which are “sufficiently linked” to those parameters. See e.g.: *Afghanistan Appeal Judgment*, paras. 62, 79 (referring to the factors set out in ICC-02/17-7-Red (“Afghanistan Article 15(3) Request”), para. 1); ICC-01/09-19-Corr (“Kenya Article 15(4) Decision”), paras. 74-75; ICC-01/15-12 (“Georgia Article 15(4) Decision”), para. 63; *Burundi Article 15(4) Decision*, paras. 191-194; ICC-01/04-

01/10-451 (“*Mbarushimana Decision*”), para. 21; *Burundi decision*, 2017.

These parameters are initially defined by the entity triggering the preliminary examination (*i.e.*, the referring entity for referred situations, or the Prosecutor for *proprio motu* situations)—but they must be reasonable within the Court’s legal framework. In particular, the parameters must be defined in a way which is objective, impartial, and consistent with the object and purpose of the Statute.

In *Mbarushimana* (2011),¹⁷ the defendant challenged that the charges brought against him did not fall within the authorised scope of investigation, granted to the OTP by the Pre-Trial Chamber (PTC).

The Pre-Trial Chamber established a standard:

[S]uch a situation can include not only crimes that had already been or were being committed at the time of the referral, but also crimes committed after that time, in so far as they are sufficiently linked to the situation of crisis which was ongoing at the time of the referral. This link is necessary, precisely with a view to avoiding that referrals become instruments “permitting a State to abdicate its responsibility for exercising its jurisdiction over atrocity crimes for eternity”.

In *Mbarushimana* the events occurred (i) after the date of the Referral and (ii) in North Kivu and South Kivu, two regions situated in the Eastern part of the DRC (as opposed to Ituri, the region addressed in the self-referral). For such facts to still fall within the boundaries of the situation in the DRC, the PTC had to address whether they could be said to be sufficiently linked to the facts which led the DRC to refer the situation to the Court.

- **Geographical.** The PTC concluded that, on the basis of DRC referral, there was no intent to narrow the scope of the investigation to Ituri, specifically.

The Chamber also recalled that, pursuant to articles 13 and 14 of the Statute, a State Party may only refer to the Prosecutor an entire “situation

17 Decision on the “Defence Challenge to the Jurisdiction of the Court”, 2011.

in which one or more crimes within the jurisdiction of the Court appear to have been committed". Accordingly, a referral cannot limit the Prosecutor to investigate only certain crimes, e.g. crimes committed by certain persons or crimes committed before or after a given date; as long as crimes are committed within the context of the situation of crisis that triggered the jurisdiction of the Court, investigations and prosecutions can be initiated.

Of particular interest and relevance was also Resolution 1565 (2004), dated 1 October 2004, whereby the Security Council inter alia (i) affirmed being "deeply concerned by the continuation of hostilities in the eastern part of the Democratic Republic of the Congo (DRC), particularly in the provinces of North and South Kivu and in the Ituri district, and by the grave violations of human rights and of international humanitarian law that accompany them" and (ii) noted "that the situation in the Democratic Republic of the Congo continues to constitute a threat to international peace and security"

- **Temporal.** The Defence Second Argument centered on the fact that "no evidence has been provided of FDLR atrocity crimes prior to the date of the referral", lacking an "objective criteria" connect Mbarushimana to the referral.

The Chamber recalled that, according to that test, crimes committed after the time of a referral may also fall within the jurisdiction of the Court, provided only that they are sufficiently linked to the situation of crisis which was ongoing at the time of the referral and was the subject of the referral. It is the existence, or non-existence, of such link, and not the particular timing of the events underlying an alleged crime, that is critical in determining whether that crime may or may not fall within the scope of the referral. The PTC also considered that FDLR atrocity crimes had been a focus of concern for the UN way before the referral.

- **Material.** The Defence submitted that, since "contemporaneous" events in the Kivus and the activities of the FDLR did not prompt the Referral, "there is consequently no causal nexus to Mr. Mbarushimana in so far as he is allegedly a member of the FDLR. "Further, it argued that failure by the Prosecutor to allege that Mr.

Mbarushimana's involvement in crimes allegedly committed by the FDLR dates back to the time of the Referral should entail that the case against him falls outside the scope of the Court's jurisdiction.

The PTC was not persuaded by this argument. It considered the events were indeed inextricably linked to the situation of crisis in the DRC which has been under the constant examination by, and a continuing source of deep concern for, the United Nations since at least the early 2000s. By its very nature, the link required for an event to be encompassed in the scope of a situation can stretch over a number of years; accordingly, it cannot be required that the person targeted by the Prosecutor's investigation be active throughout the duration of the relevant time-frame.

An investigation is not a "judicial proceeding" yet. Thus, according to the ICC regime, victims are not entitled to participate under Article 68(3) in this phase. The Office will nonetheless ensure that their views are properly considered.

This criterion was established by the Appeals Chamber in its judgment on victim participation in the investigation stage of the proceedings in the DRC situation (2008; para.45). The Chamber dealt with the question of the existence of power, if any, to accord procedural status to victims with a view to participating in the Prosecutor's investigations in a situation.

The article of the Statute that confers power upon a victim to participate in any proceedings is Article 68 (3). What emerges from the case law⁵⁷ of the Appeals Chambers is that participation can take place only within the context of judicial proceedings. Article 68 (3) of the Statute correlates victim participation to "proceedings", a term denoting a judicial cause pending before a Chamber. In contrast, an investigation is not a judicial proceeding but an inquiry conducted by the Prosecutor into the commission of a crime with a view to bringing to justice those deemed responsible. The modalities of participation under article 68 (3) of the Statute must be specified by the Chamber in a manner not prejudicial to the rights of the person under investigation or the accused, and in a way non-antagonistic to a fair and impartial trial. A person has the right to participate in proceedings if a) he/she qualifies as a victim

under the definition of this term provided by rule 85 of the Rules, and b) his/her personal interests are affected by the proceedings in hand in, i.e. by the issues, legal or factual, raised therein.

