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Abstract

The Pre-Trial Chamber's decision to unanimously deny authorisation for an investigation into the situation of Afghanistan has been severely criticised by legal scholars and advocates of the ICC. The critics, the paper observes, have not sympathised with the inherent legal uncertainty and ambiguity surrounding the term interests of justice (IoJ) as contained in Article 53 of the Rome Statute. Specifically, criticism of the Afghanistan decision fails to pragmatically account for the interplay between politics and law, which creates overlapping or conflicting norms inherent in the Rome Statute of Article 53. The article, therefore, argues that the term, interests of justice, must be allowed to develop its interpretative norms and boundaries as the Court's jurisprudence develop. Consequently, to ensure legal certainty and norm clarity, the ICC's approach to interpreting Article 53 must adequately respond to questions of necessity, legitimacy and the genuine constraints on the goals of international criminal justice. In conclusion, the paper notes that such an approach to both discourse and application will contribute towards the avoidance of the binary debate associated with the term, interests of justice.

Key Words: International Criminal Justice, Interests of Justice, International Criminal Court, Rome Statute, Afghanistan Decision

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How to Ensure Legal Certainty and Norm Clarity in the Interpretation of Article 53 of the Rome Statute of the ICC: Pointers from the Pre-Trial Chamber’s Afghanistan Decision

Introduction

Arguably, the International Criminal Court (ICC, herein the Court) remains one of the most criticised international organisations. The Court was established in 2002 after sixty state parties had ratified the Rome Statute. The preamble of the Rome Statute, crafted in eleven paragraphs, seems to have been an indicative source or evidence of consensus among the members of the international community not just for the Court but also to bring an end to gross human rights violations among state-level power holders, deter impunity among actors by punishing crimes that are of humanitarian nature and substantial international significance (Gallavin 2003). While several efforts to punish grave crimes of international significance before the coming into force of the Statute, these systems failed to deliver on a long-term permanent basis. They were instead ad hoc, arbitrary and limited to regional scope, without the needed consistency and the level of certainty required to ensure the proper functioning of the international system of criminal investigations and prosecutions. From this perspective, the ICC faces a daunting task of leading the charge against Article 5 crimes and walking through the complex minefield of law and politics.

Part of the reasons for the criticisms of the ICC is the interplay between politics and law, which creates overlapping or conflicting norms inherent in the Statute and procedures of the Court. The Court seems to be at a crossroads. It is caught between "the idealistic vision of a global criminal court designed to investigate and prosecute cases that the domestic jurisdictions cannot or will not prosecute and the pragmatic concerns of a new institution seeking judicial results to secure its legitimacy"(Clark 2008: 37). The reflections of Clark (2008) puts the Court in an inseparable symbiotic relationship with international politics. Therefore, the Court must be mindful of the external political environment and where necessary, on legal grounds take into account political factors that will allow for its
existence in delivering justice to victims and perpetrators of core international crimes. The success of the ICC cannot solely emanate from the applications of the provisions of the Rome Statute but in mobilising States' and State parties' support for the effective implementation of the goals of international criminal justice.

Undeniably, the Office of the Prosecutor (OTP), plays a central role in the success or otherwise of the ICC. The Office of the Prosecutor is the sole organ that initiates prosecutions before the Court and by extension can determine the direction of the Court, draw attention to the Court, situations, people and places. Article 13(b) mandates the U.N. Security Council to refer situations to the Court. However, the UNSC remains without the power to initiate prosecutions. Rightly so, Hector Olasolo conceptualises the Prosecutor as the gatekeeper of the ICC who directs the Court (Olásolo 2003). This is supported by the claims of Luc Côté (2012), who argues that Prosecutors are the driving force of international criminal tribunals and that, they constitute the engine that sets in motion, the whole adjudication process. This means that the success of the Court will be measured by the conduct of the OTP. This calls to question a delicate balance between the law and international politics and how the OTP selects cases for investigation and prosecution. What will make some subjects attention-worthy, leading to investigation and prosecution while others are ignored? The majority view, based on the current interpretation of the Rome Statute, has failed to adequately respond to the effects of politics on the ability of the Courts to exercise jurisdiction and how much weight the OTP or the Court should place on pragmatic issues that affect its decision-making on case investigation and prosecution.

