

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.

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.

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A. Introduction/General Remarks

- 1 Article 53 of the Statute governs the exercise of essential aspects of prosecutorial discretion once the Prosecutor's power to commence actual investigatory activities has been activated. It regulates the Prosecutor's decision-making on whether to proceed with a full investigation after he or she is empowered to do so, as well as the scope of and procedural requirements for the Prosecutor's discretionary power not to proceed with prosecution upon investigation. Prosecutorial discretion is the principal manifestation of the statutory principle of prosecutorial independence as it is expressed in declaratory and functional terms in article 42. The principle of the independence of the Office of the Prosecutor is based on the interest of impartial justice on which the credibility and legitimacy of the criminal justice process depends. At the core of any notion of prosecutorial discretion lies the power to decide whether or not to investigate and prosecute.
- 2 It is article 13 of the Statute that regulates the exercise of the Court's jurisdiction by the organs of the Court, including the Office of the Prosecutor. It provides that the activation of the Prosecutor's power to investigate can have three different bases. *First*, the activation may be based on referral of a situation to the Prosecutor by a State Party in accordance with articles 13 (a) and 14; *secondly*, the Prosecutor's empowerment may be based on a referral of a situation by the Security Council acting under Chapter VII of the United Nations Charter, in accordance with article 13 (b); and, *thirdly*, it may be based on an independent initiation of an investigation by the Prosecutor which has then been expressly authorised to proceed by the Pre-Trial Chamber of the Court, pursuant to articles 13 (c) and 15. A situation must have passed one of the three thresholds of article 13 before article 53 comes into play. If the Prosecutor has initiated a preliminary examination pursuant to articles 13 (c) and 15 paras. 1 and 2, the Pre-Trial Chamber must have authorised the commencement of full investigation as prescribed by article 15 paras. 3 and 4 for article 53 to apply. Additionally, if the Prosecutor is seized of a situation through article 13 (a) or (c), article 12 requires a minimum State acceptance of the jurisdiction of the Court. At least the territorial State or one State of nationality must either be Party to the Statute or have accepted the exercise of jurisdiction by the Court with respect to the crime in question¹.

¹ See article 12 paras. 2 and 3 respectively.

The deliberations on article 53 of the Statute took place against the changing and unpredictable background of the drafting of the controversial articles 12 and 13, which set the jurisdictional parameters of the Court and its Prosecutor. Drafts from both the Preparatory Committee and the ILC contained references to provisions on the triggering of the jurisdiction of the Court in the article corresponding to final article 53. Article 54 of the Draft Statute proposed by the Preparatory Committee was very lengthy and contained provisions which can be found in articles 53, 54, 55 and 57 of the final Statute². The provisions relevant to final article 53 appeared in draft article 54 paras. 1-3 with multiple brackets and tentative language on several of the issues regulated. This article 54 paras. 1-3 reflects draft article 47 paras. 1, 1*bis* and 1*ter* of the Zutphen Draft Statute³. The preliminary nature of both drafts is indicative of the inconclusive and preliminary deliberations in the Preparatory Committee on the questions regulated by final article 53. Article 26 paras. 1, 4 and 5 of the ILC Draft Statute had formed the basis of the work of the Committee⁴. It is fair to say that the Diplomatic Conference itself did substantial work on what was adopted as article 53.

The close connection between article 53 and the rules on the activation of the Court's jurisdiction makes the corresponding article 18 of the ICTY Statute of limited relevancy to the interpretation and analysis of article 53. When article 18 para. 1 states that the Prosecutor "shall initiate investigations *ex-officio* or on the basis of information obtained from any source", that is a reflection of the determination by the Security Council, when it established the Tribunal pursuant to Chapter VII of the United Nations Charter, that the Prosecutor needs no judicial or other authorisation to start investigating. The Security Council referred the situation, which the Prosecutor is mandated to fully investigate and prosecute, to the Tribunal through the resolution establishing it and the annexed Statute⁵. As a Chapter VII resolution it is binding on all Member States of the United Nations. It substitutes provisions on State acceptance of the exercise of jurisdiction, triggering mechanisms and deference to national criminal justice systems on the basis of a principle of complementarity.

Article 18 para. 1 of the ICTY Statute does provide that the Prosecutor has the prosecutorial discretion to "decide whether there is sufficient basis to proceed" with an investigation based on his or her assessment of "the information received or obtained". This is, however, an *evidentiary* test and not one of *appropriateness*. The latter consideration, which some would be inclined to describe as more political, was exercised by the Security Council when it found that there was a situation involving serious violations of international humanitarian law in the former Yugoslavia justifying international judicial intervention.

Article 18 para. 4 of the ICTY Statute relates to article 53 para. 2 of the ICC Statute only insofar as it provides that the Prosecutor, "upon a determination that a *prima facie* case exists, ... shall prepare an indictment".

² See Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute and Draft Final Act, U.N. Doc. A/CONF.183/2/Add.1 (14 Apr. 1998), pp. 89-95.

³ See Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands, U.N. Doc. A/AC.249/1998/L.13 (30 Jan. 1998), pp. 86-87.

⁴ See Report of the International Law Commission on the Work of its Forty-Sixth Session ("Draft statute for an international criminal court"), U.N. Doc. A/49/10 (1994), II, B, I, p. 90.

⁵ Res. 827 (1993), 25 May 1993.