Rules 89, 91 and 92 of the Rules relied upon by the Pre-Trial Chamber as supporting the position that victims can participate in the investigation stage of a situation outside the framework of judicial proceedings, far from supporting the position adopted contradict it. Rule 89 of the Rules is specifically fashioned to the provisions of article 68 of the Statute and aims to regulate the steps that must be taken in order for a victim to participate in judicial proceedings. Rule 91 of the Rules acknowledges that victims may participate through a legal representative whereas rule 92 of the Rules adverts to notification of judicial proceedings to victims and their legal representatives in which they may have an interest in seeking participation and decisions which may affect them. The class of victims to whom notification must be given is also specified.¹⁸

How does the Prosecutor address these matters generally?

It will do so by seeking the views of victims from the outset of its investigation, and at subsequent intervals, to ensure that those views are properly understood. Given the confidentiality usually associated with ongoing investigations and any proceedings under article 58, the Office will not be able to consult with victims on decisions whether to select or prosecute individual cases, or whether to conclude an investigation. But victims' interests can still be properly considered in these contexts if the Office has already gained a sufficient understanding of their views through its general consultations.

Article 54(1) of the Statute requires the Prosecutor, "[i]n order to establish the truth," to "extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility

¹⁸ See also: *Appeals Chamber, 2009. SITUATION IN UGANDA IN THE CASE OF THE PROSECUTOR v. JOSEPH KONY, VINCENT OTTI, OKOT ODHIAMBO, DOMINIC ONGWEN*. Para. 12. See also: *Burundi decision re-opening an investigation, 2017*. The PTC III weighted that even in these stages, where the PTC must grant an authorization to open an investigation, victims' have entitlement to submit their views before the Court.

under this Statute and, in doing so, investigate incriminating and exonerating circumstances equally"

Therefore, in order to obtain a full picture of the relevant facts, their potential legal characterisation as specific crimes under the jurisdiction of the Court, and the responsibility of the various actors that may be involved, the Prosecutor must carry out an investigation into the situation as a whole" (Afghanistan Appeal Judgement, para 60).

This requirement does not imply that the Office must investigate every case in the situation, but rather ensures that investigations on selected cases are carried out objectively and based on the evidence. The decision whether or not to prosecute a selected case will be determined on its own merits.

Since opening an investigation by the Office is conditional on determining that there is a reasonable basis to believe at least one potential case arising from the situation would be admissible before the Court, the Office will conduct its investigation with the primary objective of bringing appropriate cases to trial before the Court. This is consistent with article 53(2), which ordinarily contemplates the prosecution of at least one case—providing this is supported by the evidence, and without prejudice to the complementary mandate of the Statute. At the same time, it is generally understood that the Office will never be in a position to investigate every potentially admissible case in a situation.

The Prosecutorial Programme is the total docket of cases that will be brought to confirmation proceedings with a view to trial at the Court, and for which suspects must be surrendered; that is, cases where the Pre-Trial Chamber has *granted* the Prosecutor's article 58 request(s).

Once the Prosecutorial Programme is defined, such that the Prosecutor is of the view that *no further article 5 prosecutions will be brought into the situation*, the Investigation Phase is concluded. The Prosecutor has the discretion to define how many cases will make up the Prosecutorial Programme for a situation. (Statute article 53(2), 54, 48) (*Darfur* Rule 103 Situation, 2009, ICC-02/005, Pre-Trial Chamber 1, Para. 24).¹⁹ The Prosecutor will exercise her discretion so that the Prosecutorial Programme gives effect to the Situation Strategy.

The Situation Strategy

Is thus the framework for mapping out and evaluating the number and variety of cases selected for investigation in the context of the apparent criminality in the situation, as established by (i) the evidence, and (ii) other appropriate prosecutorial considerations (including the interests of victims, and relevant operational matters). The Situation Strategy is confidential and will be initially framed at the start of the investigation and will be adapted as the investigation progresses.

However, the Office will only decide to prosecute each case (that is, to request an arrest warrant or summons to appear, under article 58) on its own individual merits—in particular, when it is sufficiently established on the evidence. Consequently, if one or more of the cases selected for investigation does not meet the test for prosecution, but alternative lines of inquiry still remain within the Situation Strategy (potentially leading to the investigation and prosecution of a different case), the investigation may continue.

General rule. Once the Prosecutor has defined the Prosecutorial Programme, and thus concluded the Investigation Phase, the Office will make no further requests to the Pre-Trial Chamber to start proceedings for article 5 crimes in that situation, save for exceptional circumstances within the scope of the Court's jurisdiction in that situation.

Exceptions: Incidence of new or resurgent criminality or the discovery of new and critical evidence which did not previously exist or could not previously be obtained due to external circumstances.

Where it can be foreseen that the external obstacle(s) to a proper investigation will continue for a protracted period, the Prosecutor may decide to suspend the Office's activity regarding the situation as a whole. This will continue pending a material change in external circumstances. Alternatively, if the Prosecutor does proceed to conclude the Investigation Phase, such circumstances may again be relevant to a

¹⁹ States Parties have granted the Prosecution discretion to decide whether to request the initiation of a case through the issuance of an arrest warrant or a summons to appear", subject to the Pre-Trial Chamber's verification of reasonable grounds to believe that the person in question is responsible for a crime under the Statute

subsequent determination, exceptionally, to re-open the investigation if new and critical evidence becomes available.

2.1 OTP calls during the investigation (and the prosecution)

*** Based on Draft Policy Paper on Situation Completion, March 2021**

The Office will only decide to prosecute each case (that is, to request an arrest warrant or summons to appear, under article 58) on its own individual merits—in particular when it is sufficiently established on the evidence. Consequently, if one or more of the cases selected for investigation does not meet the test for prosecution, but alternative lines of inquiry still remain within the Situation Strategy (potentially leading to the investigation and prosecution of a different case), the investigation may continue.

