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Date: **15 November 2019**

THE APPEALS CHAMBER

Before: **Judge Piotr Hofmański, Presiding Judge**
Judge Howard Morrison
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa
Judge Kimberly Prost

SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN

Public

Observations of the OPCD on the Appeals Against ICC-02/17-33

Source: **Office of Public Counsel for the Defence**

Document to be notified in accordance with regulation 31 of the Regulations of the Court to:

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I. INTRODUCTION

"The international community has entrusted the Tribunal with the task of trying persons charged with serious violations of international humanitarian law. It expects the Tribunal to do so in accordance with those rights of the accused [...] If the Tribunal is not given sufficient time and money to do so by the international community, then it should not attempt to try those persons in a way which does not accord with those rights."[1]
- *The late Judge David Hunt*

1. Judge Hunt's warning was one aimed at the ICTY and over 15 years ago, but elements of it resonate to this day in the discussion surrounding Pre-Trial Chamber's Impugned Decision of 12 April 2019. In analysing several factors relating to the interests of justice, the Chamber's foundational consideration of fair trial rights of the current or future suspects and accused are present. Such considerations are properly made in any assessment of 'interests of justice'; as discussed below, it is a phrase that necessarily entails consideration of how we can accord those rights to persons tried before the International Criminal Court and how just results can be delivered to those who seek relief from the international community for harm.
2. Some may regard observations focusing on future defendants restricts them to merely being 'Defence perspective', but they are given with a view to seeking the truest definition of the Rome Statute that will help achieve justice – which includes fundamental fair trial rights and serves as the overarching goal of the ICC's mandate.[2]
3. The Office of Public Counsel for the Defence ("OPCD") takes this opportunity to make certain observations about how the considerations of the Pre-Trial Chamber in the Impugned Decision were not errant reflections or misplaced

[1] *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.4, Dissenting Opinion of Judge David Hunt on Admissibility of Evidence in Chief in the Form of Written Statement (Majority Decision given 30 September 2003), 21 October 2003, para. 21.
[2] *See* Dov Jacobs, "A Tale of Four Illusions in Defence Perspectives", in C. Rohan and G. Zyberi (eds.), *Defense Perspectives on International Criminal Justice* (CUP 2017) pp. 583-584.

concerns, but natural elements that arise under a 'interests of justice' assessment in opening of an Article 15 investigation.

II. RELEVANT PROCEDURAL HISTORY

4. The Prosecution began its preliminary examination of Afghanistan in 2006.[3] It filed a request to open an investigation on 20 November 2017.[4]
5. Pre-Trial Chamber II issued its decision rejecting an investigation on 12 April 2019 on the basis that it would not be in the interests of justice ("Impugned Decision").[5] On 31 May 2019, Judge Mindua issued his concurring and separate opinion.[6]
6. Various litigants have filed requests for leave to appeal, notices of appeal, as well as requests to appear on specific issues, including the Prosecution,[7] Office of Public Counsel for Victims ("OPCV"),[8] and other Legal Representatives of Victims.[9]

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[3] Office of the Prosecutor, Report on Preliminary Examination Activities, 13 December 2011, para. 20.
[4] Public redacted version of "Request for authorisation of an investigation pursuant to article 15", 20 November 2017, ICC-02/17-7-Conf-Exp, 20 November 2017, ICC-02/17-7-Red ('Request to Open an Investigation').
[5] Decision Pursuant to Article 15 of the Rome Statute on the Authoriation of an Investigation into the Situation in the Islamic Republic of Afghanistan, 12 April 2019, ICC-02/17-33 ('Impugned Decision').
[6] Concurring and Separate Opinion of Judge Antoine Kesia-Mbe Mindua, 31 May 2019, ICC-02/17-33-Anx ('Concurring and Separate Opinion').
[7] Request for Leave to the Appeal the "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan", 7 June 2019, ICC-02/17-34 ("Request for Leave to Appeal").
[8] Request to appear before the Chamber pursuant to regulation 81(4)(b) of the Regulations of the Court, 10 June 2019, ICC-02/17-39; Request to appear before the Appeals Chamber pursuant to regulation 81(4)(b) of the Regulations of the Court, 20 September 2019, ICC-02/17-67.
[9] Victims' Notice of Appeal of the "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan", 10 June 2019, ICC-02/17-36 (OA); Victims' Notice of Appeal of the "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan", 10 June 2019, ICC-02/17-38 (OA2); Notice of appeal against the "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan" (ICC-02/17-33), 10 June 2019, ICC-02/17-40 (OA3); a corrected version was registered on 12 June 2019 (ICC-02/17-40-Corr (OA3)); Victims' request for leave to appeal the "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan", 10 June 2019, ICC-02/17-37; Victims' Appeal Brief',

7. On 17 September 2019, Pre-Trial Chamber II granted the Prosecutor, in part, the Prosecution request for leave to appeal the Impugned Decision under Article 82(1)(d) of the Statute.[10]
8. On 25 September 2019, the OPCD requested leave to appear before the Appeal Chamber on the appeals.[11] On 26 September, the Prosecutor filed a response to the OPCD Request opposing same in its entirety.[12]
9. On 27 September 2019, the Appeals Chamber issued an Order scheduling hearings from 4 to 6 December 2019 to hear oral arguments on the issues arising in the appeals. In its decision, the Appeals Chamber invited interested States to submit observations and to attend the hearing. The Appeals Chamber also invited professors of criminal procedure and/or international law, including international human rights law as well as organisations with specific legal expertise in human rights to express their interest in participating as *amici curiae* in the proceedings.[13] In the same Order, the OPCV was granted leave, pursuant to Regulation 81(4)(b) of the Regulations of the Court ("RoC"), to file written submissions on the Prosecutor's and the victims' appeal briefs.[14]

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24 June 2019, ICC-02/17-53 (OA). *See also* Victims' request for extensions of time and of page limit, 24 June 2019, ICC-02/17-52 (OA2 OA3); Victims' response to "Prosecution's notice of joined proceedings, and request for extension of pages", ICC-02/17-66 (OA OA2 OA3 OA4); Victims' response to Prosecution's notice of joined proceedings, and request for extension of pages, ICC-02/17-65 (OA4).

[10] Decision on the Prosecutor's and Victims' Requests for Leave to Appeal the "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, 17 September 2019, ICC-02/17-62, p. 16. *See also* Partially Dissenting Opinion of Judge Antoine Kesia-Mbe Mindua, 17 September 2019, ICC-02/17-62-Anx.

[11] Request to appear before the Appeals Chamber under regulation 77(4)(c) of the Regulations of the Court or, in the alternative, appoint Defence Counsel under Regulation 76 of the Regulations of the Court, 25 September 2019, ICC-02/17-70 ('OPCD Request').

[12] Prosecution's response to the request by the Office of Public Counsel for the Defence for leave to appear before the Appeals Chamber, 26 Spetember 2019, ICC-02/17-71.

[13] Corrigendum of order scheduling a hearing before the Appeals Chamber and other related matters, 27 September 2019, ICC-02/17-72-Corr, pp. 4, 8.

[14] *Ibid.*, pp. 4, 9.

