



Policy Paper on Preliminary Examinations

DRAFT

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Executive Summary

1. States Parties to the Rome Statute agreed they had a duty to put an end to the impunity of the most serious crimes of concern to the international community as a whole in order to prevent future crimes. They committed to prosecute such crimes domestically and accepted the intervention of an independent and permanent International Criminal Court on their territory should they fail to act.
2. Within this framework, it is the Office of the Prosecutor which is responsible for determining whether a situation meets the legal criteria established by the Statute to warrant investigation by the ICC. For this purpose, the Office conducts a preliminary examination of all situations brought to its attention based on statutory criteria and the information available.
3. This policy paper describes the relevant Rome Statute factors and procedures applied by the Office in the conduct of its preliminary examination activities.
4. The preliminary examination of a situation may be initiated by: (a) a decision of the Prosecutor, taking into consideration any information on crimes under the jurisdiction of the Court, including 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 pursuant to article 12(3) by a State which is not a Party to the Statute.
5. Once a situation is thus identified, article 53(1)(a)-(c) of the Statute establishes the legal framework for a preliminary examination. It provides that, in order to determine whether there is a reasonable basis to proceed with an investigation into the situation the Prosecutor shall consider: jurisdiction (temporal, material, and either territorial or personal jurisdiction); admissibility (complementarity and gravity); and the interests of justice.
6. Jurisdiction relates to whether a crime within the jurisdiction of the Court has been or is being committed. It requires an assessment of (i) temporal jurisdiction (date of entry into force of the Statute, namely 1 July 2002 onwards, date of entry into force for an acceding State, date specified in a Security Council referral, or in a declaration lodged pursuant to article 12(3)); (ii) material jurisdiction as defined in article 5 of the Statute (genocide; crimes against humanity; war crimes; and aggression); and (iii) either territorial or personal jurisdiction, which entails that the crime occur on the territory or by a national of a State Party or a State not Party that has lodged a declaration accepting the jurisdiction of the Court, or arises from a situation referred by the Security Council.

7. Admissibility comprises complementarity and gravity.
8. Complementarity involves an examination of the existence of relevant national proceedings in relation to the potential cases being considered for investigation by the Office, taking in consideration the Office's policy to focus on those who appear to bear the greatest responsibility for the most serious crimes. Where relevant domestic investigations or prosecutions exist, the Prosecution will assess their genuineness.
9. Gravity includes an assessment of the scale, nature, manner and impact of the alleged crimes committed in the situation.
10. The 'interests of justice' is a countervailing consideration. The Office must assess whether, taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.
11. There are no other statutory criteria. Factors such as geographical or regional balance are not relevant criterion for a determination that a situation warrants investigation under the Statute. While lack of universal ratification means that crimes may occur in situations outside the territorial and personal jurisdiction of the ICC, this can only be remedied by a Security Council referral.
12. As required by the Statute, the Office's preliminary examination activities will be conducted in the same manner irrespective of whether the Office receives a referral from a State Party or the Security Council or acts on the basis of information of crimes obtained pursuant to article 15. In all circumstances, the Office will analyse the seriousness of the information received and may seek additional information from States, organs of the United Nations, intergovernmental and non-governmental organizations and other reliable sources that are deemed appropriate. The Office may also receive oral testimony at the seat of the Court.
13. Before making a determination on whether to initiate an investigation, the Office will also seek to ensure that the States and other parties concerned have had the opportunity to provide the information they consider appropriate.
14. There are no timelines provided in the Statute for a decision on a preliminary examination. Depending on the facts and circumstances of each situation, the Office may either decide (i) to decline to initiate an investigation where the information manifestly fails to satisfy the factors set out in article 53(1)(a)-(c); (ii) to continue to assess relevant national proceedings; (iii) to continue to collect information in order to establish sufficient factual and legal basis to render a determination; or (iv) to initiate the investigation, subject to judicial review as appropriate.

15. In order to promote transparency of the preliminary examination process the Office aims to issue regular reports on its activities and provides reasoned responses for its decisions to either proceed or not proceed with investigations.

16. Where the Prosecutor has initiated the preliminary examination process *proprio motu* and determined a reasonable basis to proceed, the Office has adopted a policy of inviting the State(s) concerned to refer the situation to the Court in order to promote cooperation. As in all other situations, such a referral will have no impact on preliminary examination activities.

17. The Office will also consider, as a matter of policy, the extent to which its preliminary examination activities can serve to stimulate genuine national proceedings against those who appear to bear the greatest responsibility for the most serious crimes. In accordance with its positive approach to complementarity, based on the goals of the preamble and article 93(10) of the Statute, the Office will seek to encourage and cooperate with efforts to conduct genuine national proceedings.

I. Introduction

18. This policy paper of the Office of the Prosecutor describes the Office's policy and practice in the conduct of its preliminary examination activities, i.e how the Office applies the statutory criteria to assess whether a situation brought to its attention warrants investigation. The paper is based on the Statute, the Rules of Procedure and Evidence, the Regulations of the Court, the Regulations of the Office of the Prosecutor, the Office's prosecutorial strategy and policy documents and its experience over the first seven years of its activities.

19. This is an internal policy document of the Office of the Prosecutor. As such, it does not give rise to legal rights and is subject to revision based on experience and in light of legal determinations by the Chambers of the Court.

20. The Office of the Prosecutor has made this policy paper public in the interest of clarity and predictability over the manner in which it applies the legal framework agreed upon by States Parties. The Office hopes that such clarity may facilitate the adjustment of other actors (political leaders, diplomats, conflict managers and mediators, NGOs and advocacy groups) to the legal framework set out in the Rome Statute, promote cooperation and increase the preventive impact of the Statute.