The construction of Article 53 further compounds the problems of the OTP and the Courts as it favours investigation and prosecution consistent with the object and purpose of the Rome Statute. The scope of article 53 does not anticipate pragmatic issues such as state cooperation during investigations and prosecutions: an important but inherent political matter that can collapse cases before the ICC and during the investigation phase. This is an essential claim in the
light of the Pre-Trial Chambers' unanimous decision to reject the request for authorisation for investigation by the OTP in Afghanistan. The argument here is that there is the need for an expansive view on the scope of article 53, which will accommodate the strategic interpretation of the interests of justice requirements of Article 53(1c)-(2c). This strategic interpretation will create the needed flexibility around the OTP and the Court to safeguard its long-term goals of pursuing international criminal justice. Exceptional permission for the Court and the OTP to carefully consider the immediate and long-term political effects of its involvement in cases or situations at the same time dealing with the perception of bias and selective justice. While this may provoke adverse reactions among commentators, human right lawyers, NGOs and the international legal community, it is important to assert that the long term viability and state support or cooperation remain an integral part of the institutional needs of the Court, particularly where the Court reflects the consent-based legal system. The point here is that the flexibility or the strategic interpretation should account for how political factors are valid legal considerations to avoid arbitrariness (Schabas 2010).

**The legal framework and the elements of interests of justice (IoJ)**

This paper is situated in the legal framework of Article 53 (1) of the Rome Statute, notes that:

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 sub-paragraph (c) above, he or she shall inform the Pre-Trial Chamber.

53 (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;

53 (3) 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.

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
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effective only if confirmed by the Pre-Trial Chamber (Rome Statute, ICC: Art 53).

What is of immediate interest are the two provisions of Article 53 (1)(c) and 53 (2)(c) that introduces the legal term "interests of justice" as a countervailing consideration even when the requirements of jurisdiction and admissibility have been met (Adem 2019). This means that the OTP is under a legal obligation or constrained to disengage from an investigation that will not serve the interests of justice. First, the framing of article 53 (1) (c) takes into account the gravity of the crime and the interest of victims as the primary but not exclusive factors to be considered as the provision stipulates "nonetheless substantial reasons to believe that an investigation will not serve the interests of justice". This creates a legal or even logical presumption that other factors could be considered in the assessment apart from the gravity of the crime and the interest of victims. The Rome Statute may not be useful in the search for the scope and interpretation of this element, as it provides no guidelines, making it possible and compelling for some persons to be inclined towards a broad interpretation of the concept.

The second part, sub-paragraph (2) (c) relates to prosecution. After the Prosecutor has finished an investigation, there is the need to determine whether to prosecute or not. In so doing, the following four cumulative factors must be considered: the gravity of the crime, interests of the victims, the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime. A careful reading of the provision reveals that the four factors serve an illustrative purpose and are not in any way exhaustive2. Overall, the interests of justice test must be performed by the OPT during the

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2. The sub-paragraph reads, ‘If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because 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.'
decision to investigate and prosecute, and any such decision "in the interests of justice" must be reviewed by the PTC. Intriguingly, the OPT has not officially made a negative decision based on the "interests of justice" requirement even though commentators have raised concerns about how this could lead to politically motivated prosecutions. The Rome Statute has not defined the scope of the interests of justice, and there appears to be a lack of consensus among legal scholars as to what should be the scope and boundaries of interpretation relative to the concept. Notwithstanding the lack of consensus over the scope of the interests of justice concept, it is imperative at this point to analyse, in detail, the four cumulative elements of Article 53.

The first factor to be considered is the gravity of the crime. The concept introduced in Article 53, which confers enormous discretionary power on the OTP is indicative of its discretionary function (Danner 2003). Meaning, strategically, the severity of a situation or case can warrant an investigation or prosecutions, better put, the gravity test can favour or disfavour an investigation by the OTP and the initiation of prosecution. The contours of gravity have not been defined in the Statute, and the practice of the OTP in relation to the gravity test has been unclear with regards to Article 53. The closest attempt to defining the gravity term and laying out clear factors to be considered has been that of the PTC I: the Chamber in the Ntaganda and Lubanga case arrived at two main factors3 namely, (1) the conduct must be either systematic (patterns of incidents) or large scale, and (2) due consideration must be given to the social alarm such conduct may have caused in the international community.

It is worth noting that this gravity test was dismissed by the Appeals Chamber on the reasoning of the OTP that, it lacks transparency and limits the prosecutors' discretion as envisioned in Article 53.

