

# Master thesis

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**Project title:** *“Analyzing and comparing the International Criminal Courts Pre-trial Chambers decisions in the Afghanistan and Myanmar case and finding out- What is “interest of justice”, who can use the term “interest of justice” while proceeding towards an investigation and how?”*

## Abstract

Since the beginning of ICC, the decision of a Pre-trial Chamber to authorize an investigation initiated *proprio motu* by the Prosecutor has been an essential step which has been mentioned in the Rome statute. The Afghanistan and the Myanmar situations are two such situations where the Prosecutor have initiated an investigation *proprio motu* and requested to the Pre-trial Chamber for its authorization. So, this paper did a side by side comparison of both the decisions by Pre-trial Chamber in these two situations. In the Afghanistan situation the Pre-trial Chamber rejected the request and said that it will not serve the interest of justice even though 680 out of 699 requests from the victims have welcomed the idea of an investigation to punish the alleged perpetrators. It is because the chamber assumed that it will be difficult for the Court to collect evidence as the alleged parties will try their best to keep the evidence out the courts hands and so it will be a misuse of the Courts limited resources to investigate this case and they suggested that the resource can be used on solving other cases. Later that year, the Myanmar decision from the Pre-Trial Chamber came out and there they accepted the request from the Prosecutor and authorized the investigation. As regards to interest of justice, the judges mentioned that their decision is based on victim's representation as most of the victims asked for the punishment of the alleged criminals which was the same in Afghanistan but the approach of the chamber in this situation was completely different. The Afghanistan decision raised many questions as to use of the term "interest of justice" and was criticized very badly. The decision was appealed by the Prosecutor and finally it got annulled by the Appeals Chamber as it was impugned, and Pre-trial chamber erred in the application of article 53. It turns out in the analysis of this paper that article 53 does not provide any power to the Pre-trial Chamber to reject an application initiated *proprio motu*. Moreover, it is the discretion of the Prosecutor to initiate or not to initiate an investigation *proprio motu* solely based on the concept interest of justice and for that he/she is not answerable to anyone.

## **List of Abbreviations**

ICC	International Criminal Court
PTC	Pre-trial Chamber
PTC II	Pre-trial Chamber II
PTC III	Pre-trial Chamber III
OTP	Office of the Prosecutor
VCLT	Vienna Convention on the Law of Treaties
VPRS	Victims Participation and Reparations Section
BGP	Border Guard Police
MPF	Myanmar Police Force
UNAMA	United Nations Assistance Mission in Afghanistan
AIHRC	Afghanistan Independent Human Rights Commission
CIA	Central Intelligence Agency
ANSF	Afghan National Security Forces

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## **1.Introduction**

The international Criminal Court (ICC) started its journey on 2002 after the ratification of the Rome statute by 60 countries. Genocide, war crimes, crimes against humanity and aggression are the subject matters of this court.<sup>1</sup> The Court is participating in a global fight to end impunity, and through international criminal justice, the Court aims to hold those responsible accountable for their crimes and to help prevent these crimes from happening again.<sup>2</sup> The ICC is certainly not a substitute for national courts. According to the Rome Statute, it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes. The International Criminal Court can just mediate where a State is unable or unwilling genuinely to carry out the investigation and prosecute the perpetrators which make it a court of last resort.<sup>3</sup> Governed by an international treaty called the Rome Statute, the ICC is the world's first permanent international criminal court. ICC, like other international organizations serves only the state parties. Security Council referral is the exception to this rule as by such referral it can act against the countries which are not the state party to the Rome statute such as the case of Libya and Sudan. Another way for the ICC to take a case is when a state party refers a situation to ICC, and it can also be self-referral.<sup>4</sup> Self-referral means when a country makes referral to the ICC voluntarily that has jurisdiction over the referred situation. According to Article 15 of the statute the Prosecutor can initiate investigations *proprio motu* based on information on crimes within the jurisdiction of the Court subject to the authorization of the Pre-trial Chamber. That means when the Prosecutor, upon preliminary examination, have reasons to believe that there is reasonable basis to proceed with an investigation than he/she may request to the Pre-trial Chamber for the authorization of such investigation and upon getting such authorization they may proceed with

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<sup>1</sup> Carlson, The Justice Laboratory, Chapter One: The ICC page 4

<sup>2</sup> About International Criminal Court, available at: <https://www.icc-cpi.int/about>

<sup>3</sup> Preamble, Rome Statute,1998

<sup>4</sup> *Supra* note 1

the investigation and prosecution of the case. The case of Afghanistan and Myanmar are two recent examples where the Prosecutor initiated *proprio motu* investigation and submitted the proposals to the Pre-trial Chambers for its authorization. The focus of the Afghanistan case is to initiate an investigation into alleged war crimes and crimes against humanity in relation to the armed conflict in the Islamic Republic of Afghanistan since 1 May 2003, as well as regarding similar crimes related to the armed conflict in Afghanistan allegedly committed in the territory of other States Parties to the Rome Statute since 1 July 2002.<sup>5</sup> In the Myanmar case, the focus is to investigate Alleged crimes of deportation, persecution, and any other crime within the ICC jurisdiction committed, against the Rohingya people or others, violence which occurred in Rakhine State, Myanmar, and any other crimes under the ICC's jurisdiction sufficiently linked to these events. In both the cases the victims expressed their views and the alleged crimes are done by the countries which are not state party to the Rome Statute for example United States of America (in the Afghanistan case) and Myanmar (in Bangladesh/ Myanmar case). On 12 April, 2019 Pre-trial chamber II (PTC II) provided its decision in regards of Afghanistan case rejecting the prosecutors request to investigation and stated that the investigation may not serve the interest of justice, and it may not be useful as the alleged party might not support the investigation hence leading the misuse of ICC's limited resources. On the other hand, Pre-trial chamber III (PTC III), in the Myanmar situation, has authorized the Prosecutor to proceed with an investigation for the alleged crimes within the ICC's jurisdiction in the Situation in the Bangladesh/Myanmar on 14 November of the same year.<sup>6</sup> Though the decision of PTC II in the Afghanistan case was criticized a lot but after the Myanmar decision it seemed relevant to look into both the decisions and do a comparison side by side to look deeply in the main points raised to reject/

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<sup>5</sup> Situation in the Islamic Republic of Afghanistan ,ICC-02/17, available at: <https://www.icc-cpi.int/afghanistan>

<sup>6</sup>Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19, available at: <https://www.icc-cpi.int/bangladesh-myanmar>

authorize the investigation in the two cases from a legal point of view. This paper will try to dig deeper into the PTC decisions and discuss the similarities and dissimilarities of the two situations especially in the reasoning showed in both the decisions regarding the “interest of justice” concept as the Afghanistan decision raised questions about the use and application of this concept. This paper will be explaining the term “interest of justice” as this term has played a significant role in rejecting the authorization of investigation in the Afghanistan situation and the Pre-trial Chamber, in this case, has come up with their own explanation about this term which raises many questions about the proper and legal definition, application, the concerned authority mentioned in law to use this term while deciding a case etc. As this was the first time in the history of cases handled by ICC a decision was taken mentioning that a decision taken otherwise may not serve the interest of justice and new explanation have come up that creates a research gap as justification for such explanation is needed to look into as it is matter of ending impunity which eventually is ICCs goal. This paper will try to focus on the explanation of the term interest of justice by PTC II and try to find out how justified under law those explanations are and to do that this paper will also discuss the findings from the very recent decision in the Afghanistan case from the Appeals chamber which annulled the decision by PTC II stating it as impugned and finally authorized the investigation in the Afghanistan situation which already speaks that those explanations by PTC II should be looked at and it is also necessary to come up with a proper application of the term which eventually will be discussed in the paper.

## **2.Methodology**

As the title of the paper suggest this a study of the decisions taken by the ICC Pre-trial Chamber in relation to the two situation which are the Afghanistan situation and the Myanmar situation. The following section starts in the first place to understand how the whole process of how the ICC takes

a case and to do that relevant ICC jurisprudence will be outlined and analyzed later to answer the research question.

The most important document that has been used in this paper is the Rome Statute for International Criminal Court. Also called the Rome Statute or the International Criminal Court Statute, the Rome Statute of the International Criminal Court is an agreement that led to the formation of the International Criminal Court (ICC). The Rome Statute was approved in Rome on July 1, 1998, during a diplomatic session. The statute became effective as from July 1, 2002. Data shows that there were 123 member nations as of now. 42 states are non-party, non-signatory states. After protracted negotiations, the United Nations General Assembly held a conference in June 1988 to finalize negotiations and adoption of the statute. In the vote held during the conference, 120 states were for the statute, seven were against, and 21 abstained. The individual votes of the delegation were not recorded, so the identity of four of the seven is unknown. Three of the states, People's Republic of China, the United States, and Iran came out publicly. The Rome Statute was ratified in New York on April 11, 2002, by ten countries. Officially the statute became effective on July 1, 2002 and could investigate crimes. Modifications were made in 2010 at Kampala during a conference, which have been already implemented.

The statute provides rules regarding the structure, function, jurisdiction of the court as well as different four organs of the court, which are: The Presidency, the Judicial Division, the Office of the Prosecutor, and the Registry. The Presidency is responsible for the proper administration of the Court. The Judicial Divisions consist of the 18 judges of the Court, organized into three chambers which are the Pre-Trial Chamber, Trial Chamber and Appeals Chamber. They all carry out the judicial functions of the Court. Judges are elected to the Court by the Assembly of States Parties and they must be national of the member states of the court. The judges serve for 9 years and usually they are not re-elected. The Office of the Prosecutor (OTP) is responsible for conducting investigations and



prosecutions. It is headed by the Chief Prosecutor, who is assisted by one or more Deputy Prosecutors. According to the Rome statute the OTP has the power to work independently without answering to any other states, International Organization, NGO's, or offices. In short, the OTP is independent from any external sources. The Registry is responsible for the non-judicial aspects of the administration and servicing of the Court. This includes, among other things, the administration of legal aid matters, court management, victims and witnesses matters, defense counsel, detention unit, and the traditional services provided by administrations in international organizations, such as finance, translation, building management, procurement and personnel. The Registry is headed by the Registrar, who is elected by the judges to a five-year term.

In short, the Rome statute is the law that the ICC mainly follows from choosing a case to coming to a decision regarding any situation. It provides a whole legal framework of how every organ of this court should work. It also provides with office's and chamber's duties, responsibilities, liabilities etc. This paper is mainly focusing on the articles 15,17 and 53 of the statute as these articles state the rules regarding the Prosecutor (article 15), issues regarding the admissibility of the case (article 17) and initiation of an investigation (article 53).<sup>7</sup> As these are the laws that the Prosecutor of the ICC must follow when he/she is willing to initiate an investigation whether *proprio motu* or by the Security Council or member state referral. Article 15(3) mentions that the Prosecutor must take authorization from the Pre-trial Chamber if the Office of the Prosecutor finds reasonable basis to believe that an investigation is needed, and this rule is binding on the Office of the Prosecutor. The Article 15(4) of the statute provides the power and responsibility of the Pre-trial Chamber in such a request from the Office of the Prosecutor. And in the two decisions, on which this paper is being written, Rome Statute is mentioned again and again which shows its binding nature on the ICC. As no decision can be taken

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<sup>7</sup> Rome Statute for the International Criminal Court, available at: <https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf>

in this court which is against the statute. So, interpreting the relevant laws from this statute is very important for a decision to be just and right. For this reason, the applicable laws will be interpreted to analyze the two decisions and the “interest of justice” as there is no statutory definition for this term hence making it important to interpret the law.

Next to the Rome statute, another important document that will be used to understand the working process of the International Criminal Court are the Rules of Procedure and Evidence. The Rules of Procedure and Evidence is an instrument for the application of the Rome Statute of the International Criminal Court, to which they are subordinate in all cases. In elaborating the Rules of Procedure and Evidence, care has been taken to avoid rephrasing and, to the extent possible, repeating the provisions of the Statute. Direct references to the Statute have been included in the Rules, where appropriate, in order to emphasize the relationship between the Rules and the Rome Statute, as provided for in article 51, in particular, paragraphs 4 and 5. In all cases, the Rules of Procedure and Evidence should be read in conjunction with and subject to the provisions of the Statute. The Rules of Procedure and Evidence of the International Criminal Court do not affect the procedural rules for any national court or legal system for the purpose of national proceedings.<sup>8</sup> At the time the Rome Statute was adopted, it was clear that the Statute alone could provide only a basic framework for the establishment of the Court. There was a multitude of details that could not be included within one document and warranted separate discussions. Thus, Resolution F, Final Act of the July 1998 Rome Conference established a Preparatory Commission to work on various supplemental agreements to the Rome Statute, to address these outstanding issues. The Preparatory Commission has been meeting regularly since February 1999 and continues to finalize these issues with a view to the eventual adoption of all draft texts by the Court’s Assembly of States Parties, once the Rome Statute enters into force.