10. On 30 September 2019, the Prosecutor filed her appeal brief.[15] The same day, 'LRV1' filed an updated appeal brief[16] and 'LRV2' and 'LRV3' (herein after 'LRV2') filed a joint appeal brief.[17]
11. On 11 October 2019, the Cross-Border Victims applied for leave to make submissions.[18]
12. Between 14 and 22 October 2019, at least 15 persons or groups applied to submit *amicus curiae* observations.
13. On 22 October 2019, the Prosecutor filed a consolidated response to the appeal briefs of the LRVs.[19] The same date, the LRV2 filed a Joint Response and Request to Reply to the Prosecutor's Appeal Brief.[20]
14. On 24 October 2019, the Appeals Chamber granted the request of the OPCD to submit observations – under Rule 103 of the Rules of Procedure and Evidence and invited the Office to file written submissions on the Prosecutor's and victims' appeal briefs by 15 November 2019.[21] The same decision also granted applications of all applicant *amici* and the request of the Cross-Border Victims.[22]

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[15] Prosecution Appeal Brief, 30 September 2019, ICC-02/17-74.
[16] Corrigendum of Updated Victims' Appeal Brief, ICC-02/17-73-Corr, 2 October 2019 ('LRV1 Brief').
[17] Victims' Joint Appeal Brief against the "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan", original version filed on 30 September 2019 and corrigendum registered on 1 October 2019, ICC-02/17-75-Corr ('LRV2 Brief').
[18] Application on behalf of victims of cross border aerial bombardment in the Afghan conflict to make written and oral submissions, 11 October 2019, ICC-02/17-77 ('Application of Cross-border Victims'), paras 4-6.
[19] Consolidated Prosecution Response to the Appeals Briefs of the Victims, 22 October 2019, ICC-02/17-92 ('Consolidated Prosecution Response').
[20] Victims' Joint Response and Request for Reply, 22 October 2019, ICC-02/17-94.
[21] Decision on the participation of *amici curiae*, the Office of Public Counsel for the Defence and the cross-border victims, 24 October 2019, ICC-02/17-97.
[22] *Ibid.*

III. PRELIMINARY MATTERS

15. The OPCD has been granted leave to file "consolidated written submissions […] on the Prosecutor and victims' appeal briefs"; to this end, these submissions will attempt to make observations in a consolidated, cross-referenced manner as Prosecution has done in its Consolidated Prosecution Response.
16. However, the observations filed are limited – not every issue raised in the appeals is one to which the OPCD wishes, at this time, to make submission. As noted in the request to make these observations, the purpose of such would be to highlight issues relevant to future suspects who may become parties in cases should an investigation be opened.[23] Therefore, absence of observation on any issue should represent neither assent nor discord with the Impugned Decisions's findings or the arguments asserted by the Prosecution and LRVs. In sum, unless a position is stated, none is taken at this time.
17. Where positions are taken, the OPCD aims to serve, like the Prosecution, as "officer of the court" in addressing a view of the law with a view to "a wider interest – which, in the long term, militates to the benefit of all constituents of the Court".[24] Such observations submitted herein, however, are with reservation to the individual defendants submitting same or counter-position in their own individual cases, should they wish to do so. Nothing in these arguments can be construed as binding on each and every defendant that has or will appear before the Court.

[23] OPCD Request.
[24] Prosecution Consolidated Response, para. 5.

IV. STANDARD OF REVIEW

18. "With respect to errors of law the Appeals Chamber has held that [it] will not defer to the Trial Chamber's interpretation of the law. Rather, it will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law. If the Trial Chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the Impugned Decision. A judgment is 'materially affected by an error of law' if the Trial Chamber 'would have rendered a judgment that is substantially different from the decision that was affected by the error, if it had not made the error'."[25]

19. With respect to discretionary decisions, the Appeals Chamber has stated that "it will not interfere with the Chamber's exercise of discretion merely because the Appeals Chamber, if it had the power, might have made a different ruling. The Appeals Chamber will only disturb the exercise of a Chamber's discretion where it is shown that an error of law, fact or procedure was made. In this context, the Appeals Chamber has held that it will interfere with a discretionary decision only under limited conditions and has referred to standards of other courts to further elaborate that it will correct an exercise of discretion in the following broad circumstances, namely where (i) it is based upon an erroneous interpretation of the law; (ii) it is based upon a patently incorrect conclusion of fact; or (iii) the decision amounts to an abuse of discretion. Furthermore, once it is established that the discretion was erroneously exercised, the Appeals Chamber has to be satisfied that the improper exercise of discretion materially affected the impugned decision."[26]

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[25] *In the Registered Vessels Situation*, Judgement on the appeal of the Prosecutor against Pre-Trial Chamber I's 'Decision on the "Application for Judicial Review by the Government of the Union of the Comoros"', 2 September 2019, ICC-01/13-98, para. 26.

[26] *Prosecutor v Ongwen*, Judgment on the appeal of Mr Dominic Ongwen against Trial Chamber IX's 'Decision on Defence Motions Alleging Defects in the Confirmation Decision', 17 July 2019, ICC-02/04-01/15-1562, para. 46. [Internal citations omitted.]

20. In this regard, the Appeals Chamber has recalled that "the burden is on the appellant to substantiate not only that the first-instance Chamber erred, but also that the purported error materially affected the Impugned Decision."[27]

21. Specifically on the abuse of discretion, the Appeals Chamber has held: "[T]he Appeals Chamber may interfere with a discretionary decision [when it] amounts to an abuse of discretion. Even if an error of law or of fact has not been identified, an abuse of discretion will occur when the decision is so unfair or unreasonable as to "force the conclusion that the Chamber failed to exercise its discretion judiciously". The Appeals Chamber will also consider whether the first instance Chamber gave weight to extraneous or irrelevant considerations or failed to give weight or sufficient weight to relevant considerations in exercising its discretion. The degree of discretion afforded to a Chamber may depend upon the nature of the decision in question."[28]

V. SUBMISSIONS

22. In the Impugned Decision, the Pre-Trial Chamber determined that both the jurisdiction and the admissibility requirements were satisfied, but nonetheless found that there were substantial reasons to believe that an investigation would not serve the interests of justice.[29] In reaching this conclusion, it considered three factors to be particularly relevant: (i) the significant time elapsed between the alleged crimes and the Request to Open an Investigation; (ii) the scarcity of cooperation; and (iii) the likelihood that relevant evidence

[27] *Prosecutor v S Gbagbo,* Judgment on the appeal of Côte d'Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled "Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo", 27 May 2015, ICC-02/11-01/12-75-Red, para. 41.
[28] *Prosecutor v Katanga,* Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled "Order for Reparations pursuant to Article 75 of the Statute", 8 March 2018, ICC-01/04-01/07-3778-Red,, para. 44. [Internal citations omitted.]
[29] Impugned Decision, paras 87–96.

and potential suspects might still be available and within reach (the "Three Factors").[30]

23. These Three Factors are relevant for a determination under Article 51(3)(c) of the Statute because they go to the heart of the interests of justice; namely, whether the circumstances would allow a defendant to receive a fair trial. Indeed, the Pre-Trial Chamber appeared to have defence rights in mind, because it stated that the purpose of the Article 15 filter is to "*avoid engaging in investigations which are likely to ultimately remain inconclusive*",[31] which "*would unnecessarily infringe on fundamental individual rights without serving either the interests of justice or any of the universal values underlying the Statute*".[32] Judge Mindua further stated, in his Concurring and Separate Opinion, that "*the rights of the accused for a fair trial*" is a factor which "*may weigh in favour of a decision not to prosecute on the basis of the "interests of justice*".[33]

A. THE PTC DID NOT ABUSE ITS DISCRETION IN ASSESSING THE INTERESTS OF JUSTICE [34]

24. The OPCD submits, first, that considering the prospects of a fair trial is relevant to any "interests of justice" assessment under Article 53(1)(c) of the Statute. Second, the OPCD submits that the Pre-Trial Chamber effectively considered the prospects of a fair trial by taking into account the Three Factors it identified. These are therefore not extraneous or irrelevant considerations, and are examined in turn below. The Pre-Trial Chamber sufficiently weighed all the relevant factors by balancing the gravity of the crimes and interests of victims on one side, against the Three Factors on the other, and the Prosecutor