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reversed the PTC I gravity test, the Appeals Chamber failed to provide a convincing gravity test; its proposal was outrightly rejected and severely criticised in the legal scholarship. There has been a lack of clear articulation of what constitutes gravity in the early practice of the OTP until late 2005 (Schabas 2008), when things somehow changed particularly in the selection of cases and situations of DRC, Northern Uganda, and Sudan. The main factors outlined as the reference point for assessment include: scale, nature, manner, and impact of the crimes seem vague and subjective and overall, further conflate both legal gravity under Article 17(1)(d) and relative gravity under Article 53(1)(c). The present form of the OTP Regulation 29 does not in any way satisfactorily resolve the distinction between the relative and legal gravity. This calls for a new framework to settle the gravity debate in the ICC.

The second factor to be considered in stopping or proceeding with investigations or prosecutions relates to the interests of victims. The jurisprudence of the ICTY has shown an established practice about the interests of victims. For instance, Richard Goldstone utilised this strategy to delay the indictment of Slobodan Milosevic to pave the way for the Dayton Peace Agreement. The decision was to avoid any condition that may undermine or possibly aggravate the conditions of the victims. This demonstrably reflects the overlapping relationship between the role of the alleged perpetrator and the victims' interests. The interests of victims can be shaped by time, geography and several other factors that leave some victims demanding for criminal prosecution.

In contrast, others simply choose to leave their past behind through means of reconciliation. Equally important, the relative power position or military command status of the perpetrator can become an influencing point in determining the interest of victims, and this

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4. President of Federal Republic of Yugoslavia, indicted by the ICTY for several international crimes, and died during his trial in 2006.
can function as a subtle way of coercing the victim to accept political settlements as against criminal prosecution (Rauschenbach 2008). The Prosecutors’ assessment of the interest of the victims seems challenging to make predictable as multiple factors are involved. However, what remains important is to estimate how the investigation or the prosecution could harm the life and dignity of the victim and consequently, the appropriate strategies adopted in response to such challenges. In circumstances where the Prosecutor determines that the interests of victims may be at stake, the decision should not be to abandon the investigation or the prosecution immediately but to delay it or adopt some other form of litigation strategies, taking into account all relevant circumstances.

The following criteria identified relates to the role of the alleged perpetrator but only in the context of prosecution. The role of the alleged perpetrator can function in opposite ways making it play a dual role by either initiating a prosecution or delaying the prosecution and possibly based on relevant prevailing circumstances, abandon the idea of prosecution. This means that the Prosecutor has enough discretion to be able to determine the scope of the role of the alleged perpetrator in ways that respect the interests of the victims. Again, this reflects another source of overlap between the interest of victims and the role of the alleged perpetrator. However, the latter relates only to prosecution. The first thing to examine about the role of the alleged perpetrator is how any possible prosecution could weaken the power position of the individual in the conflict situation and the second factor could be the presence or the absence of a political climate that favours prosecution or and admittedly the interest of powerful states (Danner 2003). This criterion also seems broad and allows for smart policy and legal manoeuvrings by the Prosecutor. This means the assessment of a negative or a positive decision to the role of the alleged perpetrator may be conducted on a case by case basis. Finally, the last criterion in relation to prosecution concerns the age or the infirmity of the alleged perpetrator. The scope of the age or health conditions of the alleged perpetrator can be interpreted in two ways: the first is to
ascertain the real effect of the criminal prosecution on the health conditions of the person involved and the second relates to general conditions of the poor health of the alleged perpetrator which may have to be given a narrow scope. The mere presence of general conditions of poor health should not bar or prevent the Prosecutor from going ahead with the trial processes. The ICTY's jurisprudence points to the use of postponements and adjournments in situations where the health conditions of the alleged perpetrator are raised (Webb 2005). Having discussed the four criteria in Article 53, the next concern of this paper is to reflect on the early understandings of the interests of justice in the context of the Rome Statute.

**Early understandings of the notion of interests of justice (IoJ)**

The phrase interests of justice as appeared in the Rome Statute has not been defined, and there appears to be a legal and policy controversy over what the drafters intended and what could constitute an appropriate interpretation within the framework of the ICC and in ways that does not expose the phrase to political considerations or manipulations by the Prosecutor. The drafting history has also failed to clarify what could be the meaning and scope of the term interests of justice. The most significant reference to the term interests of justice was proposed by the U.K. in a discussion paper (the United Kingdom 1996) where it appears to provide broad discretion to the Prosecutor not to investigate on the grounds of interests of justice (Schabas 2008). Arguably, the drafting history points to the desire to grant broad discretion to the Prosecutor to avoid investigations and prosecutions that could harm the Court's own long term viability and objective of ending impunity. The appearance of the words "all circumstances" in Article 53 (2) (c) provides evidence to support the assertion for a broad view on the term interests of justice. Unfortunately, there was no consensus among the delegates, and there was the presumption that this disagreement will be better handled by professionals, who are to make sound judgements in the Court and its processes.
The attempt by the Office of the Prosecutor (OTP) to define the scope of the interests of justice was contained in a policy paper adopted in the year 2007, well known as "the policy paper". The consultative nature of the process to delimit the boundaries or the scope of the term interests of justice created three schools of thought. From the perspective of the OTP:

The issue of the interests of justice, as it appears in article 53 of the Rome Statute, represents one of the most contentious and 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 (albeit implicitly), but there is no clear guidance on what the content of the idea is (OTP, 2007).

The term interests of justice remains a thorny issue to the extent that the three schools of thought that emerged in the context of the OTP policy paper have still not been able to resolve or reconcile their competing legal, policy and pragmatic claims but each further contributing to the ambiguity in Article 53. The legal literature has been bombarded by several authors who believe that "the creative ambiguity" in Article 53 may have to include notions of peace negotiations (political settlements), amnesties and national reconciliation processes, and international peace and security (Scharf 1999). The first view believes the provision, potentially carries with it a dynamic and pluralistic interpretation that reflects a broad view (Le Fraper, Du Hellen & Cassese 2001). The second view, seems, quite satisfactorily, accepting the discretionary nature of the provision but indicates that the discretion must be exercised in the context of judicial review and the third view, made up of predominantly international human rights NGOs, human right advocates and lawyers whose notion of justice is narrowly limited to

5. The concept ‘creative ambiguity’ is believed to have been coined by Philip Kirsch, former president of the ICC and chairman of the Rome Diplomatic Conference.
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Retributive justice (Amnesty International 2005) or criminal prosecutions: they believe any reference to the provision to reject investigation and prosecution of crimes under the jurisdiction of the ICC could effectively harm and erode the legitimacy of the Court (HRW 2005). The then Prosecutor, Luis Ocampo, in his address to the United Nations Security Council, on the 13 December 2005, averred:

In addition to admissibility, I am also required by the Rome Statute to consider whether a prosecution is not in the interests of justice. In considering this factor, I will follow the various national and international efforts to achieve peace and security, as well as the views of witnesses and victims of the crimes.⁶

This statement or policy consideration by the then Prosecutor seems to be tilting the balance in favour of the first and second school of thought. My assertion is subsequently confirmed in the admission on his part that amnesties are part of local mechanisms and there is the need for standards to be developed to facilitate the Court acknowledging their role (Moreno-Ocampo 2006). This approach by the OTP to have a broad view on Article 53, particularly, the term interests of justice was short-lived through the adoption of a restrictive scope in 2007. The policy paper significantly changed the position of the OTP, on the interpretation of the term interests of justice, as indicated earlier, largely, due to the influential role played by the Amnesty International and the Human Rights Watch. The pressure from NGOs led to the OTP adopting not just a restrictive scope of Article 53 and the interpretation of the term interests of justice but also a very cautious policy position to avoid being

criticised as politically motivated and to please the advocates of victim focused teleological interpretation of Article 53. The policy paper also noted the lack of clarity and definition of the term interests of justice but fails to provide explicit factors or a clear guidance on the content of the term. It rather adopted a context specific approach indicating that all relevant circumstances must be taken into account in reference to the term. The lack of explicit definition in the policy paper on what the term interests of justice means further gives credence to the argument that not all legal text or terms must be defined in a treaty or Statute but it behooves on reasonable legal professionals to make a sound judgement over the meaning of such terms or concepts, however elusive the term may be. Schabas argues that the lamentation over the lack of clarity and definition of the interests of justice misses the point (Schabas 2010: 660).