2.1.1. *Decision on whether to prosecute a case*

- Decisions on whether or not to prosecute a case or cases are made on a dynamic, rolling basis, and need not wait until the end of the Investigation Phase.
- Determining whether or not to prosecute a specific case is distinct from deciding to conclude the Investigation Phase for the situation as a whole—although, necessarily, when this decision concerns the 'last' case to be prosecuted in the situation, these decisions may coincide.
- As a matter of policy: The Prosecutor will decide to prosecute a case, and thus to apply to the Pre-Trial Chamber under article 58 of the Statute, if (i) there is a sufficient basis to proceed under article 53(2) and (ii) there is a reasonable prospect of conviction at the end of the trial. (Policy Paper on Case Selection and Prioritisation, para. 23, 51-53).

↓ Table 7. Office of the Prosecutor's lines of action on case prosecution

1. If the OTP decides that there is no sufficient basis to prosecute a case, it could decide:

- a. Continuing the investigation phase: Investigate the case further;
- b. Deprioritise: Suspend the investigation of the case pending a material change in external circumstances, which will have also the effect of continuing the Investigation Phase; or
- c. Take no further action concerning the case. This will usually be because all relevant lines of inquiry have been exhausted, but may also occur if the Prosecutor has decided that a prosecution is not in the interests of justice, in the sense of article 53(2)(c).

2. Alternatively, the OTP could consider there is a sufficient basis to prosecute a case, but take the view that it is no longer admissible under articles 17 and 53 (2)(b). In such circumstances, the Office will defer any action before the Court, in favour of the domestic proceedings.

Consequences: Since assessing the relevance and genuineness of national proceedings forms part of the Office's activities in a situation, but the Statute recognises the primacy of national jurisdictions, **the Prosecutor's decision to defer a case in these circumstances (a) will not bar the conclusion of the Investigation Phase.** This is (b) without prejudice to requesting the prosecution of relevant cases before the Court, if they subsequently become admissible, as explained further below.

2.1.2. Decision on whether to conclude the investigation in a situation

The Prosecutor will conclude the Investigation Phase in a situation when the Situation Strategy, as adapted in light of the evidence collected, is given effect in the Prosecutorial Programme. This means that key lines of inquiry have been resolved through the cases selected for investigation, and that each of those selected cases has been investigated sufficiently for the Prosecutor to decide whether or not to initiate a prosecution, as described above. This assessment will be conducted by the Office internally.

The Office will publicly notify its decision, exercising its discretion. Further, when article 53(2) applies (interest of justice's decision) will make the notifications required by that provision, which enables a confined regime of judicial review.

1) Internal process

The Office will carry out the assessment leading to the conclusion of the Investigation Phase internally and confidentially. This is because it is intrinsically related to the conduct of the investigation and, potentially, to *ex parte* article 58 applications before the Court.

The Prosecutor will decide whether or not to prosecute relevant cases on a rolling basis, whenever the lines of inquiry relevant to that case are considered to have been adequately addressed. By such timely decisions, the Prosecutorial Programme for the situation will be determined as the Investigation Phase moves forward. However, in assessing whether the Situation Strategy has been fully realised, the Prosecutor will not only need to determine whether to prosecute those selected cases which have been prioritised for investigation but also to manage cases that have been deprioritised.

Prioritisation is the process that determines how the investigation of selected cases is rolled out over time. Cases are prioritised on the basis of both strategic and operational considerations. When possible, this is informed by joint planning and coordination with the national investigation and prosecution authorities.²⁰

i) Strategic considerations include a comparative assessment of all the cases selected by the Office, relative to one another, as well as considerations such as the existence of prior investigations or prosecutions concerning a suspect or their affiliates, the anticipated impact of investigating and prosecuting a given case on victims of the relevant crimes and the affected communities, the potential for preventing or disrupting ongoing criminality, and the impact of investigating and prosecuting a given case on other cases under investigation or prosecution by the Office. (Policy Paper on Case Selection and Prioritisation, para. 50)

²⁰ Prioritisation is a relative process, in which cases across all situations under investigation by the Office are compared with one another. The necessary consequence of prioritising some cases for investigation (culminating with a decision on whether or not to prosecute) is that others will be temporarily deprioritised (suspending their investigation).

ii) Operational considerations include the quantity and quality of the evidence available and the prospects for obtaining or preserving additional evidence, the prospects for cooperation with the Office and judicial assistance, the practical capabilities of the Office in relevant locations at that time, and the potential to secure the appearance of suspects before the Court (Policy Paper on Case Selection and Prioritisation, para. 51).

Deprioritised cases necessarily affect the duration of the Investigation Phase for the situations concerned since they prevent the Office from fully pursuing all lines of inquiry in the Situation Strategy and thereby proceeding to conclude the Investigation Phase. When this scenario arises, therefore, and all other selected cases have been resolved, the Office will consider whether it is appropriate (and feasible) to mitigate the factor(s) causing the case(s) to be deprioritized (favoured option); suspend the investigation of the situation as a whole,²¹ or take no further action before the Court on the deprioritised case(s) and thus potentially enable the conclusion of the Investigation Phase given the anticipated continuity, in the long term, of the strategic and operational factors which led to deprioritisation.

* Other factors may also be relevant, such as the potential for accountability for the case(s) to be pursued in other jurisdictions or by other mechanisms; and the potential for investigating and prosecuting cases of similar or connected crimes at the Court.

2) *Public Notification*

Once the Prosecutor has concluded the Investigation Phase of a situation, and as part of a tailored outreach and public information strategy, the Office will make a public notification to this effect.

Public notification of the conclusion of the Investigation Phase in a situation will not contain details of the Prosecutorial Programme, since

²¹ Because the Prosecutor considers that the Situation Strategy demands the proper investigation of the deprioritised case(s), enabling an independent decision on whether or not to prosecute. This will mean that the Investigation Phase cannot be concluded until there is a material change of circumstances. At that point, the Prosecutor may reprioritise the case(s), complete the investigation, and make the appropriate decision on whether or not to prosecute. This will eventually enable the conclusion of the Investigation Phase, but only after a potentially lengthy hiatus.

these will frequently be confidential. Nor will the notification be filed before the Court, subject to the exception of an “interests of justice” cause, since this milestone does not directly trigger or relate to any judicial proceeding, but rather solely affects the operations of the Office. Public notification can bolster cooperation, manage expectations and stimulate advocacy for additional forums. The Investigation Phase may identify more leads and cases than the Court can properly accommodate—including cases which do not meet the gravity threshold for prosecution before the Court.²²

3) *Legal notification for potential review purposes (article 53.2)*

Article 53(2) of the Statute requires the Prosecutor to inform the Pre-Trial Chamber and the referring entity if there is not a sufficient basis for “a prosecution” in a situation that has been referred to the Court. By contrast, there is no obligation of legal notification for an investigation in a situation that has been opened *proprio motu* by the Prosecutor under article 15, with authorisation of the Pre-Trial Chamber.