II. The Rome Statute system

21. As affirmed in the Preamble, the goal of the Rome Statute is to put an end to impunity for the most serious crimes of international concern and thus to contribute to their prevention. To achieve this goal, the Statute created an innovative system of international justice. This system is based on national states interacting with an independent and permanent International Criminal Court supported by

international organizations and a global civil society. First, States committed to punish such crimes themselves, recalling “the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”.¹ Second, they established the ICC to be “complementary to national criminal jurisdictions,”² accepting that, should a State Party fail to genuinely investigate and prosecute, the ICC could independently decide to step in. Finally, they resolved “to guarantee lasting respect for and the enforcement of international justice” thus committing to cooperate with the ICC whenever and wherever it decides to act.³

22. The institutional design thus created heightens the prospect of accountability for those suspected of bearing the greatest responsibility for the most serious crimes.

23. Within this framework, national jurisdictions have primary responsibility, the Court will intervene only in the absence of genuine national proceedings and it is the responsibility of the Office of the Prosecutor to determine where statutory conditions for the opening of investigations exist, subject to judicial review as appropriate.

24. This role of the Prosecutor is a unique trait of the ICC.⁴ The ability of national and international Courts to define their own jurisdiction within statutory parameters - *compétence de la compétence* - is well established. The difference with the ICC is that its Statute does not pre-define situations for investigations. The International Military Tribunals in Nuremberg and Tokyo,⁵ the International Criminal Tribunals for the former Yugoslavia and Rwanda,⁶ the Special Court for Sierra Leone⁷ and the Extraordinary Chambers in the Courts of Cambodia⁸ were provided jurisdiction over a specific situation. States or the Security Council defined those situations and decided that the intervention of an international criminal court was appropriate.

¹ Preamble paragraph 6, ICC Statute.

² Articles 1 and 17, ICC Statute.

³ Part 9, ICC Statute.

⁴ Articles 15(3), 42(1), 53(1) ICC Statute.

⁵ The IMT at Nuremberg was established for the “trial and punishment of the major war criminals of the European Axis” arising from World War II; Article 1, Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (8 August 1945). The IMTFE was established for the “trial and punishment of the major war criminals in the Far East” arising from World War II; article 1, Charter of the International Military Tribunal for the Far East.

⁶ The ICTY and ICTR were established by the Security Council pursuant to Chapter VII of the UN Charter for the prosecution, respectively, of “persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991”, S/RES/827 (1993), and “persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994”, S/RES/955 (1994).

⁷ The Special Tribunal for Lebanon was established to hear a specific case, namely “to try all those who are found responsible for the terrorist crime which killed the former Lebanese Prime Minister Rafiq Hariri” and other connected cases.

⁸ The ECCC was established by an agreement between the United Nations and the Government of Cambodia, for the prosecution of “senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979”; article 1, Law on the Establishment of the Extraordinary Chambers.

These courts were not in a position to decline, nor to expand their focus to other situations. By contrast, under the system established by the Rome Statute, it is the ICC that ultimately determines when and where the Court should intervene based on the statutory criteria. This was the object of lengthy deliberations during the negotiation of the Statute.⁹

III. Initiation of preliminary examination

25. The preliminary examination of a situation may be initiated on the basis of: (a) a decision of the Prosecutor, taking into consideration any information on crimes under the jurisdiction of the Court, including 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 pursuant to article 12(3) by a State which is not a Party to the Statute.¹⁰

26. Once a situation has been thus identified, the Office will proceed to assess whether the opening of an investigation is warranted under the Statute.

27. As set out in article 53(1)(a)-(c), the Office will consider in all situations whether: (a) the information available provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed; (b) the case is or would be admissible under article 17; and (c) an investigation would not serve the interests of justice.¹¹

28. The Office will consider those factors irrespective of the way in which the preliminary examination is initiated. In particular, no automaticity is assumed where the Prosecutor receives a referral from a State Party or the UN Security Council. Thus, the referrals received to date from Uganda, the Democratic Republic of the Congo ("DRC"), the Central African Republic ("CAR") and from the Security Council concerning Darfur, Sudan, were all subjected by the Office to the same preliminary examination process in order to determine whether the factors set out in article 53(1) were satisfied before an investigation could be initiated.

29. Moreover, documents attached to a referral or declaration or any other information will be subject to the Office own critical evaluation.¹²

30. As of end September 2010, the Office had considered information on crimes from numerous sources including open sources and "communications" (8,874 such "communications" were received pursuant to article 15 of the Statute, of which 4,002 were manifestly outside of the jurisdiction of the Court); three State Party referrals;

⁹ See e.g. Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, U.N. GAOR, 50th Sess., Supp. No. 22, U.N. Doc. A/50/22, ¶ 113 (1995); Report of the Preparatory Committee on the Establishment of an International Criminal Court, U.N. GAOR, 51st Sess., Supp. No. 22, Vol. I, U.N. Doc. A/51/22, ¶ 35 (1996).

¹⁰ Regulation 25, Regulations of the Office of the Prosecutor.

¹¹ Article 53(1), ICC Statute; Rule 48, ICC RPE.

¹² See below Section IV *General Principles*.

one Security Council referral; and two declarations accepting the jurisdiction of the Court, lodged by Cote d'Ivoire and the Palestinian National Authority.¹³

31. The Office has made public its preliminary examination of 13 situations, including those that have led to the opening of investigations (Uganda, DRC, CAR, Darfur, Kenya), those dismissed (including Venezuela and Iraq),¹⁴ and those that remain under preliminary examination (Colombia, Afghanistan, Cote d'Ivoire, Georgia, Palestine and Guinea).¹⁵

32. While lack of universal ratification means that crimes may occur in situations outside the territorial and personal jurisdiction of the ICC, this can only be remedied by a Security Council referral.

IV. General Principles

33. The preliminary examination process is conducted by the Office on the basis of the facts and information available and in the context of the overarching principles of independence, impartiality and objectivity.