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<sup>8</sup> The Rules of Procedure and Evidence for the International Criminal Court, available at: <https://www.icc-cpi.int/iccdocs/pids/legal-texts/rulesprocedureevidenceeng.pdf>

One of the main tasks for the Preparatory Commission was to draft the ICC's Rules of Procedure and Evidence, which entered into force once adopted by a two-thirds majority of members of the ICC Assembly of States Parties (see articles 51 and 112 of the Rome Statute). The "finalized draft text" of these Rules of Procedure and Evidence was completed in June 2000 and adopted by consensus by all the States participating in the Preparatory Commission process. In other words, this "finalized draft text" represents the views of States from every region and principal legal system of the world. Of the 225 rules contained in the "finalized draft text" of June 2000, many of these would be of interest to States currently in the process of ratifying and implementing the Rome Statute. Many rules would also be of interest to those States Parties with existing implementing laws wishing to establish effective administrative procedures to complement these. In some cases, the Rules of Procedure and Evidence were already mentioned explicitly in certain provisions in the Rome Statute. They were identified as a source of further details yet to be negotiated in specific provisions.<sup>9</sup> The elaboration of principled and practical Rules of Evidence and Procedure is critical to the functioning of the International Criminal Court. The Rules ensure that the Court can operate efficiently and effectively. They protect the interests of witnesses who may put themselves at risk by cooperating with the Court, while guaranteeing respect for the rights of suspects and accused persons.<sup>10</sup>

Apart from the abovementioned documents, secondary sources will be used for the sake of analyzing. Secondary sources in accordance with article 31 of the Vienna Convention on the Law of Treaties (VCLT) with the aim of identifying the meaning and scope of the term "interest of justice" and

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<sup>9</sup> International Centre for Criminal Law Reform & Criminal Justice Policy, "INTERNATIONAL CRIMINAL COURT Checklist of Implementation Considerations and Examples Relating to the Rome Statute and the Rules of Procedure & Evidence A supplement to the "Manual for the Ratification and Implementation of the Rome Statute"", April 2002, available at:

<http://iccnow.org/documents/ICCLR-Checklist.pdf>

<sup>10</sup> Human Rights Watch, "Commentary To The Preparatory Commission Rules Of Evidence And Procedure For The International Criminal Court", February 1999, available at:

<https://www.hrw.org/legacy/campaigns/icc/docs/prepcom-feb99.htm>

determining whether the Pre-trial Chambers concept and application of it is in line with this meaning. The VCLT rules of interpretation are stipulated in articles 31 and 32. Article 31, para. 1, states: “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 the light of its object and purpose.” Para. 2 indicates that the context can be derived from the text of the treaty including its preamble and annexes as well as other agreements or instruments made between the parties in relation to the treaty. In addition, as described in para. 3, any other agreement, practice, or relevant international law applicable to the interpretation of the treaty shall be considered.<sup>11</sup>

Article 32, establishing the supplementary means of interpretation, “the preparatory work of the treaty and the circumstances of its conclusion” may be referred to in order to clarify an interpretation following application of article 31 or “determine the meaning when the interpretation according to article 31 “(a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable.”<sup>12</sup>

The VCLT thereby in article 31 allows for textual (“in accordance with the ordinary meaning to be given to the terms”), systematic/contextual (“in their context”) and teleological (“in the light of its object and purpose”) as well as in article 32 for historical interpretation (“the preparatory work of the treaty and the circumstances of its conclusion”). Literary understanding includes that the words used should be given their ordinary and natural meaning which must be unambiguous and must not lead to an absurd or unreasonable result. The systematic approach requires compatibility of the ordinary meaning of the terms with the treaty text and further agreements made regarding the treaty. Applying a teleological interpretation means determining the meaning of terms considering the object and purpose of the given treaty. This approach offers a larger extent of flexibility as the understanding of

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<sup>11</sup> Article 31 of the Vienna Convention on the Law of the Treaties

<sup>12</sup> Article 32 of the Vienna Convention on the Law of the Treaties

the object and purpose can evolve with political and societal developments. The historical approach is a supplementary means to confirm interpretation made in accordance with article 31 or, if no satisfying results can be reached by applying the three other forms, to ascertain the meaning.<sup>13</sup>

The approach outlined in articles 31 and 32 VCLT will be applied to determine the meaning of the term “interest of justice” within the framework of the Rome Statute and the Rules of Procedure and Evidence. Since the concept of interest of justice is not defined in these documents and does not have an ordinary meaning in a legal context, a textual interpretation may produce very limited results. Therefore, recourse will often be taken to the systematic and teleological approach using historical interpretation complementarily.

In the next section to give a brief idea on what is going on, the background story of the two situations will be stated from the beginning to its present condition. For doing so, information will be taken from the official website of the ICC. In this website, all the details regarding the court, important documents related to the organization and all the details regarding the situations ICC ever worked with has been stated. This website also provides with all the articles and press conference reports about ICC. The website has separate tabs dedicated for researchers, media, teachers, diplomats etc. to help them get detailed material that can be helpful for their research. In this paper this website is used to gather necessary information and documents that will help us analyze the research question and answer it properly. For the better understanding of the background, ICC documents like the Prosecutors requests to the Pre-trial Chamber to initiate an investigation, the decisions of the Pre-trial Chamber on both the situations, the Appeals chambers decision in the Afghanistan situation will be used as all these documents have very important information regarding the cases.

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<sup>13</sup> Kaczorowska, Alina (2010) Public International Law. London/New York: Routledge. pp.122-126

The paper than aims to present a side by side comparison of the two decisions in question which has been delivered by the PTC II and PTC III based on the request by the OTP to initiate investigation in the Afghanistan and the Myanmar situation. For that purpose, the common section which can be seen in both the Afghanistan and Myanmar decision by Pre-trial Chamber will be considered to determine different steps that the decision shows along the way to its concluding statements which includes explanation of relevant laws, reasonable basis based on which the Chamber has determined its decision, Jurisdiction of the case, victims representation, complementarity of the case, gravity of the crime and last but not the least the determination that if the case serves interest of justice or not. For the sake of analyzing the similarities and dissimilarities all this different sections from the PTC decisions will be focused individually and the relevant laws will also be cited which determines the way to decide on the subject matter of the section. This will be done to get a brief idea what the law says and what have been done.

The most interesting part for this paper will be explaining the term “interest of justice” which has been used in the Afghanistan decision as main reason to reject the authorization of investigation and the Chambers use of the term in this manner while deciding the case has been highly criticized. As mentioned earlier secondary sources will be used to analyze this part and get a proper idea on this concept. As there is no statutory definition of this term but ICC came up with a Policy paper in 2007 which states some guidelines for the Prosecutor as to use of this term. This policy paper sets out the Office of the Prosecutor’s understanding of the concept of the interests of justice as mentioned in Article 53 of the Rome Statute. This is a document of the Office of the Prosecutor and, as such, it does not give rise to rights in litigation and is subject to revision based on experience and in the light of legal determinations by the Chambers of the Court.<sup>14</sup> Though this policy paper is not a binding

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<sup>14</sup> OTP Policy paper on the interests of justice, September 2007, available at: <https://www.iccpi.int/nr/rdonlvres/772c95c9-f54c14321-bfD9-73422bb23528/143640/iccotpinterestsofiustice.pdf>

agent as any statutory law, but it surely has its own significance. This policy paper is used in the PTC decisions and cited while PTC tried to explain the use of the term interest of justice in its decisions. For the better understanding of the term “interest of justice” the relevant points from the policy paper will be highlighted that will clear out many questions as to the application of the term in question.

Apart from the policy paper on the interest of justice by ICC, the policy paper by Human Rights watch and opinions from some other authors such as Jean-Marie Eleylofedé, Joseph Yav etc. and different NGOs has been taken into consideration for understanding and analyzing the concept interest of justice. All these articles and papers have been found in the website called The Coalition for the International Criminal Court (CICC) which includes 2,500 civil society organizations in 150 different countries working in partnership to strengthen international cooperation with the ICC; ensure that the Court is fair, effective and independent; make justice both visible and universal; and advance stronger national laws that deliver justice to victims of war crimes, crimes against humanity and genocide.<sup>15</sup> From December 2004 to April 2005, many NGOs submitted written comments when the Office of the Prosecutor asked for input from NGOs on the interpretation of the concept of the Interest of Justice. The Office of the Prosecutor was particularly interested in hearing from NGOs about their views on the relevance of the issues of security and stability in relation to a decision on whether to initiate an investigation or to proceed with a prosecution. The OTP also expressed their interest in hearing views on the issues of the availability of appropriate alternatives to prosecution and the minimal content these mechanisms should have to satisfy the principle of complementarity on which the Rome Statute is based. Moreover, the question of what constitutes the Interest of Justice was discussed during consultations held between the Office of the Prosecutor and NGO

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<sup>15</sup> The Coalition for the International Criminal Court (CICC), available at: <http://iccnow.org/?mod=coalition>

representatives from 21-24 June 2005.<sup>16</sup> Those submissions by NGOs are not binding materials rather they suggested how to interpret the law, to be more specific article 53 of the Rome statute, in regards to the use of the interest of justice. These papers also came up with some recommendation for the OTP to make some regulations which will define the term as well as its application. As mentioned above, the current Policy paper on interest of justice by ICC is not of binding nature so the NGOs recommended the OTP to come up with something that describes the term in detail and will be of a binding nature to make its use more definite. These papers have discussed, in detail, the probable meaning and usability of the term interest of justice which provide guidelines as to the understanding of the concept very well.

The paper will try to analyze the powers and authority the Pre-trial chamber has, under existing law, to use the term interest of justice while deciding a case. To do so, the findings from policy papers and articles mentioned above will be used. The explanation that came out in the decision from Pre-trial Chamber and the Appeals chamber will also be used to analyze as these are the latest explanation found on the topic of interest of justice.<sup>17</sup>

### **3.The legal framework**

In a first step, the process of starting an investigation into a situation and in prosecuting a case in accordance to the Rome Statute will be outlined. As mentioned in the introduction, the three trigger mechanisms for the Office of the Prosecutor (OTP) to start an investigation are: referral by the United

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<sup>16</sup> The Coalition for the International Criminal Court (CICC), Interest of Justice, available at: <http://iccnw.org/?mod=interestofjustice&idudctp=21&show=all#21>

<sup>17</sup> Judgment on the appeal against the decision on the authorization of an investigation into the situation in the Islamic Republic of Afghanistan, Page: 16-22, 5 March 2020, available at: [https://www.icc-cpi.int/CourtRecords/CR2020\\_00828.PDF](https://www.icc-cpi.int/CourtRecords/CR2020_00828.PDF)



Nation Security Council (UNSC) (article 13(b)), referral by a state party (article 14), or the Prosecutor acting *proprio motu*, pending the authorization of the Pre-trial chamber (article 15).

### **3.1. Referral by the United Nation Security Council (UNSC)**

The UNSC plays an important role in helping the ICC dive into a situation as it has been given power under the article 13(b) to refer a situation to ICC. Originally ICC has jurisdiction to proceed with a situation only where a member state is involved as it is a treaty-based organization. But impunity is not limited to ICCs member states. In that case, Security Council referral works as an exception. As it has been bestowed with the power to refer a situation where a member state of ICC is not in question and by such referral ICC can extend its jurisdiction to that situation.<sup>18</sup> The case then rests to the Prosecutor to evaluate and the Prosecutor after evaluating the result will inform the UNSC if the answer is in negative, or initiate investigation if the evaluation provide a reasonable basis to proceed with a case including fulfilling all the conditions.<sup>19</sup> Until this date UNSC has referred two situations to the ICC which are Sudan and Libya.

### **3.2. Referral by a state party**

Under article 14 of the statute, a state party to the Rome statute can refer a situation to the Prosecutor in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes. As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation.<sup>20</sup> From there, again, it is the duty of

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<sup>18</sup> Article 13(b) of the Rome statute for International Criminal Court

<sup>19</sup> Article 53(2) of the Rome statute for International Criminal Court

<sup>20</sup> Article 14 of the Rome statute for International Criminal Court

the prosecutor to look deeply in the information available to him/her and evaluate if there is reasonable basis to proceed with the situation or not.