[30] *Ibid.*, paras 91–94.
[31] *Ibid.*, para. 33.
[32] *Ibid.*, para. 34.
[33] Concurring and Separate Opinion, para. 39.
[34] Prosecution Appeal Brief, Ground 2; LRV 1 Brief, Grounds 2 and 3; LRV 2 Brief, Ground 2.

and LRVs have failed to demonstrate that, in making this assessment, the Chamber abused its discretion.

i. Considering the prospects of a fair trial is relevant to assessing "interests of justice" under Article 53(1)(c) of the Statute[35]

25. Fair trial rights should be considered when assessing the "interests of justice" under Article 53(1)(c) of the Statute. This is the conclusion to be drawn from examining the "interests of justice" criterion through the normal framework of interpretative tools. This section will therefore discuss:
    a. the general rule of interpretation of the "interests of justice" under the Vienna Convention on the Law of Treaties ("VCLT");
    b. the supplementary means of interpreting the phrase under the VCLT;
    c. the understanding of "interests of justice" at the ICTY, ICTR, SCSL and IRMCT;
    d. how discretionary decisions to investigate are carried out in selected domestic jurisdictions, as well as the domestic understanding of "interests of justice";
    e. internationally recognised human rights on fair trials at the preliminary examination phase; and,
    f. the requirement of a *prospective* assessment on the "interests of justice" under Article 53(1)(c) of the Statute.

    By examining the "interests of justice" through these six steps, it becomes clear that the consideration of fair trials is a pervasive feature that appears throughout.

[35] Prosecution Appeal Brief, Ground 2(B); LRV 1 Brief, Grounds 1 and 2; LRV 2 Brief, Ground 2(i).

(a) Applying the general rule of interpretation to "interests of justice"

26. The VCLT provides the guide to interpreting the phrase "interests of justice" in the Statute,[36] which must start with applying the general rule of interpretation.[37] It is evident, however, that the "interests of justice" is a concept for which there is no single or unified ordinary meaning. The more helpful step is to examine the meaning of "interests of justice" through its *context*, including where the phrase is used elsewhere in the Court's legal instruments.[38]

27. Besides in Article 53, "interests of justice" appears four other times in the Statute, and in three of those times it is in the context of ensuring the rights of the defendant:

- A person about to be questioned must be informed of the right to have legal assistance assigned to him or her, "in any case where the interests of justice so require";[39]
- A person absent from potential confirmation of charges hearings "shall be represented by counsel where the Pre-Trial Chamber determines that it is in the interests of justice";[40]
- The accused is entitled to the guarantee of having "legal assistance assigned by the Court in any case where the interests of justice so require".[41]

[36] *See, e.g., Prosecutor v Katanga & Ngudjolo*, Judgment on the Appeal Against the Decision on Joinder rendered on 10 March 2008 by the Pre-Trial Chamber in the Germain Katanga and Mathieu Ngudjolo Chui Cases, 9 June 2008, ICC-01/04-01/07-573, para. 5.
[37] Article 31 of the VCLT (in particular "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose").
[38] *See* Richard Gardiner, *Treaty Interpretation* (2nd Edition) (Oxford University Press, 2015), p. 197.
[39] Article 55(2)(c) of the Statute.
[40] Article 61(2) of the Statute.

28. There are a further nine times the "interests of justice" is mentioned in the Rules, three of which is in the context of safeguarding the rights of the defendant:
    - The defence may apply for disclosure of material or information in the possession of the accused to be restricted, by showing that it is "in the interests of justice";[42]
    - An accused who is mandated to fulfil extraordinary public duties of the highest national level may request excusal from presence at trial where a Trial Chamber "determines that it is in the interests of justice and provided that the rights of the accused are fully ensured". [43]
    - Trial Chambers may order that separate trials are necessary "in order to avoid serious prejudice to the accused [or] to protect the interests of justice".[44]
29. Therefore, the term "interests of justice" appears more often in the context of ensuring the rights of the accused than in any other context. Further, interpreting it in this light is consistent with the object and purpose of the Statute. This includes resolving to "guarantee lasting respect for […] international justice" in the Preamble, which ensuring fair trials would promote. It can also be said that guaranteeing accused's rights is central to the object and purpose of the Statute, given that such rights features in many key provisions, including Articles 20 (*ne bis in idem*), 22 (*nullum crimen sine lege*), 23 (*nulla poena sine lege*), 24 (non-retroactivity *ratione personae*), 54(1) (Prosecutor's duty to fully respect the rights of persons); 55 (rights of persons during an investigation), 66 (presumption of innocence), and 67 (rights of the accused) of

[41] The one other time the phrase "interests of justice" appears in the Statute is in relation to providing a more complete presentation of the facts of the case in proceedings on an admission of guilt, under Article 65(4) of the Statute.
[42] Rule 82(5) of the Rules.
[43] Rule 134*quater* of the Rules.
[44] Rule 136(1) of the Rules. There are six other mentions of the "interests of justice" in the Rules which are not directly related to the rights of the defendant in: Rule 68(2)(b); Rule 68(2)(d)(i); Rule 69; Rule 73(6); Rule 100(1); Rule 165(3).

the Statute. The contextual meaning of "interests of justice" arrived at above therefore also corresponds with this object and purpose.

30. Moreover, other sources interpreting the "interests of justice" are consistent with this view. Human Rights Watch stated that the use of the phrase "interests of justice" in the Statute suggests the phrase "really means 'so that justice may be administered in an orderly way' or the 'good administration of justice'".[45] Further, the Prosecution has suggested that the phrase appears in provisions that "tend to deal with matters closely related to the rights of the accused or of victims in the course of investigations or trial" and that this "may provide some guidance for the way in which the phrase should be understood in the context of Article 53".[46] The OPCD agrees.

(b) The supplementary means of interpretation

31. When examining the preparatory works of the Statute as a supplementary means of interpretation,[47] we can also infer that the inclusion of the "interests of justice" provision was motivated by circumstances of the suspects and accused. An "interest of justice" criterion was first introduced by the delegation for the United Kingdom during the first session of the Preparatory Committee (25 March–12 April 1996). In doing so, the delegation expressly "intended to reflect a wide discretion on the part of the prosecutor to decide not to *investigate* comparable to that in (some) domestic systems".[48] This part of the preparatory works is therefore relevant in interpreting the discretion not to investigate under Article 53(1)(c) of the Statute, and consequently the

[45] Human Rights Watch, Policy Paper: The meaning of "the interests of justice" in Article 53 of the Rome Statute, June 2005, p. 6 & fn. 19.
[46] Office of the Prosecutor, Policy Paper on the Interests of Justice, September 2007, p. 2 & fn. 3.
[47] Article 32 of the VCLT.
[48] Proposal by the delegation of the United Kingdom, titled in Legal Tools as "UK comments on Complementarity", para. 30 (emphasis added). This is despite the modification being proposed to Article 26(4) of the ILC Draft Statute, which concerns the decision to *prosecute*.

meaning of "interests of justice" in that provision.[49] Importantly, the British delegation also expressly envisaged that the discretion could be exercised where "the suspected offender was very old or very ill", and thus had the circumstances of defendants in mind from the very genesis of this provision.