The policy paper has outlined three main elements that should guide the applicability of the term interests of justice: the first deals with the exceptional character of the prosecutorial discretion imposed by Article 53 and presumption in favour of investigation and prosecution; the second deals with particular reference to the object and purpose of the ICC Statute and the goal of fighting core international crimes; the third refers to a distinction between the notions of interests of justice and the interest of peace, indicating that the latter seems to be the mandate of other international organisations such as the United Nations Security Council. The three elements in the policy paper require further analysis that will enable us to unpack the nuanced dynamism that they present. In the first place, there is almost consensus about the legal presumption for investigation and prosecution in Article 53. However, there is also the operational difficulty of the ICC Prosecutor's limited capacity, where not all situations or cases under the Court's jurisdiction can be prosecuted. The exceptional nature of Article 53, particularly when it is narrowly conceptualised, further fails to account for the realities surrounding the functioning of the Court in the selection of situations and cases.
From this perspective, one is likely to argue that investigation and prosecution appear to be the exception and not the rule (Schabas 2010: 661). The second concern has to do with the overestimation of the Courts’ capacity in fighting atrocities to serve as deterrence (Akhavan 2001). The Courts’ intervention to fight impunity may not hold such visible promise of deterrence, particularly when it cannot investigate or prosecute all situations or cases under its jurisdiction due to logistical constraints (Wippman 1999). The final contention with the three elements the policy paper raised deals with the categorical attempt on the part of the OTP to distinguish between interests of justice and the interest of peace. The OTP fiercely resists any attempt for a broad interpretation of the term interests of justice as including peace and security considerations. This is not only challenging but does not admit to the inherent relationship between the goals of international justice and international peace and security. The interplay of the goals of international justice and the notions of peace and security appear to have been embedded in Article 16 of the Rome Statute that mandates the United Nations Security Council to defer investigations and prosecutions. The primary purpose of the UNSC deferral will be to preserve international peace and security. This provision has so far not been invoked by the UNSC, which also means that we are yet to know its scope and the threshold required for its applicability or whether this provision is solely discretionary and the U.N. Security Council satisfying its requirements under Article 27 of the UN Charter will suffice.

The policy paper gives a subtle recognition to alternative justice mechanisms such as truth-seeking, reparation programs, amnesties, national reconciliation, institutional reform processes as part of the broader justice mechanisms for fighting impunity. The policy paper

7. Article 16 of the Rome Statute, although some argue that this provision must be invoked only in exceptional circumstances by the Security Council, it remains unclear what could constitute the threshold for the UNSC to exercise this mandate under the Rome State and the Chapter VII of the UN Charter.
seems to be silent on specific circumstances within which these complementary justice mechanisms will be seen as an alternative to criminal investigations and prosecution and the key factors that will be driving the decision-making, whether for legal or policy considerations. The Policy paper failed to appropriately give a clear understanding on what the meaning of interests of justice means but rather, simply argues that scholars, practitioners and commentators should be interested in how real situations are handled. This points to a case by case assessment of the drivers of interests of justice and the judicial review that may be exercised by the PTC whenever such a determination is made by the OTP. The prosecutorial practice, in a consistent manner, has revealed that the OTP has for all intent and purposes, marginalised resorting to the interests of justice assessment (Clark 2011). This marginalisation may be to avoid an automatic review by the PTC and ceding prosecutorial independence to the PTC. The practice of the OTP in relation to the policy paper has further strengthened the narrow interpretation of the term interests of justice, making it depart from alternative justice mechanisms. The OTP asserts to conduct its own independent investigations or prosecutions without the recourse to the mandate of others by simply respecting their work (OTP 2007). The key observation here is that the pre-phase of the policy paper was open to entertain broad notions of the interests of justice only in exceptional circumstances but post the policy paper, the OTP seems hostile to any broad notions of the term, interests of justice making the OTP give emphasis to investigations and prosecutions.

The interaction between the OTP and the PTC in relation to the interests of justice

Clearly, an important point that has come up for analysis is the institutional interaction between the OTP and the PTC in relation to the authorisations of investigations into situations and cases. From the Rome Statute, the following Articles and provisions create an institutional interaction between the OTP and the PTC. Articles 15, 53, and rule 48 of the Rules of Procedure and Evidence of the Court
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Specifically, Article 15(3)(4), which relates to *proprio motu* investigations details that:

3) 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 authorisation 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.

4) 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 authorise the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case (Rome Statute, ICC: Art 15).

Article 53(3) (b)

(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 (Rome Statute, ICC: Art 53).