### **3.3. *proprio motu* initiation of investigation by the Prosecutor**

Where there is no referral from the UNSC or a member state, the Prosecutor may, according to article 15 of the statute, initiate investigations *proprio motu* based on information on crimes within the jurisdiction of the Court. A *proprio motu* initiation means that the Prosecutor initiates the investigation on her own motion without any kind of referral from any state party or UNSC but based on some information received from trusted sources. The Prosecutor shall analyze the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence. If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.<sup>21</sup>

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<sup>21</sup> Article 15 of the Rome statute for the International Criminal Court

### **3.4. Role of the Prosecutor regarding the initiation of investigation after getting UNSC or State party referral or *proprio motu* initiation**

Article 53(1) lays down the procedure for the OTP to determine if there is reasonable basis to pursue an investigation. Upon following that the OTP starts with the preliminary examination phase by assessing whether the Court has any kind of jurisdiction over the respective situation in accordance with articles 5, 11, 12 and 53(1)(a) of the Statute. The Prosecutor then decides on whether he/she must adhere to the exact scope of the situation referred to him/her by a state party and UNSC or not. The OTP looks for having established that the Court has jurisdiction over the situation in question. For this the OTP must determine the three jurisdictional requirements and those are: (1) subject-matter jurisdiction (what acts constitute crimes), (2) territorial or personal jurisdiction (where the crimes were committed or who committed them), and (3) temporal jurisdiction (when the crimes were committed). The OTP continues the preliminary examination by analyzing whether the situation is admissible under article 17 and article 53. According to article 17(1), a case is inadmissible when it a) violates the principle of complementarity<sup>22</sup>, b) the case has already been decided by the concerning state and they decided not to prosecute,<sup>23</sup> and/or c) it does not fulfill the gravity threshold.<sup>24</sup>

Article 53(1) stipulates that the Prosecutor shall initiate an investigation “unless he or she determines that there is no reasonable basis to proceed under the Statute” considering, amongst others, whether the case is or would be admissible under article 17 and whether it would not serve the “interest of

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<sup>22</sup> Article 17(1(a)) of the Rome statutes states that the principle of complementarity is met when a state is unwilling or unable genuinely to carry out the investigation or prosecution and only then ICC can initiate investigation or prosecution otherwise ICC is unable to do so.

<sup>23</sup> Article 17 (1(b) and (c)) of the Rome statutes states that a case will be inadmissible when the case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned genuinely and not out of unwillingness or inability to prosecute and when the person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3.

<sup>24</sup> Article 17 (1(d)) of the Rome statute.

justice”.<sup>25</sup> When the Prosecutor is satisfied, based on the information being available to him/her, that the situation fulfills all the conditions laid out in article 53(1) then he/ she shall initiate the investigation on the situation referred to him/her by UNSC or member state referral. The Prosecutor at this stage, shall submit the proposal to the Pre-trial Chamber according to article 15(3) for the *proprio motu* initiation of investigation.<sup>26</sup>

If the conditions mentioned in Article 53(1) of the statute are not met by the situation the Prosecutor may not initiate investigation. In that case, the Prosecutor shall inform the Pre-trial Chamber and the State making a referral under article 14 or the Security Council in a case under article 13(b), of his or her conclusion and the reasons for the conclusion.<sup>27</sup> In this case, the Pre-trial Chamber may, upon the request of UNSC or the state making referral, review a decision of the Prosecutor which has been taken based on article 53(1) not to proceed and may request the Prosecutor to reconsider that decision.<sup>28</sup> In addition, the Pre-Trial Chamber may, on its own initiative, review a decision of the

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<sup>25</sup> Article 53(1) of the Rome statute full text

Article 53

Initiation of an investigation

1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:

(a) The information available to the Prosecutor 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) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.

<sup>26</sup> Article 15(3) of the Rome Statute for International Criminal Court

<sup>27</sup> Article 53(2) of the Rome statute for International Criminal court

<sup>28</sup> Article 53(3)(a) of the Rome statute for International Criminal court

Prosecutor not to proceed if it is based solely on Article 53 paragraph 1 (c) or 2 (c). In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber.<sup>29</sup>

If the Prosecutor, after being satisfied that all the conditions laid in article 53 and 17 have been met, submits a proposal to the Pre-trial Chamber for its authorization then article 15(4) of the Rome Statute provides additional details as to the scope and object of the scrutiny to be performed by the Pre-Trial Chamber, by stating that if the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case. So the legal scrutiny for Pre Trial Chambers includes determining if, 1) there is reasonable basis to proceed with an investigation, 2) the case appears to fall within the jurisdiction of the Court.<sup>30</sup> The determinations of the Chamber are based on the information provided in the Request, in its annexes and supporting materials, in the victims' representations, and in the responses to orders issued by the Pre-Trial Chamber under Rule 50(4). The Statute vests the Prosecutor with discretion in setting priorities and deciding if, when and how to file a request of authorization to investigate. Once the mechanism under article 15 has been triggered, however, it is the Chamber's duty and responsibility to conduct a scrutiny on all of the evaluations that have led the Prosecutor to apply for an authorization to investigate, including those pertinent to the prospects of an investigation.<sup>31</sup> The Chamber must also verify whether the case is or would be admissible under article 17 of the Statute. At this initial stage, the admissibility test calls for a twofold assessment: first, as to whether the relevant States are conducting or have conducted national

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<sup>29</sup> Article 53(3)(b) of the Rome statute for International Criminal court

<sup>30</sup> Article 15(4) of the Rome statute for International Criminal court

<sup>31</sup> Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Islamic Republic of Afghanistan, Page: 16, 12 April 2019, available at:

[https://www.icc-cpi.int/CourtRecords/CR2019\\_02068.PDF](https://www.icc-cpi.int/CourtRecords/CR2019_02068.PDF)

proceedings in the same matter (complementarity); second, if the conclusion is in the negative, as to whether the gravity threshold is met (gravity).<sup>32</sup> Article 17(l)(d) states that a case may be inadmissible if it is not of sufficient gravity to justify further action by the Court.

If the Pre-trial Chamber, after analyzing the Prosecutors request and supporting material finds out that there is a reasonable basis to proceed with the case and it fulfills the jurisdiction and admissibility requirements of the Court according to Rome statute than it should authorize the investigation without further delay. Upon getting such authorization, the Prosecutor may start investigation and proceed into the prosecution.

But if the Pre-trial Chamber rejects the request of the Prosecutor for any reason than the Prosecutor can not proceed with an investigation. If the OTP still wants to proceed than they may file an appeal against the decision of the PTC in Appeals Chamber. The Appeals Chamber, upon such request may review the decision and whether to uphold the appealed decision, amend it, or reverse it. his is thus the final judgment unless the Appeals Chamber orders a re-trial before the Trial Chamber.<sup>33</sup>

## **4.An overview of the Afghanistan case**

On 20 November 2017, the Prosecutor had requested authorization from Pre-Trial Judges to initiate an investigation into alleged war crimes and crimes against humanity in relation to the armed conflict in the Islamic Republic of Afghanistan since 1 May 2003, as well as regarding similar crimes related to the armed conflict in Afghanistan allegedly committed in the territory of other States Parties to the Rome Statute since 1 July 2002.

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<sup>32</sup> Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Islamic Republic of Afghanistan, Page 23, 12 April 2019, available at: [https://www.icc-cpi.int/CourtRecords/CR2019\\_02068.PDF](https://www.icc-cpi.int/CourtRecords/CR2019_02068.PDF)

<sup>33</sup> Appeal Stage, International Criminal Court, available at: <https://www.icc-cpi.int/Pages/Appeal.aspx>

Between 7 December 2017 and 9 February 2018, the ICC Victims Participation and Reparations Section (VPRS) transmitted to the Pre-Trial Chamber a total number of 699 victims' representations and 680 requests out of them have asked to authorize an investigation. On 20 February 2018, the VPRS transmitted to the Judges a final consolidated report on victims' representations, containing an overview of the victim representations process, as well as details and statistics of the transmitted representations. The preliminary examination of the situation in Afghanistan was made public in 2007. The OTP has received numerous communications under article 15 of the Rome Statute related to this situation. The preliminary examination focusses on crimes listed in the Rome Statute allegedly committed in the context of the armed conflict between pro-Government forces and anti-Government forces, including the crimes against humanity of murder, and imprisonment or other severe deprivation of physical liberty; and the war crimes of murder; cruel treatment; outrages upon personal dignity; the passing of sentences and carrying out of executions without proper judicial authority; intentional attacks against civilians, civilian objects and humanitarian assistance missions; and treacherously killing or wounding an enemy combatant. The preliminary examination also focusses on the existence and genuineness of national proceedings in relation to these crimes.<sup>34</sup>

On April 12 of 2019, Pre-Trial Chamber II provided their decision on the case under article 15(3) of the statute. In the decision they mentioned that all the other condition stated in the Rome statute such as the admissibility, jurisdiction etc. have been fulfilled in this case. But they rejected the request to authorize an investigation in Afghanistan stating that it will not serve the interest of justice and showed the following reasons,

1) as most of the incidents relevant to the case occurred between 2005-2015 and the prosecution was not in position to preserve evidences or witnesses, it is not very likely to find the availability of such

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<sup>34</sup> The background of the Afghanistan case, available at: <https://www.icc-cpi.int/afghanistan>

evidences. And the PTC II also mentioned that, during the preliminary examination, no one from the prosecution requested for preserving the evidences.

2) The political situation in both Afghanistan and other key states which might be related to this case has changed and it may lead to make it extremely difficult to gauge the prospects of securing meaningful cooperation from relevant authorities for the future, whether in respect of investigations or of surrender of suspects and it can be assumed by the unusual time of the preliminary investigation which is almost 11 years.<sup>35</sup>

On 17 September 2019, PTC II of the ICC granted in part the request of the Prosecutor for Leave to Appeal the "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Islamic Republic of Afghanistan". The Chamber granted the Prosecutor's leave to appeal the Decision on two grounds, namely whether there exists a necessity or possibility for a Pre-Trial Chamber to carry out an assessment of the 'interests of justice', and, in the affirmative, which proper and relevant factors a Pre-Trial Chamber must or may consider for the purposes of such assessment.<sup>36</sup> On 7 June 2019, the Office of the Prosecutor filed its Request for Leave to Appeal the "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Islamic Republic of Afghanistan". In addition, on 10 June 2019, the Legal Representatives of Victims filed the Victims' request for leave to appeal the 'Decision

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<sup>35</sup> Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Islamic Republic of Afghanistan, Page 26, 12 April 2019, available at:

[https://www.icc-cpi.int/CourtRecords/CR2019\\_02068.PDF](https://www.icc-cpi.int/CourtRecords/CR2019_02068.PDF)

<sup>36</sup> Request for Leave to Appeal the "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Islamic Republic of Afghanistan, 7 June 2019, available at: [https://www.icc-cpi.int/CourtRecords/CR2019\\_03060.PDF](https://www.icc-cpi.int/CourtRecords/CR2019_03060.PDF)



Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Islamic Republic of Afghanistan'.<sup>37</sup>

On 5 March 2020, the Appeals Chamber of the International Criminal Court decided unanimously to authorize the Prosecutor to commence an investigation into alleged crimes under the jurisdiction of the Court in relation to the situation in the Islamic Republic of Afghanistan. The Appeals Chamber's judgment amended the decision of Pre-Trial Chamber II of 12 April 2019. The Appeals Chamber found that the Prosecutor is authorized to investigate, within the parameters identified in the Prosecutor's request of 20 November 2017, the crimes alleged to have been committed on the territory of Afghanistan since 1 May 2003, as well as other alleged crimes that have a nexus to the armed conflict in Afghanistan and are sufficiently linked to the situation in Afghanistan and were committed on the territory of other States Parties to the Rome Statute since 1 July 2002.<sup>38</sup>

## **5. An overview of the Myanmar case**

On 4 July 2019, the Prosecutor of the International Criminal Court, Fatou Bensouda (OTP), requested authorization from Pre-Trial Chamber III to initiate an investigation into crimes within the jurisdiction of the International Criminal Court in which at least one element occurred on the territory of the People's Republic of Bangladesh – a State Party to the Rome Statute – and within the context of two waves of violence in Rakhine State on the territory of the Republic of the Union of Myanmar, as well as any other crimes which are sufficiently linked to these events" since at least 9 October 2016. Information reviewed by the Prosecution during its preliminary examination provides a reasonable basis to believe that crimes within the jurisdiction of the Court have been committed by the Myanmar

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<sup>37</sup> Afghanistan: ICC Pre-Trial Chamber II authorizes Prosecutor to Appeal Decision Refusing Investigation, Press release by ICC, 17 September 2019, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=pr1479>