(c) The understanding of "interests of justice" at the *ad hocs*

32. It is also worth bearing in mind that the phrase "interests of justice" was also associated with the rights of the accused at the ICTY, ICTR, SCSL, and is currently so associated at the IRMCT. The Statutes of the ICTY, ICTR, SCSL, and IRMCT state that the accused is entitled to have legal counsel assigned "where the interests of justice so require",[50] and further provides that issues related to pardoning or commutation of sentences shall be based on "the interests of justice".[51] These provisions from the major international tribunals reflect principles or rules of international law which aid in interpreting the ICC's Statute.[52]

(d) Domestic jurisdictions

33. Domestic practice provides further guidance[53] that supports a similar reading to the above. Most domestic jurisdictions do not have an equivalent to a preliminary examination phase, and therefore do not offer much guidance as

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[49] *Cf.* Gilbert Bitti, The Interests of Justice – where does that come from? Part I, EJIL:*Talk!*, 13 August 2019 ("*…those UK proposals […] were limited to the decision whetehr to prosecute […] and did not extend to the decision whether to investigate*").
[50] Article 21(4) of the ICTY Statute; Article 20(4) of the ICTR Statute; Article 17(4) of the SCSL Statute; Article 19(4) of the IRMCT Statute.
[51] Article 28 of the ICTY Statute; Article 27 of the ICTR Statute; Article 23 of the SCSL Statute; Article 26 of the IRMCT Statute.
[52] Article 21(1)(b) of the Statute.
[53] *See* Article 21(1)(c) of the Statute ("*…general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime…*").

to how the "interests of justice" should be exercised at this stage. There are, however, at least two States Parties (Germany and the United Kingdom) who do have equivalent preliminary examination phases for their domestic proceedings on international crimes, and it is worthwhile exploring the manner in which they decide whether or not to initiate an investigation.

34. Germany has an equivalent preliminary examination phase for universal jurisdiction crimes (*Vorermittlungen*),[54] and the Federal Prosecutor General has the discretion not to proceed to an investigation proper.[55] In at least two cases, the Federal Prosecutor General has declined to open an investigation, because, in the first case, it was deemed that "*requests for assistance to the [relevant foreign] government would be hopeless*",[56] and, in the second case, it "*would not lead to the success of a potential investigation from Germany because of the restricted access to the crime scenes and the limited effect of requests for assistance are expected to have. Rather, this would result in mere symbolic investigations which would remain one sided without prospect of further clarification of the allegations.*"[57] In both cases, the Higher Regional Court in Stuttgart upheld the decisions on review, finding that the Federal Prosecutor General had not exercised his discretion arbitrarily.[58] While the "interests of justice" was not specifically mentioned in these cases, the principle that limited cooperation would lead to "hopeless" or "symbolic" investigations that fail to serve any interests is clearly relevant to this situation. In particular, these two German cases provide a precedent that decisions not to investigate based on lack of cooperation from a foreign government can be a proper factor to consider.

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[54] Matthias Neuner, "German Preliminary Examinations of International Crimes", in Morten Bergsmo and Carsten Stahn (eds.), *Quality Control in Preliminary Examination: Volume 1* (Torkel Opsahl Academic EPublisher, 2018), p. 127 & fn. 1.
[55] *Ibid.*, pp. 129–130.
[56] *Ibid.*, p. 148.
[57] *Ibid.*, pp. 153–154.
[58] *Ibid.*, pp. 150, 155–156.

35. With regard to the United Kingdom, the Metropolitan Police force must carry out a "scoping exercise" in order to make an informed decision whether to conduct an investigation into a universal jurisdiction crime.[59] In doing so, the police must assess the level of cooperation they are anticipated to receive in identifying the suspect, and assess whether they can carry out a "safe and effective investigation".[60] There are, again, obvious parallels suggesting that cooperation is a relevant and proper consideration when assessing whether or not to authorise an investigation.

36. A significant number of domestic jurisdictions also take into account the prospects of a fair trial as part of their "interests of justice" assessment on whether to prosecute (rather than investigate). "Although there are differences in the [domestic] interests of justice provisions and their implementation", one commentator has noted that "there are sufficient similarities to yield lessons for the ICC".[61] In this regard, prosecutors in Ireland must decide whether it is in the "public interest" to prosecute an individual, and one factor they may consider is "whether any circumstances exist that would prevent a fair trial from being conducted".[62] The policy for prosecutions in the Australian state of Victoria requires a public interest test, which includes considering: "any circumstances that would prevent a fair trial".[63] In Hong Kong, the same test also includes any "special circumstances that would affect the fairness of proceedings".[64] Another example is in the standards promulgated by the

[59] HM Government of the United Kingdom, Note on the investigation and prosecution of crimes of universal jurisdiction, 2018, Annex A, p. 12.
[60] HM Government of the United Kingdom, Note on the investigation and prosecution of crimes of universal jurisdiction, 2018, Annex A, pp. 12–14 (*"…will this [third] country provide mutual legal assistance n relation to identifying the suspect, either formally or informally […] If not, then it will not be possible to identify the suspect and so an effective investigation cannot at this stage be carried out*").
[61] Linda M. Keller, *Comparing the "Interests of Justice": What the International Criminal Court Can Learn From New York Law*, Washington University Global Studies Law Review, Vol. 12, Issue 1, 2013, pp. 3–4.
[62] Ireland, Office of the Director of Public Prosecutions, Guidelines for Prosecutors, Revised November 2010, para. 4.22(m).
[63] Australia, Director of Public Prosecutions, Policy of the Director of Public Prosecutions for Victoria, 27 March 2019, para. 3.
[64] Hong Kong, Prosecution Code, para. 5.9(m).

International Association of Prosecutors, which states that prosecutors shall, "in accordance with local law and the requirements of a fair trial, give due consideration to waiving prosecution, discontinuing proceedings conditionally or unconditionally or diverting criminal cases […] with full respect for the rights of suspects and victims, where such action is appropriate."[65]

(e) Internationally recognised human rights

37. The interpretation of the "interests of justice" at this stage must be consistent with internationally recognised human rights jurisprudence.[66] The Appeals Chamber has held that "the right to a fair trial, a concept broadly perceived and applied, embrac[es] the judicial process in its entirety",[67] which must therefore include the preliminary examination phase. ECtHR case law suggests that fair trial rights arise as early as the "the date when preliminary investigations were opened".[68] The extent to which they apply during the preliminary investigations "depends on the special features of the proceedings involved and on the circumstances of the case".[69] The test, in this regard, is whether "the situation of the [suspect] has been substantially affected".[70] In another case, rights were recognised from "official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence or from some other act which carries the implication of such an allegation and which likewise substantially affects the situation of the

[65] International Association of Prosectors, Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, 23 April 1999, para. 4.3(h).
[66] Article 21(3) of the Statute.
[67] *Prosecutor v Lubanga*, 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, 14 December 2006, ICC-01/04-01/06-772, para. 37.
[68] Stefan Trechsel, Human Rights in Criminal Proceedings (Oxford University Press, 2005), p. 138.
[69] ECtHR, *Panovits v. Cyprus*, Application No. 4268/04, 11 December 2008, para. 64.
[70] Stefan Trechsel, *Human Rights in Criminal Proceedings* (Oxford University Press, 2005), p. 138

suspect".[71] This was found to be "when a preliminary investigation has been opened in [the applicant's] case and, although not under arrest, [the] applicant has officially learned of the investigation or has begun to be affected by it".[72]