Independence

34. Article 42 of the Statute provides that the Office of the Prosecutor shall act independently of instructions from any external source.¹⁶ Independence goes beyond not seeking or acting on instructions: it means that the Office decisions shall not be altered by the presumed or known wishes of any party or by the cooperation seeking process.

35. The scope of the Prosecutor's examination cannot be bound in a manner contrary to the Statute. As such, it is irrelevant for the Office if a referral identifies cases against particular individuals or particular parties to a conflict.¹⁷ For example, the referral from the Government of Uganda made reference to the "situation concerning the Lord's Resistance Army". Consistent with the Statute, the Office informed the Government of Uganda that it interpreted the referral to refer to all article 5 crimes of relevance to the situation.¹⁸

¹³ For updated information see [ICC-OTP website](#).

¹⁴ [OTP response to communications received concerning Venezuela](#), 9 February 2006; [OTP response to communications received concerning Iraq](#), 9 February 2006.

¹⁵ *Report of the International Criminal Court*, [A/64/356](#), 17 September 2009.

¹⁶ Articles 42(1)-(2), ICC Statute.

¹⁷ The Statute indicates that the Prosecutor's initiation of an investigation *proprio motu*, the referral of a situation by a State Party or the Security Council, or the acceptance of jurisdiction by a State not Party to the Statute, apply with respect to any crimes referred to in article 5 of relevance to the situation; See articles 12, 13, 14(1), 15, 42(1), and 54(1)(a), ICC Statute; rule 44(2), ICC RPE.

¹⁸ Letter from the Prosecutor to President Kirsch dated 17 June 2004 annexed to Decision of the Presidency, *Situation in Uganda*, Decision Assigning the Situation in Uganda to Pre-Trial Chamber II, [ICC-02/04-1](#), 5 July 2004.

Where a referral or an article 15 communication is accompanied by supporting documentation that identifies potential perpetrators or implies guidance, such information is not binding and is subject to the Office's independent evaluation. For example, in relation to the situation in Darfur, Sudan, the Office received a sealed envelope from the United Nations Secretary General containing the conclusions reached by the UN International Commission of Inquiry for Darfur as to persons potentially bearing criminal responsibility. The Office did not consider this list of names to be binding, but, instead, that it represented the conclusions of the Commission. Upon examining its contents the Prosecutor proceeded to reseal the document, as it could not form the basis of the Office's own investigation, which was carried out independently and autonomously. On a similar basis, the list of potential perpetrators identified by from the Commission of Inquiry into the Post-Election Violence also known as the Waki Commission, did not influence the Office's independent examination of the Situation in the Republic of Kenya.¹⁹ The manner in which the Office selects cases will be elaborated in a separate policy paper.

36. While the Office interacts and may seek information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources, any information received is subject to the Office's own critical evaluation. In relation to the situation in Darfur, Sudan, the Office received more than 2,500 items of information, including documentation, video footage and interview transcripts that had been gathered by the International Commission of Inquiry for Darfur. While the Office considered such information as part of its determination whether crimes within the jurisdiction of the Court had been or were being committed, the material was subjected to the Office's own analysis. Similarly, the Office evaluated the information received from the Waki Commission, as well as other information, before reaching a determination to request authorization to initiate an investigation into the situation in the Republic of Kenya.

37. In the same vein, the Office's policy of inviting and welcoming referrals does not impact on the manner in which the Office conducts its preliminary examination.²⁰

Impartiality

38. The principle of impartiality, which flows from article 21(3) of the Statute, means (i) that the Office will not draw any adverse distinction founded on grounds prohibited under the Statute and (ii) will apply consistent methods and criteria irrespective of the States or parties involved or the person(s) or group(s) concerned.

39. Geo-political implications of the location of a situation, geographical balance between situations or parity within a situation between rival parties are not relevant criteria for the selection of situations under the Statute.

¹⁹ Press Release: *Waki Commission list of names in the hands of ICC Prosecutor*, [ICC-OTP-20090716-PR439](#), 16 July 2009

²⁰ See below Section V *Proprio Motu* powers and policy of inviting referrals.

40. Impartiality does not mean 'equivalence of blame' within a situation either; this will be elaborated upon in the context of a separate policy paper on case selection.

Objectivity

41. In accordance with article 54 (1) the Office will investigate incriminating and exonerating circumstances equally in order to establish the truth.²¹ The same principle is applied at the preliminary examination stage in relation to information that forms the basis of a decision to proceed with an investigation.

42. As information evaluated at the preliminary examination stage is obtained from external sources rather than the Office's own evidence-gathering powers,²² the Office pays particular care to assess the relevance, reliability, credibility and completeness of such information.

43. The Office uses standard formats for analytical reports; standard methods of source evaluation; and consistent rules of measurement and attribution in its crime pattern analysis. It checks internal and external coherence and considers information from diverse sources as a means of bias control.

44. The Office also seeks to ensure due process by providing all relevant parties with the opportunity to submit information they consider important.

V. Article 53(1)(a)–(c) factors

45. This section examines each of factors set out in article 53(1)(a)-(c) that are applied at the preliminary examination stage in order to determine whether there is a reasonable basis to proceed with an investigation, based on the information available. The specificity and credibility of such information must satisfy the requisite standard of proof of 'reasonable basis', which has been interpreted by Chambers of the Court to require "a sensible or reasonable justification for a belief that a crime falling within the jurisdiction of the Court 'has been or is being committed'".²³

(a) Jurisdiction

46. In accordance with Article 53 (1)(a) of the Statute, the Prosecutor must determine whether there is a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed. Accordingly, there must be a reasonable basis to believe that the information on alleged crimes fulfils temporal requirements;

²¹ Article 54(1)(a), ICC Statute; Regulation 34(1), Regulations of the Office of the Prosecutor.

²² A notable exception is testimony collected by the Office at the seat of the Court pursuant to article 15(2), ICC Statute; rule 104, ICC RPE.