<sup>38</sup> The background of the Afghanistan case, available at: <https://www.icc-cpi.int/afghanistan>

armed forces (Tatmadaw) jointly with the Border Guard Police (BGP) and/or Myanmar Police Force (MPF) (other Security Forces), and by other Myanmar authorities, within the context of a wave of violence that started on or about 25 August 2017 (the 2017 wave of violence). These are the crimes against humanity of deportation, other inhumane acts and persecution contrary to article 7 of the Statute. There is a reasonable basis to believe that at least 700,000 Rohingya people were deported through a range of coercive acts from Myanmar to Bangladesh and that great suffering or serious injury has been inflicted on them, along with an estimated 87,000 Rohingya deported in the context of an earlier wave of violence starting on or around 9 October 2016, through violating their right to return to Myanmar, their State of origin. This investigation will be particular, because of the specific situation where Myanmar is not a party to the Court, but Bangladesh is. Nevertheless, the Court's Judges have authorized the investigation with broad parameters as specified in their decision. The Prosecutor may investigate any crimes which fall within ICC jurisdiction and committed, at least in part, on the territory of Bangladesh (or any other State Party or State formally accepting the jurisdiction of the ICC), insofar as the crimes are sufficiently linked to the situation, and irrespective of the nationality of the perpetrators. On the basis of the preliminary examination, the Prosecution also concluded that the 2017 wave of violence was closely related to an earlier wave of violence starting on or around 9 October 2016 (the 2016 wave of violence), which resulted in the deportation of an estimated 87,000 Rohingya to Bangladesh.<sup>39</sup>

The Rohingya self-identify as a distinct ethnic group with their own language and culture and claim a long-standing connection to Rakhine State. Successive Myanmar Governments have rejected these claims. Instead the Rohingya are widely regarded as 'illegal immigrants' from neighboring

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<sup>39</sup>Situation in the People's Republic of Bangladesh/Republic of Myanmar, Summary of the Prosecutor's request for authorization of an investigation pursuant to article 15 of the Rome Statute, 4 July 2019, <https://www.icc-cpi.int/itemsDocuments/2019-07-04-otp-summary-request-Bangladesh-Myanmar-eng.pdf>

Bangladesh and are often referred to as ‘Bengalis’. Even use of the term ‘Rohingya’ is contested.<sup>40</sup>

The information reviewed provides a reasonable basis to believe that, in the context of the 2017 wave of violence, the following crimes were committed, in part on the territory of Myanmar and in part on the territory of Bangladesh. This is without prejudice to other possible crimes within the jurisdiction of the Court which may be identified during any authorized investigation. Some of them are mentioned bellow.

- Deportation under article 7(1)(d) of the Statute. Although the coercive acts forcing the Rohingya population to flee took place on the territory of Myanmar, the victims crossed the border—an essential element for the crime of deportation—by entering the territory of Bangladesh.
- Other inhumane acts under article 7(1)(k) of the Statute, namely, the infliction of great suffering or serious injury by means of intentional and severe violations (colloquially, violation or deprivation) of the customary international law right of displaced persons to return safely and humanely to the State of origin with which they have a sufficiently close connection (colloquially, right to return). Although steps to unlawfully prevent the exercise by the Rohingya of their right to return were taken on the territory of Myanmar, these steps caused further grave harm—an essential element for the crime of other inhumane acts—to the recently displaced Rohingya persons on the territory of Bangladesh.

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<sup>40</sup> Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar, 14 November 2019, available at: [https://www.icc-cpi.int/CourtRecords/CR2019\\_06955.PDF](https://www.icc-cpi.int/CourtRecords/CR2019_06955.PDF)

- Persecution on ethnic and/or religious grounds under article 7(1)(h) of the Statute by means of deportation and intentional and severe deprivation the customary international law right to return.<sup>41</sup>

In this context, the investigation may cover alleged crimes committed since June 2010, when Bangladesh joined the ICC, and includes any future crimes, if they are sufficiently linked to the situation. For the exclusive purpose of assessing whether to authorize an investigation, the Court's Pre-Trial Chamber Judges accepted that there is a reasonable basis to believe that:

- since at least October 2016, widespread and/or systematic acts of violence may have been committed against the Rohingya people.
- that these coercive acts could qualify as the crimes against humanity of deportation and persecution of grounds of ethnicity and/or religion.
- that there may have been a state policy to attack the Rohingya population; and
- that members of the Myanmar armed forces, jointly with other Myanmar security forces and with some participation of local civilians, may have committed these crimes.

And based on those, the Pre-Trial Chamber III authorized the prosecutor to commence an investigation into the Situation in Bangladesh/Myanmar.<sup>42</sup> The Prosecutor will also keep under review allegations that acts of violence have also been committed in Myanmar by the Arakan Rohingya Salvation Army armed group, as well as the question of whether they may amount to crimes

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<sup>41</sup> Situation in the People's Republic of Bangladesh/Republic of Myanmar, Summary of the Prosecutor's request for authorization of an investigation pursuant to article 15 of the Rome Statute, 4 July 2019, <https://www.icc-cpi.int/itemsDocuments/2019-07-04-otp-summary-request-Bangladesh-Myanmar-eng.pdf>

<sup>42</sup> Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, 14 November 2019, available at: [https://www.icc-cpi.int/CourtRecords/CR2019\\_06955.PDF](https://www.icc-cpi.int/CourtRecords/CR2019_06955.PDF)

under the Rome Statute – the Court's founding treaty – and meet ICC's territorial jurisdictional requirements.<sup>43</sup>

## **6.Side by side comparison of different sections of the Pre-trial Chambers decision in Afghanistan and Myanmar case**

As the introduction of the paper suggest this will discuss the similarities and dissimilarities of the two decisions of the Pre-Trial chamber of ICC in the cases namely the Afghanistan and the Myanmar case. This section will show the comparison side by side as how the legal framework worked in both the cases to get to the final decisions of the cases. In both the cases the Office of the Prosecutor after the preliminary examination had reasonable basis to believe that both the cases fulfills the condition laid down under article 17 and 53 of the statute and after that under article 15(3) of the Rome statute initiated *proprio motu* investigation and requested authorization from Pre-Trial Chamber Judges to initiate an investigation. As mentioned earlier in the legal framework section, Article 15(4) of the Rome Statute provides details as to the scope and object of the scrutiny to be performed by the Pre-Trial Chamber which includes determining if, 1) there is reasonable basis to proceed with an investigation, 2) the case appears to fall within the jurisdiction of the Court.<sup>44</sup> Apart from these the chamber also examines the Prosecutors' request and looks that if in the request the following factors such as the victims representation, complementarity of the case, gravity of the crime and also if the authorization of investigation will be in the interest of justice is showed as justified and explained according to law. The chamber then finally comes into a decision about the situation and either authorize or reject the application to investigate the situation and state their reasons for their decision.

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<sup>43</sup> Statement of the Office of the Prosecutor of the International Criminal Court as delivered at the press conference in Dhaka, Bangladesh, 4 February 2020, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=20200204-otp-statement>

<sup>44</sup> Article 15(4) of the Rome statute

The following sections will show a side by side comparison of each factor that the Chamber has taken into consideration in the Afghanistan and Myanmar situation and help us understand the similarities and dissimilarities of the applicability of the law in the two decision made by the two chamber.

### **6.1. Explanation of the law**

Article 15 (4) explains two legal scrutiny for the chamber to authorize an investigation which are that 1) there is reasonable basis to proceed with an investigation, and 2) the case appears to fall within the jurisdiction of the Court. In the Afghanistan decision, while explaining the relevant laws, PTC not only mentioned the full text of article 15 of the statute but they also gave some explanation that they later used in determining their decision. PTC II while explaining the relevant laws have mentioned that the scrutiny mandated to the Pre-Trial Chamber in the proceedings under article 15 is not limited to determining whether there is a reasonable basis to believe that crimes under the Court's jurisdiction have been committed, but must include a positive determination to the effect that investigations would be in the interests of justice, including in relation to the gravity of the alleged conducts, the potential victims' interests and the likelihood that investigation be feasible and meaningful under the relevant circumstances.<sup>45</sup> In short PTC II added the scrutiny to look if the investigation will serve the interest of justice to the original text of article 15(4) of the statute. But in the Myanmar decision no such explanation was given rather only the full text of Article 15(3) and 15(4) was given as it is.<sup>46</sup>

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<sup>45</sup> Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Islamic Republic of Afghanistan, Page 12, 13, 12 April 2019, available at: [https://www.icc-cpi.int/CourtRecords/CR2019\\_02068.PDF](https://www.icc-cpi.int/CourtRecords/CR2019_02068.PDF)

<sup>46</sup> Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, page 6, 14 November 2019, available at: [https://www.icc-cpi.int/CourtRecords/CR2019\\_06955.PDF](https://www.icc-cpi.int/CourtRecords/CR2019_06955.PDF)

## **6.2. Reasonable basis for the chamber to determine its decision**

While determining the reasonable basis for the chambers determination, in the Afghanistan decision it is said that the determinations of the Chamber are based on the information provided in the Request, in its annexes and supporting materials, in the victims' representations, and in the responses to orders issued by the Pre-Trial Chamber under Rule 50(4).<sup>47</sup> The Chamber, in the same decision, notes that almost all of the information relied upon and provided by the Prosecution in support of the Request is based on authoritative, reliable and credible sources, to a significant extent corroborated by other likewise reliable ones. More specifically, the materials include a significant number of reports - many of which also available on open source - emanating from reliable bodies such as UN agencies, national organs and parliamentary inquiry committees, and contain detailed accounts of the events for which the Prosecutor requests authorization to investigate. As regards the crimes allegedly committed by the Taliban and other armed groups, the Chamber notes that almost all the information is based on the reports and internal records of United Nations Assistance Mission in Afghanistan (UNAMA). With respect to the crimes allegedly committed by the Afghan National Security Forces (ANSF), the sources of information include reports of UNAMA and of the Afghanistan Independent Human Rights Commission (AIHRC). As regards the crimes allegedly committed by the US armed forces and the Central Intelligence Agency (CIA), sources include extensive reports authored by the US Senate Select Committee on Intelligence and the US Senate Armed Services Committee. Upon consideration of the inherent qualities as well as the authoritativeness of the information, the Chamber

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<sup>47</sup> Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Islamic Republic of Afghanistan, Page 16, 12 April 2019, available at: [https://www.icc-cpi.int/CourtRecords/CR2019\\_02068.PDF](https://www.icc-cpi.int/CourtRecords/CR2019_02068.PDF)

in the Afghanistan case is satisfied that there is a reasonable basis to believe that the incidents underlying the request have occurred.<sup>48</sup>

In the Myanmar case upon reviewing of the available information, the Chamber accepts that there exists a reasonable basis to believe that since at least 9 October 2016, members of the Tatmadaw, jointly with other security forces and with some participation of local civilians, may have committed coercive acts that could qualify as the crimes against humanity of deportation (article 7(1)(d) of the Statute) and persecution on grounds of ethnicity and/or religion (article 7(1)(h) of the Statute) against the Rohingya population. As noted above, the Chamber does not consider it necessary to form any view in relation to the facts identified as relevant to the Prosecutor's submissions concerning the alleged crime of other inhumane acts. Nevertheless, the Chamber stresses that the Prosecutor is not restricted to investigating only the events mentioned in her Request, much less their provisional legal characterization.<sup>49</sup>

### **6.3. Victims representation**

Generally, the victims' representations confirm the information provided by the Prosecutor in the Request.<sup>50</sup> The victim's representation section in the Afghanistan decision is not that elaborate while in the Myanmar decision it is discussed elaborately. In the Afghanistan decision, the Court has received a total of 794 representations of which 699 were transmitted to the Pre-Trial Chamber on behalf of the following victims: 668 representations on behalf of 6,220 individuals; 17 representations

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<sup>48</sup> Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Islamic Republic of Afghanistan, Page 17, 12 April 2019, available at:

[https://www.icc-cpi.int/CourtRecords/CR2019\\_02068.PDF](https://www.icc-cpi.int/CourtRecords/CR2019_02068.PDF)

<sup>49</sup> Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, page 50, 14 November 2019, available at: [https://www.icc-cpi.int/CourtRecords/CR2019\\_06955.PDF](https://www.icc-cpi.int/CourtRecords/CR2019_06955.PDF)

<sup>50</sup> Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, page 10, 14 November 2019, available at: [https://www.icc-cpi.int/CourtRecords/CR2019\\_06955.PDF](https://www.icc-cpi.int/CourtRecords/CR2019_06955.PDF)



on behalf of 1,690 families; 13 representations on behalf of several millions of victims, including 26 villages; 17 and 1 representation on behalf of an institution. The Chamber in this case, notes that the victims' representations usefully complement and supplement the information provided by the Prosecutor on the facts alleged in support of the Request.<sup>51</sup> Out of them 680 applications welcomed the prospect of an investigation aimed at bringing culprits to justice, preventing crime and establishing the truth.<sup>52</sup>