38. In the present situation, the preliminary investigation started 13 years ago, and there are persons whom the Prosecutor has already identified as being "involved" (and seemingly attached to her Request to Open and Investigation in confidential annexes).[73] As individuals potentially suspected have been named and are known to the Prosecutor and Chamber, these fair trial rights do not exist in the abstract but concretely apply to these individuals, against whom "procedural steps" have clearly been taken. This is broadly supported by at least two current practitioners in academic writing in suggesting that a preliminary examination is a *de facto* investigation looking into the roles of possible perpetrators.[74] They suggest that making sure that potential defendants are not "*invisible during a preliminary examination […] will enhance the quality of the investigation and facilitate the work of the judges in assessing the evidence and the fairness of subsequent proceedings*".[75]

(f) Article 53(1)(c) focuses on the future consequences of "interests of justice"

39. It is important to observe that the Pre-Trial Chamber properly considered how the interests of justice will "prospectively" be served,[76] and, indeed, focusing on "prospects" throughout.[77] This is because the criterion in Article 53(1)(c) requires an assessment of whether, in the *future*, the interests of justice would

[71] ECtHR, *Kangasluoma v Finland*, Application No. 48339/99, 20 January 2004 para. 26.
[72] ECtHR, *Kangasluoma v Finland*, Application No. 48339/99, 20 January 2004, para. 26.
[73] Prosecutor's Request, confidential *ex parte* Annexes 3A–C.
[74] Dov Jacobs and Jennifer Naouri, "Making Sense of the Invisible: The Role of the 'Accused' during Preliminary Examinations", in Morten Bergsmo and Carsten Stahn (eds.), *Quality Control in Preliminary Examination: Volume 2* (Torkel Opsahl Academic EPublisher, 2018), pp. 470, 480, 518.
[75] *Ibid.*, p. 518.
[76] Impugned Decision, para. 89 (emphasis added).
[77] *Ibid.*, paras 90, 94–96.

be served by an investigation, whereas the assessment in (a) and (b) requires evaluation based on the "information available to the Prosecutor". It is therefore proper, at this stage, to make a determination what the likelihood is of a fair trial in the future, which the Pre-Trial Chamber did by considering, for instance, whether an investigation would prospectively result in proceedings within a reasonable time frame.[78]

40. Indeed the Court has previously acknowledged the need to look prospectively and examine whether the current circumstances would affect the ability to hold a fair trial in the future. Trial Chamber I emphasised the need "*to ensure that the accused receives a fair trial*" and that:

> *[i]f, at the outset, it is clear that the essential preconditions of a fair trial are missing and there is no sufficient indication that this will be resolved during the trial process, it is necessary - indeed, inevitable - that the proceedings should be stayed. It would be wholly wrong for a criminal court to begin, or to continue, a trial once it has become clear that the inevitable conclusion in the final judgment will be that the proceedings are vitiated because of unfairness which will not be rectified*.[79]

This was also highlighted at the early stages of the drafting process by the International Law Commission, which stated that "*the rights of the accused during the trial would have little meaning in the absence of respect for the rights of the suspect during the investigation*".[80] For this logic to be sustained, the same must rights also extend to the preliminary examination phase.[81]

41. In sum, the Pre-Trial Chamber correctly assessed factors that, if already an issue, would likely come to fruition in the eventual cases brought. Assertions

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[78] Impugned Decision, para. 89 (emphasis added).

[79] *Prosecutor v Lubanga*, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, 13 June 2008, ICC-01/04-01/06-1401, para. 91.

[80] ILC Draft Statute.

[81] The Chamber has recognised that Article 55, for instance, "*must be understood to encompass any investigative steps that are either taken by the Prosecutor or by national authorities at his or her behest*" (ICC-02/11-01/11-212, para. 97), and the steps already taken in the Afghanistan situation, particularly the naming of individuals, must therefore be understood to be encompassed by this.

of inability to secure witnesses, access evidence, or even conduct investigations were the consideration for the factors entertained by the Pre-Trial Chamber. If fair trial guarantees are already violated at this very early stage, how would they be avoided in the actual cases which will come even further away in years. The remedy for a lack of fair trial, as shown in the case law of the international courts and tribunals, is often a stay of proceedings or even dismissal of the case. In anticipating such traumatic ending to prosecutions – well after victims have had hope of resolution and well after defendants have been served the irreparable damage of being named a suspect by the ICC – the Pre-Trial Chamber considered these as appropriate factors in an overarching assessment of 'interests of justice' in the context of individual criminal responsibility in an international criminal court setting. While intrinsically linked, the passage of time, possibility of State cooperation, and ability to secure evidence are each proper considerations of any Chamber, for the following reasons.

ii. The PTC did not abuse its discretion in consideration of passage of time[82]

42. Regardless of who is making the assessment, 'interest of justice' necessarily includes consideration of the passage of time between the alleged crimes and the eventual prosecutions. Contrary to applying solely to "particular prosecutions",[83] leaving such assessment to the late stage of trial would be too late for true justice and would deprive the phrase 'interests of justice' of all meaning in the context of a Situation.
43. The Prosecution argues that such assessment – at this stage – "would […] contradict hard-won principles of international law", namely a lack of statute

[82] Prosecution Appeal Brief, Ground 2(B)(3); LRV 1 Brief, Ground 3; LRV 2 Brief, Ground 2(i) and (iii).
[83] Prosecution Appeal Brief, para. 113: "*passage of time can—at most—be a factor to be weighed in assessing whether it is fair to bring a particular prosecution*".

of limitations for such crimes.[84] However, while Article 29 is quite clear that no defence of statute of limitations can be launched as a jurisdictional challenge by an individual or State, there is nothing preventing an assessment by a Chamber (or the Prosecutor's Office) about the passage of time as impacting the feasibility of investigations in determining whether it is in the interests of justice to proceed at all.

44. Further, no compelling case has been put forward showing a prohibition on the consideration of passage of time by customary international law, as inferred in the Prosecution's Appeal Brief.[85] To the contrary, the Preparatory Committee's first report in 1996 outlines five different proposals on the non-applicability of statutory limitations, with at least one proposal suggesting that any such bar be made with a caveat: "unless '[o]wing to the lapse of time, a person would be denied a fair trial'."[86] The five different proposals advanced in those early discussions illustrate that the delegations highly disagreed on the matter, as evidenced in the following report:

> *Many delegations (Israel, Malaysia, and Ukraine) were of the view that owing to the serious nature of the crimes to be dealt with by the court, there should be no statute of limitations for such crimes. On the other hand, some delegations felt that such a provision was mandatory and should be included in the statute, having regard to their national laws, to ensure fairness for the accused. The view was expressed that statutory limitation might apply to lesser crimes (France). In the view of some delegations (Japan), this question should be considered in connection with the issue of the availability of sufficient evidence for a fair trial. Some delegations (Canada) suggested that instead of establishing a rigid rule the Prosecutor or President should be given flexible*

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[84] *Ibid.*

[85] *Ibid.*

[86] *See* Ruth A Kok, *Statutory Limitations in International Criminal Law* (T.M.C. Asser 2001), pp. 118-119 referencing the .1996 Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN GA 51st Sess. Supp. No. 22, UN Doc. A/51/22 (1996), Volume II, Article F: The first proposal provided for prescription periods of an unidentified length, as well as detailed rules governing their application; the second proposal provided that statutes of limitation do not apply to crimes within the jurisdiction of the Court; the third proposal provided for the non-applicability of statutory limitations to such crimes; the fourth proposal limited the material scope of the rule to only some of the crimes within the jurisdiction of the Court; and, the fifth and final proposal provided for a number of detailed rules concerning the application of statutes of limitation to all crimes within the jurisdiction of the Court.