This has been confirmed by the Appeals Chambers in the Afghanistan Appeal Judgment, para 29 and 30., by stating that “[a]rticle 53(3) of the Statute envisages judicial control over the Prosecutor’s decision not to investigate and aims at ensuring that the Prosecutor complies with her duty to investigate referred situations”

The OTP has interpreted this requirement to mean that it must notify the Pre-Trial Chamber and the referring entity **if it proposes to complete the Investigation Phase of a referred situation without initiating at least one prosecution by making an application under article 58**. In providing this legal notification, rule 106(2) requires the Office to state “the conclusion

²² ASP, *Report of the Bureau on stocktaking: complementarity—Taking stock of the principle of complementarity: bridging the impunity gap*, ICC-ASP/8/51, 18 March 2010, para. 26. ASP, *Strengthening the International Criminal Court and the Assembly of States Parties*, ICC-ASP/18/Res.6, 6 December 2019, para. 132.

²³ See e.g. ICC-02/17-74 (“Afghanistan Prosecution Appeal Brief”), para. 83 (text accompanying fn. 167). See also *Policy Paper on Preliminary Examinations*, para. 92. This interpretation of article 53(2) arises from the plain words of the provision—which refers to “a” prosecution (in the sense of “one” prosecution, or “any” prosecution)—and the object and purpose of the Statute, as well as the constant practice of the Office and Court in its operations to date. Any alternative interpretation of article 53(2) would mean that each decision not to prosecute a given case would be potentially subject to judicial review, which would not only be inconsistent with the selective mandate of the Court, but would also frustrate the Office’s effective operation and independence

of the Prosecutor and, having regard to article 68, paragraph 1, the reasons for the conclusion."²³

Concluding the Prosecution Phase

Setting the Prosecutorial Programme for a situation—and by this means concluding the Investigation Phase—defines the judicial work to be done by the Court.

It marks the transition into the Prosecution Phase, where the focus is no longer on investigations with a view to initiating new prosecutions for article 5 crimes but instead on: (i) executing arrest warrants; (ii) conducting and completing trial proceedings; (iii) and completing residual activities.

↓ Table 8. Completing the Prosecutorial Programme

Components: executing outstanding warrants of arrest; preserving and managing evidence for trial; conducting and completing legal proceedings before the Court against all suspects and accused persons; conducting additional investigative activities in support of the proceedings, as required; and assessing relevant national proceedings for cases under the Court's jurisdiction.

**Other activities include: securing the administration of justice and monitoring for resurging crimes.*

i) On preserving evidence: articles 13, 15, 18

- Preserving evidence; unique investigative opportunity (article 56).
- Sharing evidence for supporting genuine national proceedings (Article 93(10)).

ii) On conducting an additional investigation

- As a general rule, Chambers have stressed that the OTP is expected to substantially have completed its investigation by the time of the confirmation of charges hearing.
- There may be circumstances when important new evidence comes to light late in the day, and the Office will continue to investigate; for example, to strengthen the evidence or to

amend the charges under articles 61(8) and (9) of the Statute. This may be particularly the case for criminality which is often under-reported, such as sexual and gender-based violence, or which depends on evidence of a nature that makes it difficult to acquire (such as certain technical evidence). It can also happen when the Office is subsequently granted access to countries, regions or locations relevant to the case, which had previously been inaccessible due to lack of cooperation or security.

- More generally, the Office will also continue to investigate as required for the preparation and conduct of each trial, and potentially on appeal, especially with regard to developments in any case presented by the accused. Where significant time has elapsed since the investigation was completed, before the suspect is brought before the Court, the Office will investigate as necessary to ensure that it presents the best evidence available

iii) Assessing inadmissible domestic cases under the Court's jurisdiction

- If a case has been ruled inadmissible at the Court, article 19(10) of the Statute provides that the Prosecutor may seek judicial review of the decision if fully satisfied of new facts which negate the basis of the ruling.
- If a case has been ruled inadmissible at the Court, article 19(10) of the Statute provides that the Prosecutor may seek judicial review of the decision if fully satisfied of new facts which negate the basis of the ruling.
- The Office will, therefore, evaluate the progress of domestic proceedings relating to inadmissible cases for as long as necessary, in accordance with the standards in article 17, and engage with national authorities as appropriate, including under article 19(11). The Office will also engage as appropriate with other stakeholders, including legal representatives for the victims, counsel for the accused, and others. (See also ICC-01/11-01/11-695 OA8 ("Gaddafi Admissibility Appeal Judgment"), paras. 58-63; ICC-01/11-01/11-695-Anx OA8 ("Concurring Separate Opinion of Judges Eboe-Osuji and Bossa"), paras. 5-6).
- The Office will keep under review whether to make a request under article 19(10), following the procedure in rule 62, at least until relevant domestic proceedings are concluded by a final judgment in accordance with the applicable law. Thereafter, the Office will remain alert to any information suggesting that the completed proceedings were nonetheless conducted to shield the person concerned from responsibility, or were otherwise not conducted independently or impartially, as required by articles 17 and 20(3) of the Statute.

The principle of ne bis in idem does not apply in these circumstances and consequently there is no bar to the resumption of proceedings before the Court.