In the Myanmar case, within a relatively short time span, the Registry has collected and transmitted representations on behalf of a significant number of alleged victims of the Situation in Bangladesh/Myanmar that have come forward to present their accounts and views on whether or not the Chamber should authorize the commencement of the Prosecutor's investigation into this situation. Victims have also provided valuable information relevant to the scope of an eventual investigation. The Court received a total of 339 representations in English (311 representations were submitted in written form and 28 were put forward in video format). The Registry engaged with victims directly, as well as with individuals and organizations working with the affected communities. The Registry made it clear that it was not able to verify the accuracy of the information contained in the representation forms, the number of victims allegedly represented. But the representation made it clear that vast majority of victims' representations identified the Tatmadaw, the Border Guard Police, the Myanmar Government, Myanmar Police Force and other local authorities, as well as members of the local population and Buddhist monks, as being among those who were allegedly responsible for

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<sup>51</sup> Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Islamic Republic of Afghanistan, Page 10, 12 April 2019, available at:

[https://www.icc-cpi.int/CourtRecords/CR2019\\_02068.PDF](https://www.icc-cpi.int/CourtRecords/CR2019_02068.PDF)

<sup>52</sup> Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Islamic Republic of Afghanistan, Page 28, 12 April 2019, available at:

[https://www.icc-cpi.int/CourtRecords/CR2019\\_02068.PDF](https://www.icc-cpi.int/CourtRecords/CR2019_02068.PDF)

the acts and conduct like killing, forced deportation, sexual violence and other discriminator acts which according to the representatives fulfills the gravity and interest of justice threshold.<sup>53</sup>

#### **6.4. Jurisdiction**

Under article 12(2) of the Statute, in the cases of referral by a State Party or of *proprio motu* investigations, the Court may exercise its jurisdiction if the conduct has occurred in the territory of a State that is party to the Statute or has otherwise accepted the Court's jurisdiction (i.e. principle of territoriality), or, alternatively, if the offender is a national of one of those States (i.e. principle of nationality). The conducts that have allegedly occurred in full or in part on the territory of Afghanistan or of other State Parties fall under the Court's jurisdiction, irrespective of the nationality of the offender. The Prosecution asserts that the Court may, under certain circumstances, also exercise its jurisdiction over crimes committed against persons hors de combat either captured in Afghanistan and tortured or otherwise mistreated outside that country or captured outside Afghanistan. More specifically, the Request makes specific reference to a 'detention program allegedly carried out by the CIA' which 'was global in nature and included persons with no direct connection to the conflict in Afghanistan' such as individuals suspected to have links with or information about the 'core group' or 'central group' of Al Qaeda, at the time suspected for the terrorist attacks of 11 September 2001, or to have connections with the Taliban. The Chamber considers that the alleged war crimes whose victims were captured outside Afghanistan fall out of the Court's jurisdiction due to the lack of the nexus with an internal armed conflict which is required to trigger the application of international humanitarian law as well as the Court's jurisdiction. But crimes inside Afghanistan are admissible under territorial jurisdiction. In light of the nature and content of the information made available by the Prosecutor,

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<sup>53</sup> Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, page 10-18, 14 November 2019, available at: [https://www.icc-cpi.int/CourtRecords/CR2019\\_06955.PDF](https://www.icc-cpi.int/CourtRecords/CR2019_06955.PDF)

the Chamber is satisfied that there is a reasonable basis to believe that the incidents which may qualify either as crimes against humanity - namely murder, imprisonment or other severe deprivation of physical liberty and persecution on political and gender grounds; or as war crimes - namely murder, torture, killing or wounding treacherously a combatant adversary, conscripting or enlisting children under the age of 15 years or using them to participate actively in hostilities, intentional attacks against the civilian population, humanitarian personnel and protected objects underlying the Request have occurred and that they may constitute crimes within the jurisdiction of the Court.<sup>54</sup>

In the Myanmar case the chamber is satisfied that the conditions regarding jurisdiction are fulfilled. Since at least 9 October 2016 widespread and/or systematic acts of violence may have been committed against the Rohingya civilian population, including murder, imprisonment, torture, rape, sexual violence, as well as other coercive acts, resulting in their large-scale deportation. Given that there are many sources indicating the heavy involvement of several government forces and other state agents, there exists reasonable basis to believe that there may have been a state policy to attack the Rohingya. In reaching these conclusions, the Chamber has considered the allegations underpinning the 2016 and 2017 waves of violence, which took place on the territory of Myanmar. In this regard, the Chamber wishes to make the following clarification: while the Court is not permitted to conduct proceedings in relation to alleged crimes which do not fall within its jurisdiction, it 'has the authority to consider all necessary information, including as concerns extra-jurisdictional facts for the purpose of establishing crimes within its competence'. In other words, the Court is permitted to consider facts which fall outside its jurisdiction in order to establish, for instance, the contextual elements of the alleged crimes. In the situation at hand, the Chamber has considered the information regarding alleged coercive acts (including alleged murder, forcible transfer of population, imprisonment, torture, rape

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<sup>54</sup> Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Islamic Republic of Afghanistan, Page 16-23, 12 April 2019, available at: [https://www.icc-cpi.int/CourtRecords/CR2019\\_02068.PDF](https://www.icc-cpi.int/CourtRecords/CR2019_02068.PDF)

or persecution) which have allegedly occurred entirely on the territory of Myanmar for the purpose of evaluating whether the Prosecutor has a reasonable basis to believe that an attack against the Rohingya civilian population pursuant to a State policy may have occurred. In other words, although the Court does not have jurisdiction over these alleged crimes per se, it considered them in order to establish whether the contextual elements of crimes against humanity may have been present.<sup>55</sup>

### **6.5. Complementarity**

Article 17(1)(a) and (b) provides that the Court shall determine inadmissibility either if the case is being investigated or prosecuted by a State which has jurisdiction on it, unless it is unwilling or unable genuinely to carry out the investigation or prosecution; or if the case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute. With reference to national proceedings in Afghanistan against the Taliban and other armed groups and the crimes allegedly committed by the US Forces and the CIA, the Prosecution asserts that the information available indicates that no national investigations or prosecutions have been conducted or are ongoing against those who appear most responsible for the crimes under the Court's jurisdiction allegedly committed by members of these groups. The Chamber considers that the available information clearly indicates that the proceedings conducted so far in Afghanistan are limited in scope and did not target those who may bear the main responsibility for the incidents reflected in the annexes to the Request. The Chamber, conclusively, finds that at this stage that the potential cases arising

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<sup>55</sup> Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, page 42-43, 14 November 2019, available at: [https://www.icc-cpi.int/CourtRecords/CR2019\\_06955.PDF](https://www.icc-cpi.int/CourtRecords/CR2019_06955.PDF)

from the incidents presented by the Prosecution appear to be admissible and fulfilling the complementarity threshold.<sup>56</sup>

In the Myanmar situation, the Prosecutor has given an open ended request without any specific suspect and Myanmar also did not submit anything to the ICC in this regard so the Chamber therefore does not consider it necessary to assess complementarity at this point in time. It suffices to note that, based on the currently available information, there is no indication that any potential future case would be inadmissible.<sup>57</sup>

## **6.6. Gravity**

Article 17(1)(d) states that a case may be inadmissible if it is not of sufficient gravity to justify further action by the Court. Based on the Prosecutors' request, the Chamber needs to find that the gravity threshold under article 17(1)(d) is met in respect of all the 'categories' of crimes for which the Prosecution requests authorization to investigate.

Corresponding to potential cases concerning claimed violations submitted by the US powers and the CIA, the Prosecutor presents that the gravity is exhibited by the level of obligation of potential guilty parties, the number and the earnestness of the wrongdoings, the potential obligations inside the order structure, and the effect on the people in question. Regarding the wrongdoings purportedly dedicated by the Taliban and other against administrative outfitted gatherings, the Chamber explicitly states the devastating and incomplete systemic consequences on the life of innocent people of the brutal violence inflicted upon civilians and other protected persons in in Afghanistan for a delayed

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<sup>56</sup> Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Islamic Republic of Afghanistan, Page 24-27, 12 April 2019, available at: [https://www.icc-cpi.int/CourtRecords/CR2019\\_02068.PDF](https://www.icc-cpi.int/CourtRecords/CR2019_02068.PDF)

<sup>57</sup> Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, page 51-52, 14 November 2019, available at: [https://www.icc-cpi.int/CourtRecords/CR2019\\_06955.PDF](https://www.icc-cpi.int/CourtRecords/CR2019_06955.PDF)

timeframe; the abhorrent open presentation of brutality planned for ingraining dread and rousing enslavement in the populace just as the repetitive focusing of ladies, even extremely youthful, and defenseless regular people.<sup>58</sup>

As for the gravity of the circumstance in Myanmar, the Chamber is of the view that the mere scale of the alleged crimes the number of victims allegedly involved – as indicated by the supporting material, an expected 600,000 to one million Rohingya were persuasively displaced from Myanmar to neighboring Bangladesh because of the supposed coercive acts – obviously arrives at the gravity edge.<sup>59</sup>

### **6.7. Interest of justice**

Having determined that both the jurisdiction and the admissibility requirements are satisfied, it remains with the Prosecutor to determine, in accordance with article 53(1)(c) of the Statute, 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. Any decision taken by the Prosecutor on this basis, which will be negative towards authorization of investigation, will be subject to review to the Pre-trial Chamber and such negative decision can not be effective without a confirmation from the Pre-trial Chamber according to article 53(3)(b) of the Rome statute.

In the Afghanistan situation, the Prosecutor in her request did not go into detailed in the matter of interest of justice stating that she did not find anything that makes the situation to make the

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<sup>58</sup> Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Islamic Republic of Afghanistan, Page 27-28, 12 April 2019, available at: [https://www.icc-cpi.int/CourtRecords/CR2019\\_02068.PDF](https://www.icc-cpi.int/CourtRecords/CR2019_02068.PDF)

<sup>59</sup> Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, page 52, 14 November 2019, available at: [https://www.icc-cpi.int/CourtRecords/CR2019\\_06955.PDF](https://www.icc-cpi.int/CourtRecords/CR2019_06955.PDF)

investigation contrary to the interest of justice. Even in the victim's representation 680 out of 699 application welcomed the prospect of an investigation to start. But the Chamber seemed not very satisfied with that and they explained that there are no statutory texts defining the "interest of justice" and explained the meaning of the interests of justice as a factor potentially precluding the exercise of the prosecutorial discretion must be found in the overarching objectives underlying the Statute: the effective prosecution of the most serious international crimes, the fight against impunity and the prevention of mass atrocities. All these elements concur in suggesting that, at the very minimum, an investigation would only be in the interests of justice if prospectively it appears suitable to result in the effective investigation and subsequent prosecution of cases within a reasonable time frame. The Chamber also notes that an investigation can hardly be said to be in the interests of justice if the relevant circumstances are such as to make such investigation not feasible and inevitably doomed to failure due to the courts not being equipped to address all the scenarios where the most serious international crimes might have been committed. It also focused on the following factors that to them appear to be particularly relevant: (i) the significant time elapsed between the alleged crimes and the Request; (ii) the scarce cooperation obtained by the Prosecutor throughout this time, even for the limited purposes of a preliminary examination, as such based on information rather than evidence; (iii) the likelihood that both relevant evidence and potentially relevant suspects might still be available and within reach of the Prosecution's investigative efforts and activities at this stage. By the word likelihood in point (iii), the Pre-trial Chamber meant unlikelihood of the availability of the evidence within the courts reach. Finally, the PTC II, rejected the request to authorize an investigation in Afghanistan stating that it will not serve the interest of justice and showed the following reasons,

1) As most of the incidents relevant to the case occurred between 2005-2015 and the prosecution was not in position to preserve evidence or witnesses, it is not very likely to find the availability of such

evidence. And the PTC II also mentioned that, during the preliminary examination, no one from the prosecution requested for preserving the evidence.

2) The political situation in both Afghanistan and other key states which might be related to this case has changed and it may lead to make it extremely difficult to gauge the prospects of securing meaningful cooperation from relevant authorities for the future, whether in respect of investigations or of surrender of suspects and it can be assumed by the unusual time of the preliminary investigation which is almost 11 years.<sup>60</sup>

In the Myanmar situation, as regards the interests of justice, the Prosecutor has stated that she ‘has identified no substantial reasons to believe that an investigation into the situation would not be in the interests of justice and the Chamber had no reason to disagree with this assessment. This view is reinforced by the fact that, according to the Registry’s Final Consolidated Report, all victims’ representations state that the victims represented therein want the Prosecutor to start an investigation in the Situation.<sup>61</sup> And finally the Chamber has authorized the Prosecutor to initiate an investigation in this situation.