> *power to make a determination on a case-by-case basis, taking into account the right of the accused to due process. In this connection, it was noted that Article 27 of the statute was relevant to this issue. It was suggested that an accused should be allowed to apply to the court to terminate the proceedings on the basis of fairness, if there was lack of evidence owing to the passage of many years.*[87]

45. While Article 29 was eventually adopted as a wholesale non-applicability of a statute of limitations for Rome Statute crimes,[88] these discussions – and, importantly, a joint statement by China and France disagreeing on the application of this rule with respect to war crimes, and with their concern with regard to the effect of the passage of time in terms of securing a fair trial[89] – illustrate a significant amount of disagreement amongst States relating to potential statutes of limitations for the crimes within the jurisdiction of the ICC. More importantly, the discussions demonstrate the consideration of passage of time as a vital factor in an assessment of fair trials and the most basic notions of justice.

46. Further, as the Prosecution notes the "modest" ratification of the UN '*Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity*' and the European '*Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes*', it does not specify that only 55 countries are parties to the UN Convention,[90] a mere 8 States having ratified the European Convention.[91] State practice equally does not consistently bar a statute of limitations for international crimes. As outlined by one author, countries such as France[92] and Chile[93] have assessed a

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[87] *Ibid.*
[88] Preparatory Committee on the Establishment of an International Criminal Court, 25 March - 12 April 1996, A/AC.249/CRP.3/Add.l, 8 April 1996.
[89] UN Doc.A/Conf.183/C.1/WGGP/L.4, p. 4, fn. 7.
[90] *See* https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-6&chapter=4&clang=_en.
[91] *See* https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/082/signatures?p_auth=J0z1ktMC.
[92] Ruth A Kok, *Statutory Limitations in International Criminal Law* (T.M.C. Asser 2001), p. 168.

statute of limitations on international crimes and Italian doctrine has expressed that "'it remains doubtful that a customary international rule has evolved excluding any statute of limitations for war crimes and other international crimes'."[94]

47. While statutes of limitation may not be in place under the Rome Statute, the underpinning consideration of rights of defendants and overall fairness in conducting criminal trials is evident in State practice and recognised by human rights law. As reasoned by the ECtHR in *Coeme & others v. Belgium:*

> *Limitation periods, which are a common feature of the domestic legal systems of the Contracting States, serve several purposes, which include ensuring legal certainty and finality and preventing infringements of the rights of defendants, which might be impaired if courts were required to decide on the basis of evidence which might have become incomplete because of the passage of time.*[95]

48. The U.S. Supreme Court has noted that statutes of limitations serve "the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity"[96] and "protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise."[97] Such limitations go to the fundamental features of a fair trial that would exist later down the line, as noted in *U.S. v. Podde*:

> *[W]hile it is true that one purpose of the statute of limitations 'is to prevent the Government from instituting prosecutions after excessively long delays,' […] the law's primary purpose is 'the protection of those who may during the limitation have lost their means of defence. These statutes provide predictability by specifying a limit beyond which there is an irrebuttable*

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[93] *Ibid.*, p. 180.
[94] *Ibid.*, p. 175.
[95] *Coeme & others v. Belgium (2000)*, para. 146 *citing* *Stubbings and Others v. the United Kingdom* *(1996)* pp. 1502-03, para. 51.
[96] *Toussie v United States*, 397 U.S. 112 (1970).
[97] *United States v Kubrik*, 444 U.S. 111 (1979).

> *presumption that a defendant's right to a fair trial would be prejudiced.' […] In other words, the statute of limitations exists primarily to protect the rights of the defendant, not just to prevent the government from acting in bad faith.*[98]

49. Even the *Pinzauti* commentary cited in the Prosecution's Appeal Brief contemplates the reality of passage of time on the ability to conduct fair trials, in writing:

> *[…] with the passage of time the gathering of evidence becomes more difficult, as it may no longer be available, or may in any event be hard to find and preserve. Significant delays in criminal action may thus impair the accused's right to a fair trial. For the same reasons, the passage of time may also reduce the effectiveness of criminal prosecution. In addition, criminal proceedings tend to lose legitimacy as time passes. Since such delays may be due to the prosecuting officers' failure to gather evidence or to find the culprit in a timely fashion, the preventive and deterrent effect of punishment dwindles as time goes by, as may its moral authority. The need for the social reintegration of the offender may also diminish, especially if the time elapsed has not been marked by further offending. For all these reasons, it is widely seen as fair and appropriate to bar prosecutions if they are not initiated within a reasonable time after the commission of the offence.*[99]

50. Therefore, the statute of limitations arguments are misplaced in these discussions which contemplate whether the Pre-Trial Chamber abused its discretion in considering the impact of the passage of time in the ability to achieve eventual justice for the victims of the Afghanistan situation. In fast-forwarding to the prosecutions that should naturally follow an opening of such investigations, the Pre-Trial Chamber expressed anticipation of fraught litigation rife with inability to conduct fair and expeditious trials in a manner suitable to those individuals before them and serving the interests of those victims participating in the process. While the passage of time may not diminish the wish for justice, it would impair the ability to deliver it. This, in itself, renders the Pre-Trial Chamber's consideration as properly placed in that

[98] *United States v Podde*, 105 F.3d 813 (2nd Cir 1997).
[99] G. Pinzauti, "Principle 23: restrictions on prescription" in F. Haldemann and T. Unger (eds.), *The United Nations Principles to Combat Impunity: a Commentary* (OUP 2018), p. 252.

the ability to achieve justice must be taken into consideration at all stages of the proceedings, not the least of which being these earliest given that the later stages provide more difficulty in resolving. As the ICC Appeal Chamber in *Lubanga* held (in the context of a conditional stay of proceedings presented by a lack of access to evidence):

> *A Chamber that has imposed a conditional stay must, from time to time, review its decision and determine whether a fair trial has become possible or whether, in particular because of the time that has elapsed, a fair trial may have become permanently and incurably impossible. In the latter case, the Chamber may have to modify its decision and permanently stay the proceedings*.[100]

51. Therefore, as proper consideration in these earliest stages, it was neither an error of law, nor an abuse of discretion to factor in the passage of time as contributing to an analysis of interests of justice.

iii. The PTC did not abuse its discretion in considering State cooperation[101]

52. Potential cooperation of States can also be a relevant factor in determining whether an ICC should proceed with an investigation, especially when considering a *proprio motu* case that involves non-signatories to the Rome Statute.

53. Such consideration must include the reality that even if the Prosecution is able to garner State cooperation in its investigations, the same may not be true for Defence investigations that will come along in several years only when suspects would be named. As noted by well-versed practitioners, *"[i]n this regard, the prosecution generally has an advantage over the defence, being an organ of*

[100] *Prosecutor v. Lubanga,* Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled 'Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008', 21 October 2008, ICC-01/04-01/06-1486, para. 81.