- The Office will apply these same principles in evaluating the progress of domestic proceedings concerning cases investigated by the Office, but which the Prosecutor has not decided to prosecute in accordance with article 53(2)(b) of the Statute. It will act similarly with regard to potential cases identified by the Office during the preliminary examination, but where the Prosecutor deferred to a request by a State under article 18(2).

iv) Monitoring new or resurgent criminality

- Consistent with the Court's continuing exercise of jurisdiction over all article 5 crimes within the scope of a situation,⁴⁹ the Office will continue to monitor relevant political, security, and other developments in the territory or territories within the parameters of the investigation to determine whether new or resurgent criminality is occurring. It will as necessary evaluate any such allegations to determine whether they fall within the Court's jurisdiction, and within the parameters of the situation. As noted below, this activity remains ongoing throughout the Prosecution Phase, and continues as a residual activity even once the Prosecutorial Programme is completed.

Two options:

- If new allegations of crime fall within the scope of the situation, and they are of such a nature to warrant the intervention of the Court, the Prosecutor may re-open the Investigation Phase. This will be exceptional, given the considerations militating in favour of a clear and unequivocal conclusion of the investigation, as described in the Policy Paper on Situation Completion.
This exercise of discretion is not without supervision—States and persons with standing may challenge the Court's jurisdiction in any case arising from a re-opened investigation, consistent with the Statute.
- If the Prosecutor is not satisfied that the criminal allegations fall within the scope of the situation, nor sufficiently linked thereto, the Office will instead consider opening a new preliminary examination, applying the test in article 53(1). In such circumstances, the Office will not investigate the new criminal allegations without further authorisation from the Pre-Trial Chamber under article 15(4), or referral of the relevant allegations from a State Party or the UN Security Council.

Residual activities

- i. Monitoring. OTP is obliged to monitor the situation till the Court's jurisdiction is ceased. Among others: the service of sentences by convicted persons; any alleged interference with the administration of justice; allegations of new or resurgent criminality in the situation; and information coming into the Office's possession that might be relevant to its obligations under article 84 of the Statute.
- ii. Cooperation, judicial assistance, and archiving.

3. Prosecution

Concerning the OPT, this phase is carried out based on its "Prosecutorial Programme".

II. Notes on the Prosecutorial Policy of OTP

Although the section above already includes some references to the OTP's Policy in order to better explain how the Office examines and investigates a given situation, this section is based, mainly, on the “three procedural” policy papers of the OTP. It is also enriched by its Strategic Plan 2019-2021 and the Office's different reports.

Policy papers

Bottom line. Policy papers are that –**policy**- and therefore do not give rise to rights in litigation and they are subject to revision based on experience and in the light of legal determinations by the Chambers of the Court.

There is a triade of “procedural” policy papers: (i) Policy Paper on Preliminary Examinations (2013); (ii) Policy Paper on Case Selection and Prioritization (2016), and the (iii) Draft Policy on Situation Completion.

Status. As of April 2021, the OTP has been conducting **investigations** in multiple situations, namely, Uganda; Congo; Darfur, Sudan; CAR

(two distinct situations), Kenya, Lybia; Côte d'Ivoire; Mali; Georgia; Burundi; Bangladesh/Myanmar, Afghanistan (article 18 request) and Palestine. Preliminary Examinations are being conducted in Bolivia; Colombia; Guinea; the Philippines and Venezuela (I and II). Preliminary Examinations of the situations in Ukraine and Nigeria have been concluded and wait for pending authorization.

1. Policy Paper on Preliminary Examinations (2013)

Purpose: This policy paper describes the relevant Rome Statute principles, factors and procedures applied by the Office in the conduct of its preliminary examination activities.

In addition to what has been already stated in the preliminary examinations phase of this document (Section 1) based on this policy paper, it is important to bear in mind that the OTP established some relevant considerations concerning the “interests of justice” element in it.

- Pursuant to article 53(1)(c), the Office will consider, in particular, the interests of victims, including the views expressed by the victims themselves as well as by trusted representatives and other relevant actors such as community, religious, political or tribal leaders, States, and intergovernmental and non-governmental organisations. (2013, para. 68).
- The Statute, namely article 16, recognises a specific role for the Security Council in matters affecting international peace and security. Accordingly, the concept of the interests of justice should not be perceived to embrace all issues related to peace and security. In particular, the interests of justice provision should not be considered a conflict management tool requiring the Prosecutor to assume the role of a mediator in political negotiations.
- The OTP considered that his reading would run contrary to the explicit judicial functions of the Office and the Court as a whole. The Prosecutor cited a 2009-SG Report on Mediations that notes that mediators should adjust to the legal process rather than for the legal process to accommodate political negotiations.
- On feasibility of the investigation. The Office stated that this is not a separate factor under the Rome Statute as such when determining whether to open an investigation. A consideration of

this reach would prejudice the consistent application of the Statute and might encourage obstructionism.

- Policy objectives. Overarching goals of the Rome Statute: the ending of impunity, by encouraging national proceedings, and the prevention of crimes.

a. Transparency. The Office will make the commencement of preliminary examinations public and will provide regular updates on the activities performed under phases 2 to 4. The Office reports on an annual basis on its preliminary examination activities, and issuing situation-specific reports to substantiate the decision to close a preliminary examination or to proceed with an investigation. Article 15 applications submitted to the PTC for the purpose of seeking authorisation to investigate are also made publicly available.

Where the OTP has initiated a Preliminary Examination independently under article 15 and assess there is a reasonable basis to proceed with an investigation, before requesting authorisation, it will inform relevant State(s) with jurisdiction of its determination and inquire whether they wish to refer the situation.

Among others, the purpose is to encourage national ownership and future cooperation.

b. Positive Complementarity. A significant part of the Office's efforts at the preliminary examination stage is directed towards encouraging States to carry out their primary responsibility to investigate and prosecute international crimes. Where potential cases falling within the jurisdiction of the Court have been identified, the Office will seek to encourage, where feasible, genuine national investigations and prosecutions by the States concerned in relation to these crimes.