²³ *Situation in 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, [ICC-01/09-19-Corr](#), 31 March 2010, para 35.

meets territorial or personal jurisdiction (based either on Article 12 or a Security Council referral), and falls within the subject-matter jurisdiction of the Court.²⁴

47. The temporal jurisdiction of the Court applies from the date of entry into force of the Statute, namely 1 July 2002 onwards.²⁵ Temporal jurisdiction with respect to a particular situation will be set by the date of entry into force of the Statute for a particular State Party in the case of an acceding State, the date specified in a Security Council referral, or the date indicated in a declaration lodged pursuant to article 12(3).²⁶

48. The subject matter jurisdiction of the Court, as set out in article 5 of the Statute, extends to: (a) the crime of genocide, as defined in article 6; (b) crimes against humanity, as defined in article 7; (c) war crimes, as defined in article 8; and (d) the crime of aggression, with respect to which the Court shall exercise jurisdiction once the provision adopted by the Assembly of States Parties enters into force.²⁷

49. The Court may exercise its jurisdiction if a crime referred to in article 5 of the Statute is committed on the territory of, or by a national of, a State Party (article 12(2)) or a State not Party to the Statute which has lodged a declaration accepting the exercise of jurisdiction by the Court (article 12(3)).²⁸ In addition, the Court may exercise its jurisdiction in relation to any territory or national where the Security Council refers a situation to the Prosecutor, acting under Chapter VII of the UN Charter.²⁹ Only the UN Security Council may set aside the territorial and national parameters defined in article 12; when using its *proprio motu* powers, the Prosecutor is bound by those parameters.

50. The establishment of the Court's jurisdictional parameters in accordance with article 53(1)(a) defines in objective terms the theatre within which the Office conducts its investigative activities: i.e. the 'situation'.

²⁴ Articles 12 and 13(b), ICC Statute. See also *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, [ICC-01/04-01/06-772](#), paras 21-22; *Situation in 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, [ICC-01/09-19-Corr](#), 31 March 2010, paras 39.

²⁵ Articles 11 and 24, ICC Statute.

²⁶ See also Article 11(2), ICC Statute.

²⁷ [RC/Res.6](#) (28 June 2010).

²⁸ Article 12(3), ICC Statute; rule 44, ICC RPE. It should be noted that article 12(3) is a jurisdictional provision, not a trigger mechanism. As such, such declarations should not be equated with referrals, but will require a separate triggering by the Prosecutor *proprio motu* or by a State Party. See also Regulation 45-46, Regulations of the Court, which provide for the constitution of a Pre-Trial Chamber only following the Prosecutor's notification of a referral or of an intention to submit an article 15 request.

²⁹ Article 13(b), ICC Statute.

(b) Admissibility

51. As set out in article 17(1) of the Statute, admissibility requires an assessment of complementarity (subparagraphs (a)-(c)) and gravity (subparagraph (d)). Pursuant to its prosecutorial strategy, the Office will assess complementarity and gravity in relation to the most serious crimes alleged and to those who appear to bear the greatest responsibility for those crimes.³⁰ 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 counts before proceeding.

(i) Complementarity

52. At the stage of opening a situation, article 53(1)(b) requires the Office to consider whether “the case is or would be admissible under article 17”. Prior to the initiation of an investigation at the preliminary examination stage there is not yet a ‘case’ strictly speaking, as understood to comprise an identified set of incidents, individuals and charges. Therefore the Office will consider admissibility taking into account the potential cases that would likely arise from an investigation into the situation based on the information available.³¹

53. The identification of such potential cases is without prejudice to such individual criminal responsibility as may be attributed as a result of the Office’s subsequent investigations. The assessment is preliminary in nature and is not binding for the purpose of future admissibility determinations.³²

54. As required by article 53(1)(b) and article 17, the Office’s assessment relates to whether a State has investigated or prosecuted, or is investigating or prosecuting, in a genuine manner, the case or cases that could be selected by the Prosecution. An admissibility determination is not a judgment on the national justice system as a whole. If an otherwise functioning judiciary is not investigating or prosecuting the relevant case(s), the determining factor is the absence of relevant proceedings. For example, in relation to the Situation in Darfur, the Office’s admissibility assessment related to the potential cases that would form the focus of the Prosecutor’s investigations and prosecutions and not to the state of the Sudanese judicial system as a whole.³³ The preliminary examination involved five missions by the Office to

³⁰ *Situation in the Republic of Kenya*, Request for authorisation of an investigation pursuant to Article 15, [ICC-01/09-3](#), 26 November 2009, paras 55 and 78; *Situation in 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, [ICC-01/09-19-Corr](#), 31 March 2010, para 50.

³¹ *Situation in the Republic of Kenya*, Request for authorisation of an investigation pursuant to Article 15, [ICC-01/09-3](#), 26 November 2009, paras 51 and 107; *Situation in 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, [ICC-01/09-19-Corr](#), 31 March 2010, paras 50, 182 and 188.

³² *Situation in 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, [ICC-01/09-19-Corr](#), 31 March 2010, para 50.

³³ *Situation in Darfur, Sudan*, Prosecutor's Application under Article 58 (7), [ICC-02/05-56](#) (27 February 2007), para 4.

Khartoum to meet with members of the national judiciary, including members of special courts allegedly established to address Rome Statute crimes. The assessment revealed an absence of any proceedings into the massive crimes committed in Darfur.³⁴

55. As confirmed by the Appeals Chamber, the first question in assessing complementarity is an empirical question: whether there are or have been any relevant national investigations or prosecutions. This is expressly stated in Article 17(1)(a) (“being investigated or prosecuted”), 17(1)(b) (“has been investigated”) and 17(1)(c) (“tried”). The absence of national proceedings, i.e. domestic inactivity, is sufficient to make the case admissible.³⁵ Chambers of the Court have stated, moreover, that this assessment cannot be undertaken on the basis of hypothetical national proceedings that may or may not take place in the future: it must be based on the concrete facts as they exist at the time when the Office submits an application under article 58 for an arrest warrant or a summons to appear.³⁶

56. If there are or have been national investigations or prosecutions, then the question of unwillingness or inability arises and the Office will assess whether such proceedings are vitiated by an unwillingness or inability to genuinely carry out the proceedings. Where it is necessary to assess “unwillingness” and “inability”, the Office will analyse the relevant national investigation and prosecution of the conduct alleged.