[101] Prosecution Appeal Brief, Ground 2(B)(4); LRV 1 Brief, Ground 2; LRV 2 Brief, Ground 2(i) and (iii).

the court, with more means to enforce cooperation, and often entering into cooperation agreements with governments."[102]

54. Assessments in the Chambers of the ICTY and ICTR demonstrate this factor in the context of determining the propriety of prosecutions in light of a compromised ability to secure fair trials. As early as *Tadić*, State cooperation appears in the context of a potential stay of proceedings, holding:

> *The Appeals Chamber can conceive of situations where a fair trial is not possible because witnesses central to the defence case do not appear due to the obstructionist efforts of a State. In such circumstances, the defence, after exhausting all the other measures mentioned above, has the option of submitting a motion for a stay of proceedings.*[103]

55. The *Blaškić* case also highlights the impact that failed cooperation can have on an individual trial years later. After a policy shift that showed increased cooperation of the Croatian Government, over 8,ooo pages were handed over that were previously unavailable in the course of Mr. Blaškić's trial which resulted in 108 documents admitted at the appellate phase of the case alongside new testimony before the Appeals Chamber.[104] The end result saw his conviction remain but the Appeals Chamber being required to issue a sentence *de novo* which took his 45 year sentence issued by the Trial Chamber down to 9 years based on the totality of new (and sometimes conflicting trial) evidence before it.[105]

56. Finally, the ICTR contemplated the possibility of fair trials in its assessment of whether it should allow referral of cases to Rwanda pursuant to Rule 11*bis*. In review of the Trial Chamber's considerations, the Appeals Chamber held that "*the Trial Chamber did not err in holding, based on the information before it, that if the case were to be transferred to Rwanda, Kanyarukiga might face difficulties in*

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[102] C. Buisman and D. Hooper, "Defence Investigations and Collection of Evidence" in C. Rohan and G. Zyberi (eds.), *Defense Perspectives on International Criminal Justice* (CUP 2017) p. 539. *See also* p. 546.
[103] *Prosecutor v. Tadić*, IT-94-1-A, Appeals Judgment, 15 July 1999, para. 55.
[104] *Prosecutor v. Blaškić*, IT-95-14-A, Appeal Judgement, 29 July 2004, paras 4-6.
[105] *Ibid.*, para. 726.

obtaining witnesses residing within Rwanda because they would be afraid to testify, and that he would not be able to call witnesses residing outside Rwanda, to the extent and in a manner that would ensure a fair trial."[106]

57. In the context of non-arrest in the *Al-Bashir* case, ICC Judges Ibáñez Carranza and Bossa made just such an assessment of the difficulties of Prosecution investigations in the context of non-cooperation by a State, writing:

> *[…] it seems very difficult to conceive how the Prosecutor and his or her team will be able to enter the territory of Sudan in order to carry out her investigation. Investigative measures typically include, inter alia, the identification and interviewing of witnesses and victims; visiting the locations in which crimes were allegedly committed; the search of locations of mass graves; collecting relevant documentary evidence; and conducting financial investigations. It is only logical to conclude that without the possibility of conducting the relevant and appropriate investigative measures, it will be very difficult for the Prosecutor to collect evidence, let alone submit credible and reliable evidence to the relevant chamber for the purpose of the confirmation of charges hearing and subsequently the trial.*
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> […]
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> *Without access to evidence, it will be impossible to meaningfully hold a confirmation hearing, let alone commence trial proceedings and give effect to any potential sentence imposed and award of reparations to victims. This has the necessary consequence of preventing the Court from exercising its functions and powers, delivering justice to the victims of the crimes allegedly committed by Mr Al Bashir and impeding the Court from fulfilling its mandate to put an end to impunity.*[107]

58. Access for a Defence team may be even more cumbersome by use of confidentiality agreements in line with Article 54.[108] The work product of a

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[106] *Prosecutor v. Kanyarukiga*, ICTR-2002-78-R11bis, Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11*bis*. *See also Prosecutor v. Hatagekimana*, ICTR-00-55B-R11bis, Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11bis, paras 22-26.

[107] *Prosecutor v. Al Bashir*, Judgment in the Jordan Referral re Al-Bashir Appeal, Joint Dissenting Opinion of Judge Luz del Carmen Ibáñez Carranza and Judge Solomy Balungi Bossa, 6 May 2019, ICC-02/05-01/09-397-Anx2, paras 82, 87.

[108] *See* C. Buisman and D. Hooper, "Defence Investigations and Collection of Evidence" in C. Rohan and G. Zyberi (eds.), *Defense Perspectives on International Criminal Justice* (CUP 2017) pp. 548-551.

number of governments and NGOs will likely be involved in such investigation which could lend to an increased use of such tool to protect State interests. However, even where legitimate usage, depriving Defence access by use of such confidentiality agreements will necessarily restrict or prevent the defendant from meaningfully confronting the evidence against him/her.[109]

59. Therefore, it was neither an error of law, nor an abuse of discretion to factor in potential cooperation as contributing to the interests of justice analysis. The impact of non-cooperation, even as minimally outlined here, demonstrates the enormous potential to impact fair trials and a path to justice if it cannot be secured.

iv. The PTC did not abuse its discretion in considering prospects of securing relevant evidence[110]

60. While cooperation or lack thereof, impacts many facets of running an international criminal court, non-cooperation is most impactful when it precludes access to relevant, credible evidence. Without evidence, there can be nothing to even properly identify suspects, much less issue an arrest warrant, conduct a fair trial, secure convictions that stand on appeal, and issue reparations. Without evidence, the entire process the ICC has been set up to fulfil is frustrated.

61. While the ICRC has recently expressed the impact of this lack of evidence on due process rights of suspects (as well as victims and witnesses),[111] the Appeals Chamber of the ICC has been resoundingly clear, 'unhesitating' even, on the impact of inability to secure *all* relevant evidence on fair trial rights, holding: "*that the right to a fair trial - which is without doubt a fundamental right -*

[109] *Ibid.*, p. 551.
[110] Prosecution Appeal Brief, Ground 2(B)(5); LRV 1 Brief, Grounds 2 and 3; LRV 2 Brief, Ground 2(iii).
[111] International Committee of the Red Cross, Guidelines on Investigating Violations of International Humanitarian Law: Law, Policy, and Good Practice, 16 September 2019, para. 145.

includes an entitlement to disclosure of exculpatory material."[112] Human Rights Courts have equally held that lack of evidence can result in unfair proceedings.[113]

62. Despite the LRV 1's contention that "*much probative evidence in modern international criminal prosecutions consists of communications, images, audio and video in digital form, and which can be preserved in pristine condition for an indefinite period*", the principle of orality remains paramount in ICL proceedings. As stated by the Appeals Chamber in *Bemba*:

> *The direct import of the first sentence of [Article 69(2)] is that witnesses must appear before the Trial Chamber in person and give their evidence orally. This sentence makes in-court personal testimony the rule, giving effect to the principle of orality. The importance of in-court personal testimony is that the witness giving evidence under oath does so under the observation and general oversight of the Chamber. The Chamber hears the evidence directly from the witness and is able to observe his or her demeanour and composure, and is also able to seek clarification on aspects of the witness' testimony that may be unclear so that it may be accurately recorded.*[114]

63. Quality of evidence is not to be lost in the discussion of ensuring fair trials and just results, which, unfortunately, diminishes over the course of time. The late Judge Patricia Wald, explained poignantly with respect to her experiences as an ICTY judge:

> *War crime witness testimony is also susceptible to inaccuracy for other reasons. Witnesses who come to The Hague now testify about events that*

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[112] *Prosecutor v. Lubanga*, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, 13 June 2008, ICC-01/04-01/06-1401, para. 77 *et seq*.

[113] *See Papageorgiou v. Greece,* (2004) 38 EHRR 30, 9 May 2003, Application 59506/00: Defendant was accused of using false cheques to withdraw large sums of money. The original cheques were destroyed. The ECtHR concluded that there had not been a fair trial because "essential pieces of evidence were not adequately adduced and discussed at trial in the applicant's presence"; *Genie-Lacayo v. Nicaragua*, Judgment, 29 January 1997: Article 8(1) had been breached in a criminal investigation where that the deceased's clothing had been burnt, relevant vehicles had been sold and a series of military witnesses refused to testify.