The nature of the Office's efforts towards encouraging genuine national proceedings will be dependent on the prevailing circumstances. The Office will engage with national jurisdictions provided that it does not risk tainting

any possible future admissibility proceedings. Nonetheless, the Office can report on its monitoring activities, send in-country missions, request information on proceedings, hold consultations with national authorities as well as with intergovernmental and non-governmental organisations, participate in awareness-raising activities on the ICC, exchange lessons learned and best practices to support domestic investigative and prosecutorial strategies, and assist relevant stakeholders to identify pending impunity gaps and the scope for possible remedial measures. Any interaction between the Office and the national authorities cannot be construed as a validation of the national proceedings, which will be subject to independent examination by the Office considering all of the relevant factors and information.

- c. Prevention.** The Office will seek to perform an early warning function. For this purpose, it will systematically and proactively collect open source information on alleged crimes that appear to fall within the jurisdiction of the Court. (Georgia, Kenya, Guinea, South Korea, Nigeria, Côte d'Ivoire and Mali)

2. Policy Paper on Case Selection and Prioritisation (2016)

Purpose: This policy paper sets out the considerations which guide the exercise of prosecutorial discretion in the selection and prioritisation of cases for investigation and prosecution. It describes the policy and practice of the Office of the Prosecutor ("Office") in relation to the process of choosing the incidents, persons and conduct to be investigated and prosecuted within a given situation and of prioritising cases both within a situation and across different situations.²⁴

24 Note: See Case Selection Criteria (Section I).

3. Draft Policy Paper on Situation Completion (2021)

Purpose: This policy paper explains how the OTP will complete its work for situations under investigation, where the Court –as opposed to preliminary examinations– is exercising its jurisdiction. While a “case” will generally be completed by the exhaustion of legal proceedings, or the Prosecutor’s determination to take no further action before the Court, **there is no pre-determined legal threshold or procedure to determine precisely when a situation may be completed.**

This is decided by the Prosecutor within its **broad discretionary powers**. Such powers are enshrined under articles 42, 53-54 and 58 of the Statute, in light of the material circumstances. It is distinct from the decision **whether or not to prosecute a particular case**, which is made solely on its own individual merits.²⁵ The Investigation Phase of a situation at the Court is concluded when the Prosecutor has been granted warrants or summonses under article 58 for the totality of cases in that situation to be prosecuted (thus defining the “Prosecutorial Programme”) Moves now to the “Prosecutorial Programme” execution.

From that point onwards, the Office will make no further requests to the Pre-Trial Chamber to start proceedings for article 5 crimes in that situation, save in exceptional circumstances such as those defined in this policy.

- **“Situation Strategy”**. The Prosecutor’s determination of appropriate number and variety of cases to make up the Prosecutorial Programme is informed by the Situation Strategy. This is initially framed at the start of the investigation, but is dynamically re-assessed and refined as the investigation progress.²⁶
- After the Investigation Phase is complete, the Office will devote the resources allocated to the situation to the Prosecution Phase.

²⁵ Article 42. Office of the Prosecutor. Article 53-54 (Initiation of an Investigation & Duties and powers of the Prosecutor with respect to investigations). Article 58. Issuance by the Pre-Trial Chamber of a warrant of arrest or a summons to appear.

²⁶ Completing the Investigation Phase is the key milestone towards completing a situation. Because at this point the Prosecutorial Programme is then defined, forecasting the resources required for that situation will become more predictable (although particular demands will obviously fluctuate as arrests are made), and preparations for transferring resources to other situations can begin. It will also enable external stakeholders—especially victims of crime, civil society, the Assembly of States Parties and other relevant States or bodies, such as the United Nations Security Council—to better understand the Office’s progress, and consequently where to direct their expectations and further efforts for accountability. In turn, this may encourage national and international efforts to enhance domestic capacity. These benefits will be derived from public notification by the Office that the Investigation Phase of a situation has been completed, even though the details of particular prosecutions will only become known as arrest warrants are publicly issued.

This phase aims to conclude all legal proceedings relating to the cases in the Prosecutorial Programme, and other residual activities arising from the Office's obligations in a particular case or in the situation as a whole.

- **General principles:** independence,²⁷ impartiality²⁸ and objectivity.

At the beginning of the Investigation Phase—initially, based on the preliminary examination—the Office will analyse the alleged criminality and identified preliminary lines of inquiry, to identify potential suspects and incidents representative of the gravity of the crimes in the situation. This forms the foundation for the Situation Strategy.

These lines of inquiry will be subject to an open-ended investigation that will enable the Office to make informed decisions in selecting especially grave cases for investigation and, if merited, prosecution. These cases will be selected in the manner described in the *Policy Paper on Case Selection and Prioritisation*. They will not necessarily be confined to 'broad' or 'high-level' cases, since the same forensic interests may sometimes be achieved by 'narrower' cases, potentially including certain cases against lower or mid-level perpetrators.

As the investigation progresses, the Situation Strategy is kept under regular review. In particular, mindful of the progress of those cases already selected for investigation, the Office will consider whether it is necessary to identify and pursue further lines of inquiry in order to select additional cases. This will be informed by the following factors assessed together:

²⁷ As the investigative arm of the Court, the Prosecutor is uniquely vested with that capacity, and that responsibility. But this does not mean that proper consideration will not be made of the interests of relevant stakeholders, in accordance with the law.

²⁸ Article 42(7) requires the Prosecutor to act impartially in matters investigated and prosecuted by the Office, which means acting without favouring any person or group. This means that the Office will only take into account considerations material to the Statute in deciding on the conduct of an investigation, and its conclusion. This will be demonstrated by consistent application of the same processes, methods, criteria, and thresholds in selecting and prioritising cases arising from a situation. Consequently, for example, the Office will not seek to create the appearance of parity within a situation between rival parties by investigating or prosecuting cases that would not otherwise meet the applicable criteria.

Table 9. Situation Strategy completion assessment (factors)

- * **Gravity factor.** The degree to which the cases already selected for investigation represent the gravity of the criminality in the situation, taking into account the likely charges and the likelihood that they will meet the Office's standard for prosecution and the suspect(s) will promptly appear before the Court.
- * **The interests of victims;**
- * **Evidentiary.** The types of evidence available in the situation (witnesses, documents, open source material, electronic data, imagery, financial data, scientific and other expert evidence, etc.), its volume and accessibility, and any anticipated threats to its preservation;
- * **Cooperation.** The prospects and requirements for cooperation with the Office, including from States Parties, other relevant States, international organisations, and non-governmental organisations ("NGOs");
- * **Complementarity.** The prospects for relevant proceedings in jurisdictions other than the Court, and especially the potential for accountability partnerships with relevant States;
- * **Operational.** The operational conditions affecting the Office's ability to conduct successful investigations and prosecutions, and to execute an arrest strategy; and
- * **Resources.** The resources required to investigate and, if necessary, prosecute the cases already selected.