## **7. Similarities and dissimilarities in the cases from the above**

### **Discussion**

In the segment above while looking at the two-decision next to each other it creates the impression that in both the cases based on the information available from the Prosecutors’ request the chamber

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<sup>60</sup> Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Islamic Republic of Afghanistan, Page 28-32, 12 April 2019, available at: [https://www.iccpi.int/CourtRecords/CR2019\\_02068.PDF](https://www.iccpi.int/CourtRecords/CR2019_02068.PDF)

<sup>61</sup> Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar, page 52, 14 November 2019, available at: [https://www.icc-cpi.int/CourtRecords/CR2019\\_06955.PDF](https://www.icc-cpi.int/CourtRecords/CR2019_06955.PDF)



finds that there is a reasonable basis to believe that an investigation can be opened in both the cases which indeed is the first thing to look for while taking a case by the Prosecutors *proprio motu* initiation of an investigation.

When it comes to victim's representation, in both the cases, victims participated in huge number with their experiences and views to seek justice. When it comes to jurisdiction in both the cases there is one party who is not a member state to the Rome statute which make it important for the Chamber to investigate the territorial scope of jurisdiction. But in both the cases there is a state party involved for example in the Afghanistan case Afghanistan is a member state and in the Myanmar case Bangladesh is a state party to the statute which fulfills the territorial jurisdiction criteria for both the cases. When it comes to complementarity, in both the situations in the concerning states there was no ongoing prosecution due to their inability which fulfills the condition laid down for fulfilling the complementarity threshold. In determining the gravity of the crime, the alleged crimes explained the Prosecutors' request falls into the category of grave crimes fulfilling the gravity threshold in both the situation. Finally, in the last section which is the interest of justice, the Chamber in the Afghanistan case came out with their own explanation to reject the prosecutors' request but in the Myanmar case they accepted the prosecutors explanation and authorized investigation. In the Afghanistan case, the Pre-trial Chambers main point is that the Prosecutor would be wasting time and resources on the investigation, given that the Afghani government, Taliban, and United States would all do their best to keep evidence and suspects out of the ICC's hands. In its penultimate paragraph the PTC makes its view clear that the Afghanistan investigation would not serve the interests of justice because it would consume scarce resources "to the detriment of other scenarios (be it preliminary examinations, investigations or cases) which appear to have more realistic prospects to lead to trials and thus

effectively foster the interests of justice, possibly compromising their chances for success.”<sup>62</sup> But in the Myanmar case, the PTC did not consider these factors whereas it is not certain that Myanmar Govt. or other organizations involved in the alleged crimes will not try to keep the evidences against them out of Courts sight. PTC in this case agreed with the Prosecutor that there is no reasonable basis to believe that the investigation will not serve the interest of justice. And as mentioned earlier, this view is reinforced by the fact that, according to the Registry’s Final Consolidated Report, all victims’ representations state that the victims represented therein want the Prosecutor to start an investigation in the Situation. But the same thing happened in Afghanistan case, where 680 out of 699 requests from the victims have welcomed the idea of an investigation to make sure that the alleged perpetrators are prosecuted. But the Pre-trial Chamber judges in this situation did not consider the interest of victims.

If we frame otherwise, however, the PTC had an undeniable point. The ICC has limited capacity and resources. Its investigations are difficult and time-consuming, and its trials notoriously lengthy. Undeniably, investigating Afghanistan will divert resources from other important OTP activities. But it does not mean that the Myanmar case will be solved in no time. If pursuing justice in one situation entails not pursuing justice in others, it is not in the least perverse to suggest that choosing the latter over the former might serve the interests of justice.

Such explanation of the Chamber in the Afghanistan case has been highly criticized and raised many questions about the application of the term “interest of justice” to determine if a case will be investigated or not. The decision of Appeals chamber rejecting this decision of Pre-trial Chamber in the Afghanistan situation explains to an extent that the decision was wrong but for the better

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<sup>62</sup> David Luban, The “Interests of Justice” at the ICC: A Continuing Mystery, Just Security, 17 March 2020, available at: <https://www.justsecurity.org/69188/the-interests-of-justice-at-the-icc-a-continuing-mystery/>

understanding of both the decision of Appeals Chamber and Pre-trial Chamber the following section will be thoroughly focused on explaining the term interest of justice and the legal explanation of its application.

## **8. Interest of Justice**

The concept of the interests of justice, as it appears in Article 53 of the Rome Statute, represents one of the most complex aspects of the Treaty. It is the point where many of the philosophical and operational challenges in the pursuit of international criminal justice coincide, but there is no clear guidance on what the content of the idea is. The phrase “in the interests of justice” appears in several places in the ICC Statute and Rules of Procedure and Evidence but it is never defined. Thorough reviews of the preparatory works on the treaty also offer no significant elucidation. However, as is discussed below, the text and purpose of the Rome Statute clearly favor the pursuit of investigations and cases when those investigations and cases are admissible, and the relevant standard of proof can be satisfied.

As mentioned earlier, according to the article 53 of the Rome Statute, the prosecutor while deciding to initiate any investigation, must decide that there is a sufficient basis for a prosecution. In making these decisions, the Rome Statute states that a factor to be considered by the prosecutor is “the interests of justice.” If the Prosecutor’s decision regarding initiating an investigation is in the negative showing the main reason that the investigation may not serve the interest of justice then such decision is, however, is subject to review by the Pre-Trial Chamber. But unfortunately, there is still no definition for the term “interest of justice”. The need for clarity regarding the phrase has already taken on importance regarding the situation in Northern Uganda, where community leaders argue that the ICC’s continued investigation may have the potential to jeopardize peace talks, and where the prosecutor has suggested that he could suspend the investigation, invoking the concept of “the

interests of justice”.<sup>63</sup> And as we discussed above, in the Afghanistan case the Pre-trial Chamber has also rejected the authorization of an investigation stating that the investigation will not serve the interest of justice.

The operative part of Article 53 of the Rome Statute states that “the Prosecutor shall consider whether ... taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.” But the question remains what those are “substantial reasons”. The 2007 Policy Paper does not offer specifics. In its Afghanistan decision, the PTC offered three:

(i) the significant time elapsed between the alleged crimes and the Request; (ii) the scarce cooperation obtained by the Prosecutor throughout this time, even for the limited purposes of a preliminary examination, as such based on information rather than evidence; (iii) the likelihood that both relevant evidence and potential relevant suspects might still be available and within reach of the Prosecution’s investigative efforts and activities at this stage.<sup>64</sup>

Article 53(1) states that the OTP is responsible to look if the situation in question in not contrary to the interest of justice. To explain the OTPs understanding of this matter there is a policy paper which discusses some special circumstances where a decision about a case can be taken based on interest of justice. The paper emphasizes three things. Firstly, that the exercise of the Prosecutor’s discretion under Article 53(1)(c) and 53(2)(c) is exceptional in its nature and that there is a presumption in favor of investigation or prosecution wherever the criteria established in Article 53(1) (a) and (b) or Article

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<sup>63</sup> Human Rights Watch Policy Paper, The Meaning of "the Interests of Justice" in Article 53 of the Rome Statute, 1 June 2005, available at: <https://www.hrw.org/news/2005/06/01/meaning-interests-justice-article-53-rome-statute>

<sup>64</sup> Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Islamic Republic of Afghanistan, Para- 91, 12 April 2019, available at: [https://www.iccpi.int/CourtRecords/CR2019\\_02068.PDF](https://www.iccpi.int/CourtRecords/CR2019_02068.PDF)

53(2)(a) and (b) have been met. Secondly, the criteria for its exercise will naturally be guided by the objects and purposes of the Statute – namely the prevention of serious crimes of concern to the international community through ending impunity. Thirdly, that there is a difference between the concepts of the interests of justice and the interests of peace and that the latter falls within the mandate of institutions other than the Office of the Prosecutor. Finally, it should be noted that the Prosecutor is obliged to inform the Pre-Trial Chamber of any decision not to investigate or not to prosecute based solely on Articles 53(1)(c) or 53(2)(c). The Pre-Trial Chamber may choose to review such a decision which will then only be effective if confirmed by the Chamber. Other guidelines and explanation mentioned in the policy paper is discussed below.<sup>65</sup>

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<sup>65</sup> Article 53 full text

Article 53

Initiation of an investigation

1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:

- (a) The information available to the Prosecutor 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) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.

2. If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because:

- (a) There is not a sufficient legal or factual basis to seek a warrant or summons under article 58;
- (b) The case is inadmissible under article 17; or
- (c) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime;

the Prosecutor shall inform the Pre-Trial Chamber and the State making a referral under article 14 or the Security Council in a case under article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion.

### **8.1. Interest of justice after jurisdiction and admissibility**

Article 53(1)(c) and 53 (2)(c) create an obligation to consider various factors. The interests of justice tests need only be considered where positive determinations have been made on both jurisdiction and admissibility. While the requirement is that the other two tests (jurisdiction and admissibility) are positive and that must be satisfied, the “interests of justice” is not like that. Here the requirement is to determine if there is any matter that can make the investigation or prosecution to not serve the interest of justice. It is not required anywhere that the Prosecutor must determine that if the investigation will serve the interest of justice. The interests of justice test are a countervailing consideration that might produce a reason not to proceed even where the first two are satisfied. This difference is important: The Prosecutor is not required to establish that an investigation or prosecution is in the interests of justice. Rather, he shall proceed with investigation 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. The interpretation and application of the interests of justice test may lie in the first instance with the Prosecutor but is subject to review and judicial determination by the Pre-Trial Chamber.

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3. (a) At the request of the State making a referral under article 14 or the Security Council under article 13, paragraph (b), the Pre-Trial Chamber may review a decision of the Prosecutor under paragraph 1 or 2 not to proceed and may request the Prosecutor to reconsider that decision.

(b) In addition, the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed if it is based solely on paragraph 1 (c) or 2 (c). In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber.

4. The Prosecutor may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information.

## **8.2. Interest of justice and the gravity**

Article 31 of the Vienna Convention on the Law of Treaties suggest that like any other law, the interpretation of the concept of “interests of justice” should be guided by the ordinary meaning of the words in the light of their context and the objects and purpose of the Statute.<sup>66</sup> The Preamble of the Rome Statute provides a useful point of reference in this regard. Paragraph four of the Preamble underlines that the States Parties are determined to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community and thus to contribute to their prevention. The last paragraph indicates their resolve “to guarantee lasting respect for and the enforcement of international justice”. Thus, considerations of prevention of serious crimes and guaranteeing lasting respect for international justice may be significant touchstones in assessing the interests of justice.

The Rome Statute was created to address the most serious crimes of concern to the international community. For a case to be admissible, not only do the crimes have to be within the jurisdiction of the Court, but they must also meet the higher threshold of being of “sufficient gravity to justify further action” of the Court in terms of Article 17(1)(d). In determining whether the situation is of sufficient gravity, the Office considers the scale of the crimes, the nature of the crimes, the manner of their commission and their impact. Before considering whether there are substantial reasons to believe that it is not in the interests of justice to initiate an investigation, the Prosecutor will necessarily have already come to a positive view on admissibility, including that the case is of sufficient gravity to justify further action. These reflections demonstrate both the central importance of the element of gravity of the crime, as well as the strong presumption in favor of initiating an investigation where the threshold of sufficient gravity is met.

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<sup>66</sup> Article 31 of the Vienna Convention on the Law of Treaties

### **8.3. Interest of justice and interest of victims**

Article 53 also imposes a specific obligation on the Prosecutor to consider the interests of victims before starting an investigation or prosecution. While the wording of Article 53(1)(c) implies that the interests of victims will generally weigh in favor of prosecution, the Office will listen to the views of all parties concerned. The Office will give due consideration to the different views of victims, their communities, and the broader societies in which it may be required to act. The Office considers that the “interests of victims” includes the victims’ interest in seeing justice done, but also includes other essential interests such as their protection, as indicated by the Rome Statute. Article 68(1) places an obligation on the whole Court, including the Office of the Prosecutor, to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.<sup>67</sup> Article 54(1)(b) requires the Prosecutor to respect the interests and personal circumstances of victims and witnesses in carrying out effective investigations.<sup>68</sup> Investigations are likely to often take place in unsafe or unstable circumstances. The Office of the Prosecutor, working with the Victims and Witnesses Unit of the Registry, has established internal guidelines that provide for an ongoing risk assessment for victims and witnesses. In attempting to ascertain the interests of victims, the Prosecutor will conduct a dialogue with the victims themselves as well as representatives of local communities. The Office of the Prosecutor considers that seeking the views of other actors involved in the situation will also be crucial to assess the impact for the interests of victims of investigations and prosecutions.