These Articles imposed an obligation, for the determination of the OPT for an investigation to be reviewed by the PTC. That is when the Prosecutor's decision is dictated by the interests of justice not to investigate, and this is explicitly stated, there is an automatic judicial control or oversight that has to be exercised by the PTC and the Prosecutor's decision cannot be effective until the PTC's confirmation or otherwise. Some scholars have shared the view that
unless the Prosecutor has decided solely, on the grounds of interests of justice, the review powers of the PTC cannot be exercised (Jacobs 2019). Others also believe that whether or not the determination of the OTP is influenced solely by the interests of justice considerations and a decision explicitly based on it, the review of the PTC remains valid (Heller 2019) due to the wording of rule 48 of the Rules of Procedure and Evidence. This latter view argues that the OTP's decision to investigate must consider the three main elements: jurisdiction, admissibility and interests of justice as required by Article 53(1). This interaction in my view can create puzzling antagonism especially when there are sharp disagreements between the OTP and the PTC about the meaning of concepts and terms that seem quite controversial and without sufficient guidance from the Statute about what the meanings are. For instance, this could also create the unintended consequence of judges of the Court asserting their authority on the Prosecutor. Meaning, the internal cohesion of the Court could come up for severe criticisms that may affect its legitimacy. The lack of invocation of the interests of justice by the Prosecutor in the past seems to be an avenue to avoid a clash with the PTC and also reflects the strong sense of the OTP’s shift towards interests of victims. This can be argued as one of the effects of the logic of the policy paper.

Jurisprudence of the ICC in relation to interests of justice (IoJ)

The jurisprudence of the Court regarding the notion of interests of justice has been quite inconsistent and lacks a uniform approach, particularly the PTCs review. Until recently in the Afghanistan authorisation decision, the PTC has not explicitly invoked its powers of review of the term interests of justice and has nothing comparable to the policy paper of the OTP. There is the need, therefore, for an in-depth examination of the scope of the interests of justice in the context of the PTC. The analysis of the jurisprudence of the PTC relating to the interests of justice may appear scanty. However, it is to give us a sense of how the PTC has sought to operationalise the elusive and vague nature of the term. I will be concerned with three
main situations or cases, namely: Kenya, Cote d'Ivoire, Georgia and Burundi. First, in the Kenyan situation, Pre-Trial Chamber II argues that the requirements under Article 53 (1) (c), does not impose an obligation on the Prosecutor to establish that an investigation is in the interests of justice. By this assertion of the PTC II, the Prosecutor does not need to provide material evidence or support for her decision. The Chamber believes a review of the Prosecutor's decision may be unwarranted considering that there is no explicit determination that an investigation "will not serve the interests of justice" which will prevent the Prosecutor from proceeding with the request for authorisation. The PTC review may take place as required by Article 53 (3) (b) when the Prosecutor decides not to proceed with an investigation solely based on the factor, interests of justice.\(^8\) The Chamber argues that "It is only when the Prosecutor decides that an investigation would not be in the interests of justice that he or she is under the obligation to notify the Chamber of the reasons for such a decision, thereby triggering the review power of the Chamber."\(^9\) The decision by the Pre-Trial Chamber III in the Côte d'Ivoire situation does not necessarily depart from the approach of the Kenyan authorisation decision under Article 15. The Chamber in the Côte d'Ivoire decision regarding the assessment of the interests of justice relied on the fact that the representation from victims had not indicated that authorisation of an investigation was not in the interests of justice.\(^10\) The Chamber also further affirmed that the only

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10. Pre-Trial Chamber III, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, at 207-208.
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circumstances under which the Prosecutor's decision may have been reviewed would have been when it was solely based on the interests of justice factor (Ibid). Curiously, the Chamber noted the interplay of rule 48 of the Rules of Procedure and Evidence but failed to draw its relationship with both Article 53, 15. This is because rule 48 of the Rules of Procedure and Evidence mandates the PTC to consider the interests of justice as well as the elements of jurisdiction and admissibility. In this case, the review of the PTC may not necessarily be because the Prosecutor has solely based his or her decision on the interests of justice. However, by adhering to the requirements of rule 48, the review can be done without any explicit decision in relation to the interests of justice by the Prosecutor.

Similarly, the Pre Trial Chamber in its Article 15 decision in the Georgian situation states as follows:

Since the Prosecutor had not concluded that an investigation would not serve the interests of justice and taking into account Article 15(3) which allows for victim representation and whose overwhelming support for an investigation is not in doubt, in the present situation, there is indeed no substantial reason to believe that the investigation will not serve the interests of justice.11

This means that in the Georgian situation, the standard set by the Pre Trial Chamber was the lack of explicit decision on the part of the Prosecutor that an "investigation will not serve the interests of justice" and the overwhelming support from the victims who were represented under Article 15(3). Again, the Georgian decision does not account for rule 48. The latter situation to be considered in relation to the interests of justice jurisprudence in Burundi. In the Burundian Article 15 decision, the Chamber notes that Article 53 (1)