57. By way of illustration, the analysis of national proceedings represents the main focus of the Office’s ongoing preliminary examination of the Situation in Colombia. Upon taking Office, the Prosecutor conducted a review of information on crimes collected under article 15. The Office identified the situations in the DRC, Uganda and Colombia as containing the gravest occurrence of crimes within its treaty jurisdiction. Preliminary examination indicated an absence of national proceedings in the DRC and Uganda, while national proceedings had been initiated in Colombia. The Office is currently analysing the genuineness and focus of such domestic investigations and prosecutions in Colombia, including proceedings against paramilitary leaders, politicians, guerrilla leaders and military personnel. The Office is also analysing allegations of international networks working in Europe and supporting armed groups committing crimes in Colombia.

58. For the purpose of assessing inability in a particular case or potential 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, or otherwise unable to carry out its proceedings.

³⁴ *Ibid*, paras 253-267.

³⁵ *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.

³⁶ *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.

59. In conducting its evaluation, the Office may consider, *inter alia*, the absence of conditions of security for witnesses, investigators, prosecutors and judges or lack of adequate protection systems; the existence of laws that serve as a bar to domestic proceedings in the case at hand, such as amnesties, immunities or statutes of limitation; or the lack of adequate means for effective investigations and prosecutions.

60. For the purpose of assessing unwillingness in a particular case, the Office may consider whether there is evidence of intent to shield the person(s) concerned from criminal responsibility for crimes within the ICC jurisdiction.

61. This may be assessed in light of such indicators as, *inter alia*, the scope of the investigation and in particular whether the focus is on the most responsible of the most serious crimes or marginal perpetrators or minor offences; 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; lack of resources allocated to the proceedings at hand as compared with overall capacities; and refusal to provide information or cooperate with the ICC.

62. Unwillingness can also be found in light of unjustified delays in the proceedings and lack of independence or impartiality.

63. Unjustified delay in the proceedings at hand may be assessed in light of, *inter alia*, whether the delay in the proceedings can be objectively justified in the circumstances; and whether there is evidence in the circumstances of a lack of intent to bring the person(s) concerned to justice.

64. Independence in the proceedings at hand may be assessed in light of such indicators as, *inter alia*, the alleged involvement of the apparatus of the State, including those responsible for law and order, in the commission of the alleged crimes; the extent to which appointment and dismissal of investigators, prosecutors and judges affect due process in the case; the application of a regime of immunity and jurisdictional privileges for alleged perpetrators; political interference in the investigation, prosecution and trial; and corruption of investigators, prosecutors and judges.

65. Impartiality in the proceedings at hand may be assessed in light of such indicators as, *inter alia*, linkages between the suspected perpetrators and competent authorities responsible for investigation, prosecution and/or adjudication of the crimes; public statements, awards, sanctions, promotions or demotions, deployments, dismissals or reprisals in relation to investigative, prosecutorial or judicial personnel concerned.

66. 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 change in circumstance.³⁷

(ii) Gravity

67. Although any crime falling within the jurisdiction of the Court is serious,³⁸ 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. The Office will apply the same assessment in relation to gravity at the situation stage.

68. The Statute and Rules do not define the admissibility criterion of gravity.³⁹ As the Office has previously submitted, it would be an error of law to inject rigid requirements into the legal standard of “sufficient gravity” in article 17(1)(d).⁴⁰ The admissibility mechanism is intended to establish a basic standard for gravity, excluding offenders and crimes that do not warrant the exercise of jurisdiction.

69. The Appeals Chamber has dismissed the setting of an overly restrictive legal bar to the interpretation of gravity that would hamper the deterrent role of the Court. It has also observed that the role of persons or groups may vary considerably depending on the circumstances of the case and therefore should not be exclusively assessed or predetermined on excessively formulistic grounds.⁴¹

70. The Office’s assessment of gravity includes both quantitative and qualitative considerations based on the prevailing facts and circumstances. As stipulated in Regulation 29(2) of the Regulations of the Office, the non-exhaustive factors that guide the Office’s assessment include the scale, nature, manner of commission of the crimes, and their impact:⁴²

- (a) The scale of the crimes may be assessed in light of, *inter alia*, the number of direct and indirect victims, the extent of the damage caused by the crimes, in particular the bodily or psychological harm caused to the victims and their

³⁷ *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; Regulation 29(4), Regulations of the Office of the Prosecutor.

³⁸ See Preamble para. 4, articles 1 and 5, ICC Statute.

³⁹ The term ‘gravity’ is qualified for the purpose of sentencing in rule 145, ICC RPE.

⁴⁰ *Ibid*

⁴¹ *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor’s appeal against the decision of the Pre-Trial Chamber I entitled “Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58”, [ICC-01/04-169](#), under seal 13 July 2006; reclassified public 23 September 2008, paras. 69-79.