[114] *Prosecutor v. Bemba*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled 'Decision on the admission into evidence of materials contained in the prosecution's list of evidence', 3 May 2011, ICC-01/05-01/08, para. 76.

> *occurred five to ten years ago. In the meantime, they have often communicated with several people: fellow witnesses, journalists, NGOs, or counselors. They have also made statements to OTP field investigators, incountry investigative bodies, journalists, and humanitarian organizations. Their stories have sometimes changed form over the years. Details from one version are different or cannot be recalled at all in other versions. If they have suffered multiple crimes, they may confuse one perpetrator for another or what happened in one place for what happened somewhere else. The phenomenon of 'misattribution' of witness memories to the wrong time or place is a familiar event in any trial. In war crimes trials featuring multiple defendants and multiple violations of the same victim, it is an even greater danger. Additionally, where witnesses simply heard about something from someone else, the potential for mistake is enormous, especially in a group setting like a prison camp where rumor was rife and tensions furious between inmates and their captors. I have heard witnesses testifying in radically different manners about such seemingly plain facts as who was the commander of the camp, how long he stayed at the camp and how many bodies were found in a certain spot.*[115]

64. Recognising the standards set by the international community and the jurisprudence of the international courts and tribunals, it is also clear to see the danger of convictions being overturned or rendered unsafe by the inability to have sufficient corroboration.[116] This reality is equally presented in the text of *Fact-Finding without Facts* by Combs, explaining that "*[c]ertain factors increase the likelihood of inaccurate testimony, and unfortunately many of these factors are at work in international criminal trials*".[117] World War II cases being tried at the national level, even to this day (as the OTP, and LRVs have pointed out), often suffer from unreliable and unsupported evidence to a point of procedural impasse when subjected to the rigorous regime of suspects' rights guaranteed in a criminal trial. As just one example, one study of legal psychology points to the following risk of quality of evidence after long passages of time in the

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[115] Patricia M. Wald, *Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal*, 5 Yale Hum. Rts & Dev. L.J. (2002), pp. 236-237.
[116] *See, e.g., Prosecutor v. Karadžić*, MICT-13-55, Appeal Judgement, 20 March 2018, paras 474-475. *See also* para. 458.
[117] Nancy A Combs, Fact-Finding Without Facts (CUP 2010) pp. 14-15.

context of the *Demjanjuk* trial where a conviction was overturned on appeal for lack of evidence:

> *Even though victims may be able to recall detailed circumstances of these atrocities, such as geographical location, number of victims involved, noises or smell, the chances for submitting imprecise, divergent, and therefore unreliable evidence remains incredibly high. The more years that have passed (in the context of the Demjanjuk trial, forty years later), the greater the decline of the reliability of eyewitness evidence. Wagenaar acknowledges this aspect by stating: '[T]he horror of the events, the intensity of the emotions felt at the time and ever since, are no warrant against forgetting or confounding of details.'*[118]

65. Domestic courts have equally expressed this frustration. As stated in the U.S. case of *Thigpen v. Smith*, "*evidence is, by its nature, fragile and susceptible to destruction over time, as memories fade and witnesses die or become otherwise unavailable*".[119]

66. Given that there are tomes of academic work dedicated to the spoliation of evidence and its impact on conducting fair trials, it was neither an error of law, nor an abuse of discretion to factor in prospects of obtaining relevant evidence as contributing to the interests of justice analysis.

B. THE PTC DID NOT FAIL TO TAKE ACCOUNT OF RELEVANT FACTORS OF GRAVITY AND VICTIMS[120]

67. In considering the interests of justice, the Pre-Trial Chamber expressly took into account "the gravity of the crime and the interests of victims",[121] and noted that not all of the victims who submitted applications were in favour of an investigation.[122] The Chamber then, in essence, weighed the gravity of the

[118] Ruth A Kok, *Statutory Limitations in International Criminal Law* (T.M.C. Asser 2001) pp. 247-48 referring to Wagenaar's study *'Identifying Ivan: a case study in legal psychology'*.
[119] *Thigpen v. Smith*, 792 F.2d 1507 (11th Cir. 1986).
[120] Prosecution Appeal Brief, Ground 2(D); LRV 1 Brief, Ground 1 ; LRV 2 Brief, Ground 2(iv).
[121] Impugned Decision, para. 87.
[122] *Ibid*.

crimes and interests of victims on one side,[123] against the Three Factors on the other.[124] It considered that an investigation is not in the interests of justice if it is "not feasible and inevitably doomed to failure",[125] and concluded that, in this situation, "the circumstances are such as to make the prospects for a successful investigation and prosecution extremely limited".[126] Therefore, pursuing an investigation would not achieve victims' objectives and not honour "victims' wishes and aspiration that justice be done".[127] As the summary of the Pre-Trial Chamber's findings above demonstrates, it clearly took the gravity of crimes and the interests of victims into account.[128]

68. As discussed earlier, the German Federal Prosecutor General has similarly declined to open investigations when the prospects of cooperation were "hopeless" or would render the investigation "symbolic".[129] The Pre-Trial Chamber's reasoning can also find support in a credible volume of academic literature. For instance, one academic argued that "an investigation or prosecution should be rejected as not being in the 'interests of justice' when no investigation or prosecution could reasonably be carried out" and could lead to consequences such as States deratifiying the Statute or "influential non-party states hindering the Court's work".[130] Such consequences could eventually act against the interest of victims in the long term. Another international expert has also acknowledged that, due to the Court's lack of enforcement agencies, "the likelihood of state cooperation" will need to be

[123] *Ibid*., paras 87, 96.
[124] *Ibid*., paras 91–96.
[125] *Ibid*., para. 90.
[126] *Ibid*., para. 96.
[127] *Ibid*.
[128] *See* Prosecution Appeal Brief, paras 150, 156.
[129] Matthias Neuner, "German Preliminary Examinations of International Crimes", in Morten Bergsmo and Carsten Stahn (eds.), *Quality Control in Preliminary Examination: Volume 1* (Torkel Opsahl Academic ePublisher 2018), pp. 150, 155–156.
[130] Cale Davis, *Political Considerations in Prosecutorial Discretion at the International Criminal Court*, International Criminal Law Review, 15 (2015) 170–189.

considered "when deciding whether or not to initiate an investigation".[131] There is therefore credible academic support for the Pre-Trial Chamber's decision to give greater weight to the lack of cooperation above other relevant factors in favour of an investigation.

C. JURISDICTIONAL GROUNDS OF APPEAL[132]

69. The OPCD submits that the matters of jurisdiction as raised in the briefs of LRV1 and LRV2 pose significant issues for consideration when brought. Noting the position of the Prosecution that such findings are *obiter dicta*, and that they did not receive the full benefit of litigation at the level of the Pre-Trial Chamber, [133] the OPCD would reserve its right, or the right of any named defendant, to make submissions on these issues at first instance rather than through the vehicle of limited appellate review of the Impugned Decision.

[131] Matthew R. Brubacher, Prosecutorial Discretion within the International Criminal Court, Journal of International Criminal Justice 2 (2004), 71–95, p. 88.
[132] *See* LRV1, Ground 6; LRV2, Ground 4.
[133] Consolidated Prosecution Response, para. 74.

VI. CONCLUSION

70. For the reasons above, the OPCD respectfully requests the Appeals Chamber to accept these observations, and find no abuse of discretion in the consideration of factors that will impact the suspects in any opening of investigations and, more importantly, the fair trial rights of those who would be destined to appear before these Chambers in any future cases arising out of an authorised investigation.

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Dated this, 15th day of November 2019
At The Hague, The Netherlands