Concluding the OTP's activities in a situation

Once the Office has completed both the Investigation Phase and the Prosecution Phase, its work in a situation is complete—although the activities of other Organs of the Court, in accordance with the Statute, may potentially continue.

Only when the statutory activities of all Organs of the Court are complete **may the Court's exercise of jurisdiction in a situation be concluded**, since it is no longer necessary that it is maintained. Any formalities associated with concluding the Court's exercise of jurisdiction in a situation are matters for the chambers of the Court and/or the Presidency.

Should allegations of new article 5 crimes arise after the Office has concluded its activities in a situation, the Prosecutor may consider them within the framework of article 15 of the Statute, or otherwise if the matter is referred to the Court by a State Party or the United Nations Security Council. In such circumstances, consistent with the Statute and the *Policy Paper on Preliminary Examinations*, allegations of new crimes could be considered in any new situation which meets the legal criteria for initiating an investigation.

↓ Table 10. Conclusion of activities based on the OTP's Strategic Plan 2019-2021

Topic	Caselaw / milestone	Procedural stage in which the decision was rendered or made
Convictions. (2016-2019) *Ntaganda: sexual slavery; crime of rape against women and men. ²⁹	<i>Mahdi, Bemba et al., Ntaganda</i>	Trial (final decision)
Interlocutory trial and appellate decision. Court's jurisdiction over rape and sexual violence	<i>Ntaganda</i>	Trial (interlocutory) and appeals stage
Court's jurisdiction on deportation	<i>Myanmar/Bangladesh situation</i>	Investigation
Head of state immunity; appellate ruling	<i>Bashir</i>	Unknown
Termination of procedure	<i>Ruto & Sang</i>	Terminated at the end of the prosecution case
Termination of procedure	<i>Blé Goude</i>	Terminated at the end of the prosecution case
Acquittal	<i>Bemba</i>	Trial (final decision)
Science and technology	<i>Al Mahdi and Al-Werfalli</i>	Unknown

OTP (i) initiated five preliminary examinations. (ii) Completed four. (iii) Advanced four.

(ii) Completed:

- Gabon. Closed. (Without proceeding to an investigation)
- Burundi. Received authorization from the Pre-Trial Chamber to open an investigation.
- Afghanistan. Rejected authorization. Pre-Trial Chamber II.
*On appeal
- Bangladesh-Myanmar. Requested authorization.

Strategy of the OTP

Prosecute the most responsible following the evidence it can obtain from its independent investigations.

- It could be a broad case representing the totality of the crimes for which the most responsible is held accountable or a more narrow case in terms of crimes and criminal liability.
- It might also imply a strategy of building upwards by focusing on mid-level or notorious perpetrators first, which the aim of reaching the most responsible persons at a later stage.

29 The decision contributed to the emerging jurisprudence regarding the protective embrace of IHL to cover crimes committed by an armed group against members of their own group, including sexual violence against women and children.

III. Notes by case (short briefs)

Al Mahdi

Case: *OTP v. Al Mahdi*

Crime: *Article 8(2)(e)(iv)*. Directing an attack against buildings dedicated to religion and historic monuments which were not military targets.

- The Trial Chamber said case law of the Court pertaining to attacks against the civilian population “does not offer guidance.” As for the International Criminal Tribunal for the former Yugoslavia, which has issued several decisions concerning attacks on and destruction of cultural property, the Chamber said it is “limited guidance” because the relevant legal text was not the same (Para. 16).
- The Chamber explained that “the element of “direct[ing] an attack” encompasses any acts of violence against protected objects and will not make a distinction as to whether it was carried out in the conduct of hostilities or after the object had fallen under the control of an armed group” (Para 15).
- Religious, cultural, historical, and similar objects have a special status under the Statute. And are protected from crimes committed both in battle and out of it.

IV. Notes on relevant topics

i. Subject-matter or substantive topics

a. War crimes

- **Principles.** One of the fundamental principles of international humanitarian law is that all parties to a conflict should be approached as equals. This is particularly important concerning NIACs.
- **Nexus between the act and the conflict.** The requirement that there be a nexus or connection between the impugned conduct and an armed conflict is a well-accepted principle of international criminal law. Each of the Elements of Crimes of war crimes requires that “[t]he conduct took place in the context of and was associated with an armed conflict.”

The *nexus* is sometimes explained as follows: “the alleged crimes were closely related to the hostilities.” (*Lubanga, confirmation of charges, 2007, para 288; Katanga, confirmation of charges, 2008, para. 380*).³⁰

³⁰ The principle was set out in an early judgment of the International Criminal Tribunal for the former Yugoslavia: “[t]he existence of an armed conflict . . . is not sufficient . . . For a crime to fall within the jurisdiction of the International Tribunal, a sufficient nexus must be established between the alleged offence and the armed conflict which gives rise to the applicability of international humanitarian law.” *Tadić* (IT-94-1-T), Judgment, Trial Chamber, 7 May 1997, para. 572.

The armed conflict “must play a substantial role in the perpetrator's decision, in his ability to commit the crime or in the manner in which the conduct was ultimately committed.”. But “[i]t is not necessary, however, for the armed conflict to have been regarded as the ultimate reason for the criminal conduct, nor must the conduct have taken place in the midst of the battle.” (*Katanga, decision on the confirmation of charges, 2008, para. 380; Abu Garda, confirmation of charges, 2010, para 90; Bemba, Judgement, 2016, para. 142 & Katanga, Judgement, 2014, para. 1776*).