11. Pre-Trial Chamber I, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in Georgia, Art 58.
(a) and (b), poses a question that must be resolved positively by the Prosecutor but the same obligation is not on the Prosecutor in subparagraph (c), in that, the Prosecutor is not obliged to demonstrate or provide support for her decision that an investigation will be in the interest of justice. Once again, the Chamber in a scanty fashion, believes that there are no substantial reasons to believe the investigation of the Burundian situation "will not serve the interest of justice".12

From the various situations reviewed in this paper, it appears that the Chamber shares the view of the scholars, analysts and commentators who argue that unless the Prosecutor decides solely on the interests of justice the review powers of the PTC may not be exercised. This assertion, thus, may seem to bring into sharp criticisms why the PTC took a different approach in the situation of the Afghanistan Article 15 decision (Jacobs 2019). To the extent that some do not only see it as an ultra vires decision but equally dubious (Labuda 2019). This leads to the next section of the paper that seeks to analyse the PTC decision in the light of the Afghanistan Article 15 decision.

The Legal and Political Implications of PTC's decision in the Afghanistan situation

The first part of the PTC decision in the Afghanistan situation of interest is the issue of the competence of the PTC. This interest arises from arguments that combine the textual reading of Article 15(4), 53(1) (c) and rule 48 of the Rules. Such arguments make it imperative for the Chamber to examine the interests of justice test, whenever the Prosecutor requests authorisation for a formal investigation. This position may not enjoy consensus, but at least, it allows some clarity on why the PTC had the competence to review the authorisation request. Also, considering the interests of justice component, even

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12 Pre-Trial Chamber III, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi, at 190.
though the Prosecutor has not declined investigation based on the interests of justice determination. For the first time, the Pre-Trial Chamber departed from its standards in the determination of the interests of justice parameters. The Chamber argues that just like the parameters of admissibility and jurisdiction, the Prosecutor is required to make a positive decision that an investigation is in the interests of justice. This appears to be a new dimension as this is almost taken for granted in the jurisdiction of the Court. But what remains clear is that the Court is not bound by its jurisdiction. After convincing itself of the new parameters of the interests of justice, the Pre-Trial Chamber II, unanimously agreed that the Prosecutors' request for authorisation for an investigation into war crimes and crimes against humanity was not in the interests of justice. Following this decision, the Court has received scathing criticisms from commentators, analysts and international human rights organisations for various legal and political reasons.

Second, the Afghanistan Article15 decision, on the 12 April 2019, by the Pre-Trial Chamber has once again resurrected the debate on the meaning of the interests of justice in the context of the Rome Statute. Patryk Labuda (2019) in showing his disagreement with the Court's approach on the parameters of the interests of justice, argues that the Court has introduced non-legal factors that "there is a slightly less cynical explanation for the decision" (ibid). While his claims are valid from a purely legal perspective, this paper believes that the non-legal factors introduced by the Courts largely reflect the proposed shift in the draft strategic plan of the Prosecutor for the remaining 2019-2021 period of her mandate. The draft document by the OTP notes the challenges of the Court and aspires to adopt a better strategy in areas such as cooperation and security and lack of judicial clarity and certainty. The document aspires to ensure effective, efficient investigations and enhance the success of the OTP in Court, leading to successful prosecutions (Whiting 2019b). It also seeks to "increase the Office's ability to manage its resources in an effective, responsible and accountable manner". From the Draft Strategic Plan 2019-2021, the OTP admits to both operational and practical challenges that the
Court needs to pay attention to. The Court has received several criticisms and its legitimacy and credibility have been called to question, to a large extent, due to the operations of the OTP. The steep path is how the Court or judges can be part of the institutional rescue that the Rome Statute based system needs badly? Can this be done through pragmatic judicial orders in order to shape policy and practice of the OTP that lies at the core of the Courts’ very existence, function and legitimacy? From the Afghanistan decision, it appears, the Court intends to radically be part of guiding policy and practice of the OTP through its judicial decisions. The Pre-Trial Chamber II notes:

what is at stake is much more than the Court's credibility; it is its very function and legitimacy. Frivolous, ungrounded or otherwise predictably inconclusive investigations would unnecessarily infringe on fundamental individual rights without serving either the interests of justice or any of the universal values underlying the Statute, as spelt out in the Statute's Preamble: ending impunity and preventing mass atrocities with a view to achieving peace, security and the well-being of the people.13

Third, there is no doubt about the possible institutional tug of war or unintended tension and hostility between the judges and the OTP in the exercise of judicial scrutiny by the Courts. However, this is what the Court asserts as the needed filtering role that will avoid investigations that will not serve the interests of justice and remain largely inconclusive(Ibid). The unsatisfactory prosecutions by the OTP and obvious failures in some cases have, in my view, affected the deterrence role of the Courts. The way to go is no longer a wild