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<sup>67</sup> Article 68(1) of the Rome statute for International Criminal Court

<sup>68</sup> Article 54(1)(b) of the Rome statute for International Criminal Court



#### **8.4. Interest of justice and interest of accused**

Under Article 53(2)(c), the Prosecutor is required to consider whether a prosecution is not in the interests of justice, taking into account all of the circumstances, including the gravity of the crime, the interests of the victims and the age or infirmity of the accused, and his or her role in the accused crime. The OTP in this situation takes care of the factor which include, the alleged status or hierarchical level of the accused or implication in particularly serious or notorious crimes. That is, the significance of the role of the accused in the overall commission of crimes and the degree of the accused's involvement (actual commission, ordering, indirect participation).

#### **8.5. Interest of justice and other justice mechanisms**

Apart from these, the policy paper states some other potential consideration under Article 53(1)(c) and 53(2)(c). One of them is working together with other justice mechanism such as domestic prosecutions, truth seeking, reparations programs, institutional reform, and traditional justice mechanisms in the pursuit of a broader justice. The Office notes the valuable role such measures may play in dealing with large numbers of offenders and in addressing the impunity gap. The Office will seek to work with those engaged in the variety of justice mechanisms in any given situation, ensuring that all efforts are as complementary as possible in developing a comprehensive approach.

#### **8.6. Interest of justice and international peace**

The policy paper also states that The ICC was created on the premise that justice is an essential component of a stable peace. The concept of the interests of justice established in the Statute, while necessarily broader than criminal justice in a narrow sense, must be interpreted in accordance with the objects and purposes of the Statute. Hence, it should not be conceived of so broadly as to embrace

all issues related to peace and security.<sup>69</sup> The Rome Statute addresses the interface of international peace and security and justice. It allocates decision-making to the Security Council as to when an investigation should be halted because it may interfere with international peace and security.<sup>70</sup> When it comes to maintaining international peace and security, the Office will consider issues of crime prevention and security under the interests of justice, and there may be some overlap in these considerations and in considering matters in accordance with the duty to protect victims and witnesses under Article 68. As indicated above, however, the broader matter of international peace and security is not the responsibility of the Prosecutor; it falls within the mandate of other institutions as the responsibility to maintain international peace and security is vested in the Security Council under article 13(b) and 16 of the statute which gives it power to refer a situation even outside the court's jurisdiction (article 13(b)) and defer an investigation (article 16). With the referral power, the Security Council can refer any situation where it seems necessary, according to the council, to investigate for the sake of bringing peace and ending impunity which is eventually ICCs goal. It is a great addition to ICCs power as by such referral ICC can adjudicate a situation where, originally, it had no jurisdiction. The Security Council's deferral power was put in place as a mechanism to deal with situations where international peace and justice seem to be in conflict and thus the requirement that the deferral only be allowed pursuant to a Chapter VII resolution. Thus, article 16 is the vehicle for resolving conflicts between the requirements of peace and justice where the Council assesses that the peace efforts need to be given priority over international criminal justice. The Security Council's deferral power confirms its decisive role in dealing with situations where the requirements of peace

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<sup>69</sup> OTP Policy paper on the interests of justice, September 2007, available at:

<https://www.iccpi.int/nr/rdonlyres/772c95c9-f54c14321-bfD9-73422bb23528/143640/iccotpinterestsofjustice.pdf>

<sup>70</sup> Human Rights Watch Policy Paper, The Meaning of "the Interests of Justice" in Article 53 of the Rome Statute, 1 June 2005, available at: <https://www.hrw.org/news/2005/06/01/meaning-interests-justice-article-53-rome-statute>

and justice seem to be in conflict. Thus, authorities on the subject explain that formal deferral is only appropriate where there is a good reason to believe that a specific investigation carried out by the prosecutor might provoke such a grave political crisis as to endanger international peace and security. While Article 16 does not address implications on internal peace and security of an ICC investigation, war crimes of the scope addressed in Article 8 of the ICC Statute as well as crimes against humanity are often likely to affect international peace and security. Thus, the only means by which the Rome Statute explicitly permits concerns about a peace process to trump prosecutorial efforts is through a deferral by the U.N. Security Council acting under its Chapter VII powers. The Rome Statute clearly allocates the authority in this regard to the Security Council which puts the danger of political interference in the judicial process as article 16 may be applied-namely. Allowing the prosecutor to make prosecutorial decisions based on political factors of the same nature as those conceived of in Article 16 would undermine the perception and reality of the prosecutor as independent and beyond political influence.<sup>71</sup>

### **8.7. Interest of justice and the end of impunity**

Finally the policy paper suggest, bearing in mind the objectives of the Court to put an end to impunity and to ensure that the most serious crimes do not go unpunished, a decision not to proceed on the basis of the interests of justice should be understood as a course of last resort. Various other options, besides deciding not to open an investigation or to stop proceedings, may be available.<sup>72</sup> Accordingly, under the Rome Statute scheme: (1) the only construction of "interests of justice" that would be consistent with the preamble of the Rome Statute would be a narrow one that does not permit

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<sup>71</sup> Human Rights Watch Policy Paper, The Meaning of "the Interests of Justice" in Article 53 of the Rome Statute, 1 June 2005, available at: <https://www.hrw.org/news/2005/06/01/meaning-interests-justice-article-53-rome-statute>

<sup>72</sup> OTP Policy paper on the interests of justice, September 2007, available at: <https://www.iccpi.int/nr/rdonlvres/772c95c9-f54c14321-bfD9-73422bb23528/143640/iccotpinterestsofiustice.pdf>

considerations of domestic amnesties, truth processes, traditional mechanisms or peace negotiations; and (2) the Rome Statute allocates political decision-making regarding the impact of an investigation on international peace and security to the U.N. Security Council, not the prosecutor.<sup>73</sup>

### **8.8. Interest of justice and the Pre-trial Chamber**

If we look back into the PTC decision of Afghanistan case it says, Article 53 of the Statute makes the investigation's consistency with the interests of justice a statutory legal parameter governing the exercise of the prosecutorial discretion; as such, it follows that it also falls within the scope of the scrutiny mandated to the Chamber over that discretion for the purposes of the determinations under article 15. In the view of the Chamber, the assessment of this requirement is necessary and must be conducted with the utmost care, in particular in light of the implications that a partial or inaccurate assessment might have for paramount objectives of the Statute and hence the overall credibility of the Court, as well as its organizational and financial sustainability. The Chamber also mentioned that, In the absence of a definition or other guidance in the statutory texts, the meaning of the interests of justice as a factor potentially precluding the exercise of the prosecutorial discretion must be found in the overarching objectives underlying the Statute: the effective prosecution of the most serious international crimes, the fight against impunity and the prevention of mass atrocities. All of these elements concur in suggesting that, at the very minimum, an investigation would only be in the interests of justice if prospectively it appears suitable to result in the effective investigation and subsequent prosecution of cases within a reasonable time frame. The Chamber then stated that it must

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<sup>73</sup> Human Rights Watch Policy Paper, The Meaning of "the Interests of Justice" in Article 53 of the Rome Statute, 1 June 2005, available at: <https://www.hrw.org/news/2005/06/01/meaning-interests-justice-article-53-rome-statute>

therefore analyze whether, in light of the specific features of the situation in Afghanistan, it is likely, or at all possible, that authorizing an investigation would result in favoring those objectives.<sup>74</sup>

But in the very recent decision from the Appeals chamber in the Afghanistan situation while amending the impugned decision by PTC, it is stated that the content and placement of articles 15 and 53(1) of the Statute make it clear that these are separate provisions addressing the initiation of an investigation by the Prosecutor in two distinct contexts. Article 15 of the Statute governs the initiation of a *proprio motu* investigation, while article 53(1) concerns situations which are referred to the Prosecutor by a State Party or the Security Council. The Appeals Chamber also notes that article 15 of the Statute does not refer to the interests of justice or to article 53 of the Statute. Article 15(4) of the Statute requires a pre-trial chamber to determine only whether ‘there is a reasonable basis to proceed with an investigation’, and whether ‘the case appears to fall within the jurisdiction of the Court’. This provision does not identify additional considerations that the pre-trial chamber must consider for the purpose of this determination. A plain reading of the provisions, therefore, indicates that, for the purposes of exercising judicial control at this early stage of the proceeding, the pre-trial chamber need only consider whether there is a reasonable factual basis to proceed with an investigation, in the sense of whether crimes have been committed, and whether potential case(s) arising from such investigation appear to fall within the Court’s jurisdiction. This interpretation fully reflects the concern of the drafters in terms of the exercise of the *proprio motu* power noted above. While rule 48 of the Rules requires the Prosecutor to consider all the factors under article 53(1) of the Statute, including the interests of justice, in deciding whether to request authorization of an investigation under article 15(3), there is no equivalent rule that would import these considerations for the purposes of a Pre-trial Chamber’s determination under article 15(4) of the Statute. The rule

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<sup>74</sup> Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Islamic Republic of Afghanistan, Page 28-29, 12 April 2019, available at: [https://www.iccpi.int/CourtRecords/CR2019\\_02068.PDF](https://www.iccpi.int/CourtRecords/CR2019_02068.PDF)

was adopted after the Statute and, had the drafters intended to import these considerations into the Pre-trial Chamber authorization process they would have included such a requirement in the rule. In the Appeals Chamber's view, this shows that the factors under article 53(1)(a) to (c) are not relevant for the purposes of the Pre-trial Chamber's decision.

In the Kenya case as well, the Pre-Trial Chamber mentioned that all factors of article 53(1)(a) to (c) must be considered by a pre-trial chamber when issuing a decision under article 15(4) of the Statute which they also referred in the Afghanistan situation. But the reason behind such assumption, as per the decision of the Appeals Chambers decision in Afghanistan, must be the similarity as to the of the phrases in article 15(3) and 53(1). However, this interpretation obscures the essential difference between the standard applicable to the assessment on the one hand and the subject-matter of the assessment on the other. In the view of the Appeals Chamber, the harmonization of the standard between articles 15(3) and (4) and 53(1) of the Statute does not result in the harmonization of the subject-matter of the Prosecutor's decision under articles 15(3) and 53(1) of the Statute and the Pre-Trial Chamber's assessment under article 15(4) of the Statute. In light of the above, the Appeals Chamber considers that the 'interests of justice' factor set out in article 53(1)(c) of the Statute, while part of the Prosecutor's consideration under article 15(3) of the Statute as per rule 48 of the Rules, is not part of the Pre-trial Chamber's decision under article 15(4) of the Statute. Moreover, the Appeals Chamber notes that, if a pre-trial chamber were expected to apply all the factors under article 53(1)(a) to (c) of the Statute, this would include an assessment of the admissibility of potential case(s) under article 53(1)(b) of the Statute. In the Appeals Chamber's view, the value of a judicial assessment of admissibility at this stage would be limited. The Appeals Chamber notes that, in the context of article 15 proceedings, there is no obligation for the Prosecutor to notify States of her intention to seek authorization for an investigation and the participation of States is not provided for in the applicable procedural framework. This means that the Pre-trial Chamber would have to rely on the Prosecutor,

who considers that the case(s) would be admissible, to provide information that would allow it to form a view on issues of admissibility. Therefore, in the view of the Appeals Chamber, it is sufficient for the purposes of the article 15 procedure that the Prosecutor considers the admissibility of potential cases in determining whether she should request authorization for an investigation under article 15(3) of the Statute; there is no basis for the pre-trial chamber to consider that question as well. The Appeals Chamber concludes that a plain reading of the relevant legal provisions in their context suggests that the Pre-trial Chamber under article 15(4) of the Statute is only required to assess the information contained in the Prosecutor's request to determine whether there is a reasonable factual basis to proceed with an investigation, in the sense of whether crimes have been committed, and whether the potential case(s) arising from such investigation would appear to fall within the Court's jurisdiction. In this regard, the Appeals Chamber notes that the process under paragraphs 3-5 of article 15 is not a review of the Prosecutor's determination. Rather the Prosecutor seeks the Pre-trial Chamber's authorization to proceed and that authorization should be based on the application by the Pre-trial Chamber of the separate factors specified in paragraph 4, to the Prosecutor's application. Thus, the pre-trial chamber is required to reach its own determination under article 15(4) of the Statute as to whether there is a reasonable basis to proceed with an investigation. It is not called to review the Prosecutor's analysis of the factors under article 53(1)(a) to (c) of the Statute.<sup>75</sup>

## **9.Overall analysis**

From the discussion above, it appears that, interest of justice has been an unresolved mystery that has been there in the statute for very long. As there has never been a definition of this term it has been used in different manner and interpreted differently in different situations as per the interpreter's

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<sup>75</sup> Judgment on the appeal against the decision on the authorization of an investigation into the situation in the Islamic Republic of Afghanistan, Page: 16-22, 5 March 2020, available at: [https://www.icc-cpi.int/CourtRecords/CR2020\\_00828.PDF](https://www.icc-cpi.int/CourtRecords/CR2020_00828.PDF)

choice to decide. But it is indeed a very deep question as based on this a decision can turn negative towards an investigation to be authorized. The following analyses answers the questions that has been raised in this paper.