⁴² See, in concurrence with the Prosecution’s submissions, *Prosecutor v. Abu Garda*, Decision on the Confirmation of Charges, ICC-02/05-02/09-243-Red, 8 February 2010, paras. 31; *Situation in 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, [ICC-01/09-19-Corr](#), 31 March 2010, para 188.

families, and their geographical or temporal spread (intensity of the crimes over a brief period or low intensity violence over an extended period);

- (b) The nature of the crimes refers to the specific elements of each offence such as killings, rapes and other crimes involving sexual or gender violence and crimes committed against children, or the imposition of conditions of life on a community calculated to bring about its destruction;
- (c) The manner of commission of the crimes may be assessed in light of, *inter alia*, the means employed to execute the crime, the degree of participation and intent in its commission, the extent to which the crimes were systematic or result from a plan or organized policy or otherwise resulted from the abuse of power or official capacity, and elements of particular cruelty, including the vulnerability of the victims, any motives involving discrimination, or the use of rape and sexual violence as a means of destroying communities;
- (d) The impact of crimes may be assessed in light of, *inter alia*, their consequence on the local or international community, including the long term social, economic and environmental damage; crimes committed with the aim or consequence of increasing the vulnerability of civilians; or other acts the primary purpose of which is to spread terror among the civilian population.

71. The Prosecution's submissions to the Court on gravity show the way it has applied the above factors in accordance with the prevailing facts and circumstances in the situations before it. In the Prosecutor's *proprio motu* application concerning Kenya, for example, the Office referred to the scale (1,200 persons allegedly killed, at least 1000 reported rapes and 450,000 persons displaced) and the nature of the post-election violence, which resulted in large scale killings of civilians, rape and other forms of sexual violence, serious injury and forcible displacement; while there occurred widespread looting and wanton destruction of residential and commercial areas in six out of eight Kenyan regions, including the country's most populated areas. The Application referred to the manner of commission as, in many instances, the crimes were organized and planned within the context of a widespread and systematic attack against selected segments of the Kenyan civilian population, based on ethnicity and/or presumed political affiliation. Perpetrators often displayed particular cruelty by cutting off body parts, hacking or burning civilians to death, or using gang rape and genital mutilation. The Application then described the impact of the crimes, including infection with HIV/AIDS and other sexually transmitted diseases. Many displaced persons lost both their home and means of subsistence. The crimes also had an impact on local communities in terms of security, social structure, economy and persistence of impunity; resulting, for example, in a fall in Kenya's Gross Domestic Product growth rate from a reported 7% in 2007 to 1.7% in 2008.⁴³

⁴³ *Situation in the Republic of Kenya*, Request for authorisation of an investigation pursuant to Article 15, [ICC-01/09-3](#), 26 November 2009, paras 56-59.

72. Considerations of gravity have also been applied in situations leading to a decision not to proceed. In relation to the Situation in Iraq, the available information in relation to crimes allegedly committed by State Party nationals revealed a limited scale of conduct constituting war crimes of wilful killing and inhumane treatment by members of national armed forces. In view of considerations of gravity the Office declined to open investigations, while noting it could revisit its assessment in the light of new facts or evidence.⁴⁴

(c) Interests of Justice

73. The interests of justice is only considered where the requirements of jurisdiction and admissibility are met. Under article 53(1), while the jurisdiction and admissibility are positive requirements, interests of justice is a potential countervailing consideration that may produce a reason not to proceed. As such, the Prosecutor is not required to establish that an investigation is in the interests of justice. Rather, the Office will proceed unless there are specific circumstances which provide substantial reasons to believe it is not in the interests of justice to do so at that time. Pursuant to article 53(1), the Office will consider in particular the gravity of the crime and the interests of victims.

74. The Statute recognizes a specific role for the United Nations Security Council in matters affecting international peace and security. Accordingly, the concept of the interests of justice should not be conceived to embrace all issues related to peace and security. The interests of justice provision should not be considered a conflict management tool requiring the Prosecutor assume the role of a mediator in political negotiations: such an outcome would run contrary to the explicit judicial functions of the Office and the Court as a whole.⁴⁵

75. In light of the mandate of the Office and the object and purposes of the Statute, there is a strong presumption that investigations and prosecutions will be in the interests of justice, and therefore a decision not to proceed on the grounds of the interests of justice would be highly exceptional. The subject is treated in detail in a separate policy paper of the Office.⁴⁶

⁴⁴ [OTP response to communications received concerning Iraq](#), 9 February 2006. In the light of complementarity, the Office observed that the available information also indicated that national proceedings had been initiated with respect to each of the relevant incidents.

⁴⁵ In the same vein, the UN Secretary General has called for mediators to adjust to the legal process, rather than for the legal process to accommodate political negotiations: "Now that the ICC has been established, mediators should make the international legal position clear to the parties. They should understand that if the jurisdiction of the ICC is established in a particular situation, then, as an independent judicial body, the Court will proceed to deal with it in accordance with the relevant provisions of the Rome Statute and the process of justice will take its course"; *Enhancing Mediation and its Support Activities*, Report of the Secretary General, S/2009/189, 8 April 2009, para. 37.

⁴⁶ [Policy Paper on the Interests of Justice](#) (ICC-OTP 2007).

VI . *Proprio motu* powers of the Prosecutor and policy of inviting referrals

76. Where the Office of the Prosecutor has decided independently, using its *proprio motu* powers to trigger the preliminary examination phase, that there is a reasonable basis to proceed with opening an investigation into a situation, and before requesting authorization to the Pre-Trial Chamber, the Office may inform relevant State(s) of its determination and offer them the option to refer the situation to the Court with the aim *inter alia* of increasing the prospects of cooperation.⁴⁷ If the State(s) concerned elects not to refer the situation, the Office remains prepared at all times to proceed *proprio motu*, as was done in the Kenya situation.