13. ICC Pre Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, at 34.
goose chase by the OTP but requires an objective criterion that redirects the policy and practices of the OTP and the Court in general. In its interests of justice interpretation, the Pre-Trial Chamber curiously introduced the following factors for consideration:

(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.14

The Chamber claims that an investigation may not be in the interests of justice, for as long as relevant circumstances point to inevitable failure and lack of cooperation by key States. The political implication for the Chambers reasoning relating to investigation failure in the Afghanistan context is that it may encourage non-cooperation among States and challenges to OTP's investigations. Nevertheless, the question is whether the Court can investigate and prosecute all crimes under its jurisdiction. An affirmative response does not make practical sense. The Chamber also notes that authorising an investigation will require vast amounts of resources in a situation that is less likely to result in effective evidence gathering. There is the need to put resources in cases or situations with a higher promise of success at trials. This opinion of the Chamber certainly has policy implications where the OTP must effectively allocate resources in priority situations or cases. Perhaps this is the Court's open admission of its prosecutorial and judicial

14 . Ibid, 95
limited resources. The Court's decision fails to detail the criteria guiding its prioritisation outside of the Afghanistan decision. This is one of the disappointing parts of the decision, particularly when the decision may not be able to generate the needed environment for comprehensive discussions on prioritisation of the Courts resources.

Some have engaged in speculation by arguing that the Court capitulated to the threats of the United States of America (Whiting 2019a). This view may not be irrational, but unfortunately, we have no mechanism to ascertain this claim. However, the reality of the political environment within which the Court functions cannot be ignored in any serious analysis (Clark 2011). The ICC remains at the goodwill of states for cooperation, and it will amount to insincerity not to acknowledge this. Be that as it may, considering practical challenges of security and non-cooperation may also amount to the unequal judicial treatment of states and encouraging rogue behaviour from states. This is the reason why states must be the focus of criticisms and bear responsibility for these practical challenges that hamper the Court's efficiency. The Afghanistan decision may not necessarily be about the disagreements over the interpretation of the legal boundaries of the term interests of justice. However, the judges tried to do so.

The involvement of the U.S. in the situation makes it imperative for the Court to take stock of its institutional strengths. Further, it needs to attempt striking a balance between its aspirations of international criminal justice, narrowly defined as investigation and prosecutions of core international crimes and the murky international politics that interface with the Court (Rodman 2014). One can argue that the Court was tested and faced with hard choices in the Afghanistan situation and looking at its unimpressive record in similar complicated situations like Sudan, Libya, Israel-Palestine, and Kenya by the OTP, the judges were not inspired enough to authorise an investigation. It would seem to some observers, as though the Court had abandoned the hopes of the victims who favoured
investigation in the Afghanistan situation and lost the opportunity to confront American power, which can function in ways that may enhance the Court's credibility and legitimacy. However, the risk seems too high politically for the Court, considering its internal challenges.

Conclusion

The Court's interpretation of the interests of justice within the context of the Afghanistan case seems unconvincing to a large majority of advocates. However, the principle seems persuasive, where the Chamber as argued opted for a broader notion of the interests of justice relative to narrower representation by the OTP. While observing an obvious institutional clash and conflict over the definition of interests of justice, both the OTPs narrow and the Chamber's broad view (in principle) must be accepted for the strategic interests and institutional progress of the Courts. The debate may have to move away from the present binary: meaning it cannot be either a narrow view or a broad view on the term interests of justice but indeed both. This will, therefore, require an interplay of both legal factors and sound policy considerations. The factors considered in the determination of interests of justice can be narrow and broad, to give the Court and the OTP the ability to manoeuvre through interpretation. This is to argue that the term interests of justice must be allowed to develop its own interpretative norms and boundaries as the Court's jurisprudence develop and this will ultimately lead to a norm convergence and produce acceptable objective criteria of interpreting the interests of justice element of Article 53. This reasoning may create short-term legal uncertainty around the term. However, it is the steep path to ensuring consensus around the meaning since many commentators have used the traditional interpretative tools of international law with varied conclusions. The legal tact here is for us to accept the two faces of Article 53 and aspire to have effective enforcement mechanisms of international criminal justice. Conclusively, the interpretation of the term interests of justice must respond to questions of legal necessity,
legitimacy and the genuine constraints on the goals of criminal justice.

REFERENCES


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