- **Article 8 (2)(b)(i).31 and “conduct on hostilities crimes”**. “The war crime provided for in article 8(2)(b)(i) of the Statute is the first in the series of war crimes for which one essential element is that the crime must be committed during the conduct of hostilities (commonly known as “conduct of hostilities crimes”). Accordingly, this crime is applicable only to attacks (acts of violence) directed against individual civilians not taking direct part in the hostilities, or a civilian population, that has not yet fallen into the hands of the adverse or hostile party to the conflict to which the perpetrator belongs. (*Katanga, confirmation of charges, 2008, para. 267*)
- **Distinction between “conduct on hostilities crimes” and “fallen into hands”** Pre-trial Chambers in Katanga and Ntaganda, when interpreting article 8 of the Statute, might have established a distinction between “battlefield attacks” (conduct on hostilities crimes) and those that, being associated with the conflict, take place after a civilian population has fallen into the hands of the party charged with violating the laws and customs of war.³²

b. Crimes against humanity

- **Destruction of property**. There is a substantial body of case law from the International Criminal Tribunal for the former Yugoslavia holding that under certain circumstances the destruction of property may constitute the crime against humanity of persecution. (*Blaškić (IT-95-14-A), Judgment, 29 July 2004, para. 149.*)

³¹ Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

³² Katanga. Decision on the confirmation of charges, 2008. Para. 267 and 798. Ntaganda. Decision pursuant to article 61(7)(a) and (b) of the Rome Statute, 2004. Para 45.

- **Forced disappearance.** In the Pre-Trial Chamber III's decision on the request to open an investigation in Burundi, the Court acknowledged the fact that there had been an agreed and paid ransom involved in the alleged act of disappearance. It is still considered that the requirements for this crime were met, as far as the standard of proof required in this stage of the process is concerned. (Para. 125).

ii. Procedural matters

- **Scope on whether to authorize opening an investigation for a different type of crimes with regard to the ones requested.** In the decision to open an investigation on Burundi (2017) the Prosecutor submitted that there was no reasonable basis to believe that the degree of intensity of the armed confrontation or the level of organisation of these armed entities was sufficient to characterise the situation as a non-international armed conflict within the meaning of article 8(2)(c) of the Rome Statute.

The Chamber recalled that at the preliminary examination stage, the presence of several plausible explanations for the available information does not entail that an investigation should not be opened into the crimes concerned, but rather calls for the opening of such an investigation in order to properly assess the relevant facts. At the preliminary examination stage, the Prosecutor is allowed to draw conclusions on the basis of the information received, provided those conclusions do not appear manifestly unreasonable.³³

- **Scope on the parameters of the investigation.** In Burundi, the Chamber authorised the commencement of an investigation of any crime within the jurisdiction of the Court committed within the temporal scope established in the order.

³³ See: Burundi, decision on the request to open an investigation 2017, para 139. Comoros Article 53 Decision, para. 13; Georgia Article 15 Decision, paras 25 and 35.

This means the Prosecutor is not bound by the incidents or crimes set out in the decision or her request. She could extend her investigation to other crimes against humanity or other article 5 crimes as they remain within the parameters of the authorized. (Burundi, 2017, para 193).

Investigation bodies or commissions vis-à-vis admissibility

National investigation merely aimed at the gathering of evidence does not lead, in principle, to the inadmissibility of any cases before the Court considering that, for the purposes of complementarity, an investigation must be carried out with a view to conducting criminal prosecutions. (Burundi, decision on the request to open an investigation, 2017, para. 152)

Victims' participation.

- Article 15(3) of the Statute grants victims an independent direct avenue to make representations before a Pre-Trial Chamber seized of a request for authorization of an investigation.

Related: article 15(3) of the Statute and rule 50(1) of the Rules of Procedure and Evidence; Burundi decision on the request to open an investigation, 2017, para. 10.

The Prosecutor is not barred from deciding that giving notice would pose a danger to the life or wellbeing of the victims and witnesses or to the integrity of the investigation pursuant to rule 50(1) of the Rules.

This rule should be interpreted to mean that such a determination by the Prosecutor is not definitive with regard to the right of victims to make representations to the Pre-Trial Chamber. It is rather subject to a decision of the Pre-Trial Chamber on this matter. (Burundi decision, 2017, para. 10)

Protection of victims and witnesses.

- Article 68(1) establishes that the Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.

The time scope of these measures comprises also the preliminary examination stage, and not only the investigation and prosecution. (Pre-Trial Chamber III, 2017, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi, para.

States' obligations after withdrawal.

- The obligations of a withdrawing State Party, after the withdrawal takes effect, are specifically governed by article 127(2) of the Statute. The first sentence of this provision sets forth, in general, that “[a] State shall not be discharged, by reason of its withdrawal, from the obligations arising from this Statute while it was a Party to the Statute, including any financial obligations which may have accrued”. The second sentence of article 127(2) of the Statute stipulates, more specifically, that “[i]ts withdrawal shall not affect any cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective”. (Burundi situation – request to open an investigation, 2017, para. 25)

iii. Interpretation of the Rome Statute regime

- Article 51 sets forth the obligation of adopting a body of Rules of Procedure and Evidence. Article 51(5) provides for the hierarchy of the Rome Statute in the event of conflict among them.
- The Court has established that a Rules' provision cannot be interpreted in a manner as to narrow (or restrict) the scope of an article of the Statute.

V. Summary of Relevant Dispositions

Rome Statute

- **Rome Statute Article 127.** States' withdrawal and obligations stemming from it.
- **Rome Statute. Article 56.** Preserving evidence; unique investigative opportunity
- **Rome Statute. Article 93.** Supporting national proceedings for article 5 crimes or other crimes.
- **Rome Statute. Articles 75 and 85.** Collateral litigation; reparations and compensations.
- **Rome Statute. Article 19.** Challenges to the jurisdiction of the Court or the admissibility of a case.

Rules of Procedure and Evidence

- **Rule 85 of the Rules of Procedure and Evidence.** Victims' requirements.





www.jtmexico.org →



@JTEnMexico



JTMX - Justicia Transicional en México



@jtmx_org



JTMX. Justicia Transicional en México



JTMX