77. The idea that States with a direct stake in a situation such as the territorial State, the custodial State or the State of nationality of perpetrators would have a special interest in referring the situation, or self-referrals as they have been called in recent years, is nothing new. It was explicitly contemplated during the negotiations in Rome.⁴⁸

78. The Office's practice in relation to the DRC displays the early implementation of the policy of inviting a referral. In his first address to the Assembly of States Parties in September 2003 the Prosecutor announced that, pursuant to his *proprio motu* powers, having reviewed all information available, he had identified the situation in the Ituri region of DRC as warranting the opening of an investigation. Reports indicated the particular gravity of the crimes, both in terms of their scale and nature, resulting in, *inter alia*, an estimated 5,000 civilian deaths since 2002. Their manner of commission included summary executions, the burning of people alive, physical mutilation and the specific targeting of vulnerable groups, in particular women and children. The crimes had also caused massive displacement, exacerbated poverty, famine and disease. Reference was also made to illegal exploitation of natural resources accompanying and precipitating the commission of such crimes.⁴⁹

79. The Prosecutor stated that the Office stood ready, if necessary, to seek authorisation from a Pre-Trial Chamber to start an investigation under *proprio motu*

⁴⁷ Report on the activities performed during the first three years (June 2003 - June 2006), [Ref-RP20060906-OTP](#).

⁴⁸ As the official report of the debates of the Ad Hoc Committee observes "[S]ome delegations expressed the view that any State party to the statute should be entitled to lodge a complaint with respect to the [core crimes].... However, the view was also expressed that only the States concerned that had a direct interest in the case, such as the territorial State, the custodial State or the State of nationality of the victim or suspect... should be entitled to lodge complaints"; *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, UN Doc. A/50/22, 1995, at § 112 (emphasis added). See also Preparatory Committee consultations: "Some delegations felt that only those States parties to the statute with an interest in the case should be able to lodge a complaint. Interested States were identified as the custodial State, the State where the crime was committed, the State of nationality of the suspect, the State whose nationals were victims and the State which was the target of the crime. Some other delegations opined that the crimes under the statute were, by their nature, of concern to the international community as a whole"; *Summary of the Proceedings of the Preparatory Committee During the Period 25 March -12 April 1996*, UN Doc. A/AC.249/1, 7 May 1996, at § 163 (emphasis added).

⁴⁹ *Second Assembly of States Parties to the Rome Statute of the International Criminal Court Report of the Prosecutor of the ICC, Mr Luis Moreno-Ocampo*, [8 September 2003](#).

powers, adding: "Our role could be facilitated by a referral or active support from the DRC ... A referral or active support from African and Western countries that have taken a role in the peace process as well as other States Parties would show their commitment to the goal of putting an end to the atrocities in the region."⁵⁰

80. On 3 March 2004 the Prosecutor received a referral from the Government of the DRC requesting the Office to investigate and prosecute crimes within the jurisdiction of the Court occurring on its territory. The Office has since brought forward a number of cases from the situation.

81. A similar approach, involving the use of *proprio motu* powers to identify a situation followed by a referral by the territorial State occurred in relation to Uganda.⁵¹ In Kenya, after consultations with the national authorities over a possible referral, the Government decided to support *proprio motu* action by the ICC, stating that it remains "fully committed to discharge its primary responsibility in accordance with the Rome Statute to establish a local judicial mechanism to deal with the perpetrators of the post election violence" and "remains committed to cooperate with the ICC."⁵²

82. Pursuant to the principle of independence, the policy of inviting referrals is without prejudice to the case selection and prosecutorial strategy of the Office.

VII. Procedure

83. Preliminary examination of available information in respect of a situation is performed in a comprehensive and thorough manner. The Prosecutor is obliged to continue with the examination until such time as the information shows that there is, or is not, a reasonable basis for an investigation. For example, the complementarity criteria may require monitoring of specific national proceedings in order to determine whether they are related to the most serious crimes and are genuine. Accordingly, the timing and length of preliminary examination activities will necessarily vary based on the situation.⁵³

84. No provision in the Statute or the Rules establishes a definitive time period for the completion of a preliminary examination. This was a deliberate legislative decision in Rome and one that ensures that the analysis is adjusted to the specific features of each particular situation⁵⁴ including, *inter alia*, the availability of

⁵⁰ *Ibid.*

⁵¹ *Report on the activities performed during the first three years (June 2003 - June 2006)*, [Ref-RP20060906-OTP](#)

⁵² *Situation in the Republic of Kenya*, Request for authorisation of an investigation pursuant to Article 15, [ICC-01/09-3](#), 26 November 2009, para 21; *Statement by HE the President and the Right Honorable Prime Minister*, 5 November 2009 (*ibid.*, [Annex 28](#)).

⁵³ *Situation in the Central African Republic*, Prosecution's Report Pursuant to Pre-Trial Chamber III's 30 November 2006 Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic, [ICC-01/05-7](#), 15 December 2006, paras 7-8.

⁵⁴ *Ibid.*, paras 9-10.

information, the nature and scale of the crimes, and the existence of national responses in respect of alleged crimes.⁵⁵

85. In relation to Central African Republic, for example, the Office's preliminary examination required in order to be thorough, *inter alia*, for it to await and assess the pronouncement of the *Cour de Cassation*.

86. In order to distinguish those situations that warrant investigation from those that do not, the Office has established a filtering process comprising four phases:

- (a) Phase 1 provides an initial assessment of all information on alleged crimes received ("communications") under article 15, in order to filter out all information on crimes that are manifestly outside the jurisdiction of the Court.⁵⁶
- (b) Phase 2, representing the formal commence of preliminary examination, involves an analysis of all information on alleged crimes, including "communications" that were not rejected in Phase 1, information in relation to referrals by a State Party or the Security Council or a declaration lodged pursuant to article 12(3), open source information, as well as testimony received at the seat of the Court.
 - a. Phase 2(a) analysis focuses on issues of temporal and geographical or personal jurisdiction, and
 - b. Phase 2(b) analysis focuses on alleged crimes within the jurisdiction of the Court.
- (c) Phase 3 focuses on an analysis of admissibility, and
- (d) Phase 4 examines the interests of justice to enable a final recommendation on whether there is a reasonable basis to initiate an investigation.

87. In accordance with Regulation 28 of the Regulations of the Office of the Prosecutor, the Office will send an acknowledgement in respect of all information received on crimes to those who provided the information.