- If we first go with its relation to initiation of investigation than article 53 speaks loudly that it has an important role to play as a deciding factor in initiating an investigation.
- If we then go with its priority as a requirement then it appears from the article 53(1)(c) that it comes after the jurisdiction and admissibility of the case has been tested and result has been positive.
- If we then see that if it is necessary to look if a case is in interest of justice than it appears from the literal meaning of the article 53(1)(c) that the determination should be opposite. Which means that the concerning authority must see that there is no such reason that can make the investigation not serve the interest of justice. There is, nowhere in the statute or Rules of Procedure and Evidence it has been mentioned ever that the office of the Prosecutor must determine beforehand that the investigation will be in the interest of justice.
- When it comes to the application of article 53 where the interest of justice have come up and which is all about the rules regarding initiating an investigation it appears that, the Prosecutor only uses these law when there is a Security council referral under article 13(b) or a state party referral under article 14 of the statute. It is so because, when the Prosecutor initiates an investigation *proprio motu* then they do so after getting satisfied, with the information available to him/her, that all the conditions provided in article 12 as to the rules regarding jurisdiction and article 17 of the statute as to the admissibility have been met. Only after that the Prosecutor submits a proposal to the Pre-trial Chamber. If the Prosecutor is not satisfied that in a concerning situation there is no reasonable basis to proceed or the admissibility or jurisdiction conditions are not properly fulfilled then the Prosecutor can stop there and does



not require to proceed further with the proposal. In such case, the Prosecutor does not need show any reason to the Pre-trial Chamber for not proceeding with the situation. As, according article 15(3) of the statute, the Prosecutor is bound to communicate with the Pre-trial Chamber only when he/ she has a reasonable basis to proceed with an investigation as for starting an investigation which has been initiated by the Prosecutor must be authorized by the Pre-trial Chamber. Article 15(6) also explains this fact as it mentions that if the Prosecutor determines that there is no reasonable basis to proceed with the situation than he/she shall inform the information provider about his/her decision. There was nothing mentioned about informing such reasons to the Pre-trial Chamber in such a case.

- Rule 48 of the Rules of Prosecution and Evidence requires that the Prosecutor to consider all the factors under article 53(1) of the Statute, including the interests of justice, in deciding whether to request authorization of an investigation under article 15(3). But there is no equivalent rule that would import these considerations for the purposes of a Pre-trial Chamber's determination under article 15(4) of the Statute. The rule was adopted after the Statute for the better understanding of the Statute and, had the drafters intended to import these considerations into the Pre-trial Chamber authorization process they would have included such a requirement in the rule. This shows that the factors under article 53(1)(a) to (c) are not relevant for the purposes of the Pre-trial Chamber's decision.
- If we look into the role of the Pre-trial Chamber according to article 53(1) of the statute, it appears that the Prosecutor has to inform his or her decision to the Pre-trial Chamber only if he/she rejects any investigation which has been referred by Security council or a state party to the Rome statute and such rejection is based on the determination of the investigation not serving the interest of justice. If the Prosecutor determines that there is no reasonable basis to proceed with an investigation and such decision is based on something else than the conditions

written under article 53(1)(c) and article 53(2)(c) which include the interest of justice, then the Prosecutor does not need to involve or show reasons to the Pre-trial chamber.

- When, the Prosecutor determines that there is no reasonable basis to proceed with an investigation based on article 53(1)(c) and article 53(2)(c), then he/she shall inform the Pre-trial Chamber and the Security Council or the State making referral for the concerned situation about the decision and the reasons. If such thing happen, the Pre-trial Chamber under article 53(3)(a) of the statute may, upon the request of the Security council or the State making referral, can review the decision and if the Chamber finds it necessary then it can request the Prosecutor to reconsider such negative decision. According to article 53(3)(b), the Pre-trial Chamber may in its own initiative review such negative decision of the Prosecutor. In such case, after being reviewed by the Pre-trial Chamber, the concerned negative decision of the Prosecutor not to proceed with an investigation will only be effective if the Pre-trial Chamber confirms it.
- If we try to find out that if the Pre-trial Chamber has any authority to reject any authorization of an investigation solely based on the situation not serving interest of justice than it appears that there are no such law in the statute nor there is any explanation in the Rules of Procedure and Evidence. The Pre-trial Chamber can only control the decision of the Prosecutor relating to interest of justice only if it is in the negative from the Prosecutors side and that too when such situation have been brought up by either Security Council referral or a State party referral.
- In case of *proprio motu* initiation of investigation by the Prosecutor, the Pre-Trial chamber cannot alter a decision based on interest of justice alone as article 53 is not applicable for this situation. The explanation for this statement is hidden in the article 53(3) of the statute where it is clearly mentioned that if the state making referral or the Security Council, upon getting a

negative response from the Prosecutor on its referred situation based on interest of justice, requests to the Pre-trial Chamber to review the decision than the Pre-trial Chamber may review such negative decision and request the Prosecutor to reconsider. It has to be noted that the request to review must be made by Security Council or the State making referral and after reviewing the Chamber can only request the Prosecutor to reconsider its decision and the Chamber itself cannot alter it. In article 53(3)(b) it is stated that the Pre-trial Chamber, in its own initiative, may review such negative decision of the Prosecutor solely based on article 53(1)(c) or article 53(2)(c) and in such case the Prosecutors decision will be effective only if the Pre-trial Chamber confirms it. Though in this provision of article 53(3)(b) it is not clearly mentioned how the situation was initiated for example if it is a Security Council referral or a State party referral or a *proprio motu* initiation. But if we analyze the fact then it appears that it can only be the case of Security Council referral or a State party referral as in a *proprio motu* initiation the Prosecutor will not even submit his/her proposal to the Pre-trial Chamber for its authorization and so there is no scope of the Pre-trial Chamber to review it let alone reject such authorization of investigation. Which clears out the fact that article 53 is not applicable to *proprio motu* initiation of investigation. The provision of article 53(1), where it is mentioned that the Prosecutor shall inform the Pre-Trial Chamber if he or she determines that there is no reasonable basis to proceed and his or her determination is based solely on article 53(1)(c), is also not very upfront about the exact situation and can be confusing at the first glance as it may seem like the Prosecutor, shall inform the Pre-Trial Chamber about its decision even if it is a *proprio motu* initiation. But article 15(6) can be used as a clarifier in this case which states that if, after the preliminary examination referred to in article 15(1) and (2), the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. 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. It proves again that, article 53 has no connection with the *proprio motu* initiation hence the Pre-trial Chamber has no authority to reject the authorization of such initiation of investigation showing the reason that it will not serve the interest of justice.

- Moreover, even under article 53, the Pre-trial Chamber can only review a decision of the Prosecutor based on interest of justice if the prosecutor determines that an investigation will not serve the interest of justice. There is no provision where it is stated that, if the Prosecutor determines that he/she has not found anything that can make the investigation not serve interest of justice then the Pre-trial chamber may review it or reject such decision made by the Prosecutor.
- As mentioned earlier, article 53 of the Rome Statute states that “the Prosecutor shall consider whether ... taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.” The Rome statute, the Rules of Procedure and Evidence and the 2007 Policy Paper does not offer specifics on what those substantial reasons are but in its Afghanistan decision the Pre-trial Chamber provided that three reasons. Among those, PTC mentioned that, the evidence has not been reserved and the alleged criminals may make it difficult for the court to access the evidence against them which may lead to misuse of ICCs limited resources. If such reasons are considered in all cases, justice can never be served as it is not a secret that ICC has its own lengthy procedure of investigating a case. Leaving a situation without prosecuting for the sake of bringing justice in another case does not seem like serving interest of justice at all. So, it is very clear that, the reasons showed by the PTC as substantial reasons

that determines if the investigation would serve the interest of justice seems vague. Otherwise, such reasoning would be used in other decisions as well as the Myanmar decision.

## **10. Conclusion**

This thesis started with an intention to focus on the most criticized area of the Pre-trial Chamber decision in the Afghanistan case specially it answered the questions regarding the application of the term “interest of justice” as well as it defined the concerned authority to apply this. The Myanmar decision by the Pre-trial Chamber was taken into consideration as both these decisions came up in the same year, but different approach was shown towards them by the Pre-trial Chambers in their respective decision specially in the section of interest of justice. This thesis provides the following answers:

- The Afghanistan decision by the PTC provided some vague explanations which has been a result of misinterpretation of the statute.
- PTC has no authority to decide on the interests of justice and that the trade-offs are for the Prosecutor to make, without being second-guessed by judges, and without having to explain himself/herself to them.
- The literal meaning of article 53, as shown in the overall analysis part, describes briefly that PTC has no authority to alter the decision of the Prosecutor regarding his/her decision in *proprio motu* initiation of investigation.
- PTC can only review a decision of the Prosecutor if it is a case of Security council or State referral and the Prosecutor determined that there is no reasonable basis to proceed showing interest of justice as the reason for such decision.

- If the determination of the Prosecutor in terms of interest of justice is positive than the PTC has no authority to question that.
- The application of article 15 and article 53 is different and they provide different rules for different situation which should not be mixed up.

International Criminal court is mandated to deal with the most serious crimes of international concern<sup>76</sup>, and it is supposed to admit only cases that pass a admissibility and gravity threshold<sup>77</sup> Ordinarily, few would deny that in grave cases involving quite serious, violent crimes, justice requires a prosecutor to go forward with an investigation and follow the evidence wherever it leads. Among the core aims of the ICC, laid out in the preamble to the Rome Statute, is putting an end to impunity for grave international crimes, so declining to investigate should be the rare exception. However, the Rome Statute is worded in a way that severs the question of how grave the crimes are from the interests of justice in investigating them.<sup>78</sup>

The Afghanistan situation is a worthy case which the ICC should investigate as several grave crimes have been committed which needs adjudicated and the accused should be punished for the sake of justice and international peace. But when the Pre-trial Chamber had rejected the Prosecutors request it came as a shock to everyone and reasons showed by the chamber was even more shocking. The Pre-trial Chamber has shown three substantial reasons that made them believe that the investigation may not serve the interest of justice. They mentioned that evidence have not been preserved and the alleged criminals will try their best to keep the evidence out of the courts reach which eventually will waste ICC's time and limited resources. According to them, the time, and resources that the

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<sup>76</sup> Preamble and article 1 of the Rome statute for International Criminal Court

<sup>77</sup> Article 17 of the Rome statute for International Criminal Court

<sup>78</sup> David Luban, The "Interests of Justice" at the ICC: A Continuing Mystery, Just Security, 17 March 2020, available at: <https://www.justsecurity.org/69188/the-interests-of-justice-at-the-icc-a-continuing-mystery/>

Afghanistan case will take should be invested on other potential cases. But such a step could be very much threatening for international justice as this is showing the alleged criminals that the court has less power which can show green signal to the criminals for committing future crimes as well. Moreover, leaving one situation without adjudicating for the sake of adjudicating another can never be on the interest of justice as in this world everyone is equal, and everyone have equal rights to justice. This decision is even against ICC's goal which is ending impunity from the world and it can never be achieved if such a potential case like the Afghanistan situation is left untouched.

Thankfully, the Appeals Chamber annulled the impugned decision of the Pre-trial Chamber. Though they did not focus on defining the term interest of justice or mentioning anything about the substantial reasons based on which it can be determined that if a case is in the interest of justice or not. The legal arguments upon which the Appeals Chamber based its decision about who gets to decide. They concluded that PTC has no authority to decide in this matter and the power remains with the Office of the Prosecutor.

As it was a legal research and to find the answers this paper had to rely on various sources including binding laws, policy papers and some articles from different writers and NGOs. This thesis by using all its sources mentioned could answer the way how the concept of "interest of justice" can be applied by the Office of the Prosecutor and the Pre-trial Chambers limited access to this matter. As there is no definition found anywhere of the term "interest of justice" it seemed difficult and confusing at first to determine its use. But the thorough interpretation of the article 53 along with other sources helped getting a clear answer. But such a lack of proper definition can lead to future misunderstanding and can cause future decision from different organ of the ICC to be wrong which can cause further proceedings as it happened in the Afghanistan situation. If the Pre-trial Chamber never erred their decision, then the investigation could start a year back. It eventually caused the ICC to lose time and resources in the same case. Moreover, justice has been delayed for such error.

So, to not repeat such delay in justice and to avoid misunderstanding in future cases ICC should come up with a clear definition of the term “interest of justice” which will contain the substantial reasons based on which a decision can be taken based on “interest of justice”. This is a timely demand otherwise in future something more unimaginable can happen so its better to come up with a detailed explanation which can answer most of the concerns, remove the confusion and will be binding on everyone.

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