88. The Office will also provide a regular overview of the number of article 15 communications received by the Office, and a percentage breakdown of the total number of communications that have been determined to be manifestly outside the jurisdiction of the Court, that warrant further analysis, or are linked to a situation already under analysis.⁵⁷

⁵⁵ *Ibid*, paras 7-8.

⁵⁶ It should be recalled that the Prosecutor's *proprio motu* powers can be exercised only within the statutory parameters of territorial and national jurisdiction; the Prosecutor cannot act on information concerning crimes allegedly committed on the territory or by nationals of States not Parties unless that State has lodged an article 12 declaration

⁵⁷ See [OTP Weekly Briefing](#).

89. The Office may decide to make public its activities in relation to the preliminary examination activities in order to contribute to the prevention of future crimes and encourage genuine national proceedings. In doing so, the Office shall be guided *inter alia* by considerations for the safety, well-being, and privacy of those who provided the information or others who are at risk on account of such information in accordance with rule 49, sub-rule 1.

90. Consistent with the Prosecutorial Strategy of the Office, Objective 3, the Office may also consider the publication of an interim report regarding preliminary examination activities and may decide to hold public or confidential meetings in order to receive additional information on matters under analysis.⁵⁸ The Office may also make public reports on the legal issues that are at the heart of a preliminary examination.⁵⁹

91. Before making a final decision on its preliminary examination, the Office will seek to ensure that all parties concerned have had the opportunity to provide the information that they consider appropriate.

92. If, after its preliminary examination, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, the Office will inform those who provided the information, and may also make its decision public. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.⁶⁰

VIII. Positive Complementarity

93. The Office's positive complementarity policy, which is based on the goals of the preamble and article 93(10) of the Statute, is distinct from the legal admissibility threshold of complementarity.

94. At all phases of its preliminary examination activities, consistent with its policy of positive complementarity, the Office will seek to encourage where feasible genuine national investigations and prosecutions by the State(s) concerned and to cooperate with and provide assistance to such State(s) pursuant to article 93(10) of the Statute.⁶¹

95. In some circumstances, the Office and the State concerned may agree that ICC proceedings are the most effective way to advance the aims of the preamble, and

⁵⁸ [Prosecutorial Strategy 2009-2012](#), 1 February 2010. Objective 3 sets out to "regularly provide information about the preliminary examination process, taking into account considerations of security of persons it interacts with" and to "issue periodic reports on the status of its preliminary examination".

⁵⁹ See e.g. [Summary of submissions on whether the declaration lodged by the Palestinian National Authority meets statutory requirements](#), 3 May 2010.

⁶⁰ Articles 15(6) and 53(4), ICC Statute.

⁶¹ *Policy Paper 2003*

thus enter into “burden sharing”, with the Court prosecuting the persons most responsible for the most serious crimes.

96. In Kenya, in line with proposals of Kofi Annan, Chair of the African Union Panel of Eminent African Personalities, the Office sought to emphasise the primary responsibility of the national authorities to institute genuine proceedings, with the prospect of ICC action should such efforts fail to materialise.⁶² The Prosecutor held consultations with domestic interlocutors, including an agreement on timelines for genuine proceedings to be undertaken by the Kenyan authorities or in the alternative by the ICC.⁶³ The Office proceeded with requesting authorisation for an investigation after efforts to constitute national proceedings for those bearing the greatest responsibility for the most serious crimes had been unsuccessful.⁶⁴ At the same time, echoing the Panel of Eminent African Personalities, the Prosecutor continues to emphasise the need for national activities to complement those undertaken before the ICC.⁶⁵

97. The Office has followed a similar approach in Colombia and Guinea, involving in-country missions and consultations with the national authorities concerned.⁶⁶

IX. Judicial Review

98. The Pre-Trial Chamber may review a decision by the Prosecutor not to proceed with an investigation in relation to a referral in accordance with article 53(3).⁶⁷ To facilitate this review, in accordance with Rule 105 paragraph 4 and 5, Rule 106 and Regulation 31 of the Office of the Prosecutor, the Prosecutor will inform immediately such a decision to the Pre-Trial Chamber.

99. It should be noted in this regard that the identification of a particular case hypothesis (e.g. *Lubanga & Ntaganda*) or the selection of further case hypotheses within the situation (e.g. *Katanga & Ngudjolo*) are not new decisions to initiate an investigation within the meaning of article 53(1).

⁶² The Commission of Inquiry into the Post-Election Violence (CIPEV) recommended the setting up of a special tribunal to seek accountability against persons bearing the greatest responsibility for crimes relating to the 2007 Elections in Kenya. Short of the establishment of such a Tribunal, it recommended forwarding to the Prosecutor of the ICC the list, placed under the custody of the Panel of Eminent African Personalities, containing names of those suspected to bear the greatest responsibility for these crimes and to request the Prosecutor to analyze this information with a view to proceeding with an investigation and possible prosecution; CIPEV, [Final Report](#), 16 October 2008, p.473.

⁶³ Press Release: *Kenyan High-Level Delegation meets ICC Prosecutor*, [ICC-CPI-20090703-PR431](#), 3 July 2009; [Agreed Minutes of Meeting](#), 3 July 2009.

⁶⁴ *Situation in the Republic of Kenya*, Request for authorisation of an investigation pursuant to Article 15, [ICC-01/09-3](#), 26 November 2009, paras. 3-22.

⁶⁵ Press Release: *ICC Prosecutor Supports Three-Pronged Approach to Justice in Kenya*, [ICC-OTP-20090930-PR456](#), 30 November 2009.

⁶⁶ For information on the Office preliminary activities see [ICC-OTP website](#).

⁶⁷ Such review may be requested by the referring party, i.e. either the State Party concerned or the Security Council, or, where the Prosecutor’s decision is based solely on decision the interests of justice, on the Pre-Trial Chamber’s own initiative; article 53(3), ICC Statute.