- 5 It follows from what has already been developed that the formulation "initiate an investigation" in article 53 of the ICC Statute must be distinguished from "initiate investigations" in article 15. According to article 15 para. 6, the latter refers to preliminary examinations, *i.e.*, the preliminary gathering of information in order to determine *whether* to proceed to request the Pre-Trial Chamber to authorise a full investigation. The phrase as used in the context of article 53, on the other hand, refers to the *commencement* of a full investigation with a view to determining whether to prepare an indictment and prosecute. Article 42 para. 1 makes a distinction between "examining" (referrals and substantiated information) and "conducting investigations and prosecutions", which may be a useful indication of the cumulative phases of the exercise of the Prosecutor's duties.
- 6 The investigatory activities which commence, subsequent to the Prosecutor's powers to investigate having been triggered, are broadly speaking two-fold. In the first place the Prosecutor must assess the preliminary information provided in order to determine whether or not to embark on a full investigation. This preliminary assessment is a precautionary measure which is intended to protect the Prosecutor from the obligation of expending resources and time on an investigation which clearly has no chance of leading to a compelling indictment or prosecution. This provision provides one of several safeguards against the abuse of the investigative capacity of the Court by the Prosecutor. The second investigatory activity, which commences depending on the outcome of the assessment of the preliminary information, is the launching of an in-depth investigation of the incident or situation to which the preliminary information pertains. This in-depth investigation will determine whether a prosecution should be instituted or not.

B. Analysis and interpretation of elements

I. Paragraph 1

1. Chapeau

a) "shall"

- 7 The use of the imperative term "shall" emphasizes that the sole discretionary theme of the chapeau is whether there is reasonable basis to proceed with a full investigation. If such a reasonable basis is found to exist, the Prosecutor is obliged to proceed to an investigation with a view to formulating an indictment if the investigation so warrants. The provision does not give the Prosecutor room for arbitrary decision-making if he or she assesses the preliminary information as providing a reasonable basis on which to proceed under the Statute.

b) "information"

- 8 The "information" referred to in this provision primarily concerns that which accompanies the referral of a situation to the Prosecutor by a State Party or by the Security Council pursuant article 13 (a) and (b). With regard to *proprio motu* initiation

of an investigation by the Prosecutor pursuant to article 13 (c), the provisions of article 15 already require a preliminary assessment of the information by the Prosecutor against a reasonable basis test⁶.

The Prosecutor is not restricted to only the information which accompanies the submission when making his or her analysis. The provision does not impose such a limitation on the Prosecutor's discretion. On the contrary, the wording of the provision simply refers to "information made available to him", without specifying from whom and when. Under article 15 para. 2⁷ the Prosecutor is explicitly authorised to seek additional information from a wide variety of sources to supplement the received information so as to enable him or her to make a suitable analysis thereof. Since one main interest underlying article 15 para. 2 is to ensure that the Prosecutor has a sufficient basis to consider the seriousness of the information received before taking steps to launch a full investigation, there is no reason why the Prosecutor cannot activate a similar safeguard when situations have been referred to him or her by a State Party or the Security Council. It would fall within his or her prosecutorial discretion to seek such additional information in order to come to a fair conclusion on whether there is a reasonable basis to proceed. Article 14 para. 2 seems to support this interpretation when it provides that a State Party referral shall specify relevant circumstances and provide supporting documentation, "[a]s far as possible", suggesting that it may be possible for a State Party to make a submission which is accompanied by only sketchy information. It was not the intention of delegations at the Rome Conference to force the Prosecutor to invoke article 15 and initiate an investigation *proprio motu* when information received from a State Party or the Security Council is not sufficient to make an assessment pursuant to article 53 para. 1.

c) "initiate an investigation"

As stated under section A above, the phrase "initiate an investigation" has different meanings in the contexts of this provision and article 15. In the context of article 53 it means the launching of activities by the Prosecutor to assemble evidence with a view to the possible indictment and prosecution of perpetrators of crimes under the Court's jurisdiction. In article 15 para. 1 it refers to "preliminary examinations"⁸ for the purpose of determining *whether* to take steps to proceed to a full investigation.

d) "reasonable basis to proceed under this Statute"

In the original 1994 ILC Draft Statute the criterion used was "no possible basis". The current criterion entered the deliberations during the work of the Preparatory Committee

⁶ Article 15 para. 2 provides for the analysis by the Prosecutor of the information submitted to him or her. If he or she concludes that there is a reasonable basis on which to proceed, that information must under paragraph 3 be referred to the Pre-Trial Chamber for authorisation to continue with a full investigation.

⁷ Article 15 para. 2 pertains to *proprio motu* initiation of investigations by the Prosecutor.

⁸ See article 15 para. 6.

in 1996⁹. The reasonability test appears several places in the Statute in the context of assessment of information and evidence. It appears three times in article 15¹⁰, several times in article 53¹¹ and again in article 58 para. 1 (a)¹². It is tempting to ask whether the reasonability tests are essentially the same in all of these provisions.

With the exception of the use in article 58 para. 1 (a), the provisions refer to different aspects of the preliminary evaluation of information which is meant to enable the Prosecutor to determine whether to proceed to a full investigation. The test provided for in article 58 para. 1 (a) would only be activated after an investigation has assembled sufficient evidence to determine whether to proceed with indictment and prosecution¹³. The meaning of "reasonable grounds" within the context of article 58 para. 1 (a) will not be dealt with here, apart from mentioning that the test amounts to an assessment of whether the evidence shows the existence of a *prima facie* case against one or more perpetrators. But "reasonable grounds" is less stringent than the "beyond reasonable doubt" criterion which applies to the weighing of evidence at trial, as only evidence untested in the specific case under preparation is available prior to confirmation hearing and trial.

- 12 The information available at the time of the Prosecutor's preliminary evaluation is expected to be less comprehensive and conclusive than the evidence gathered by the completion of the investigation. It would therefore seem that the test of "reasonable basis" for preliminary information may constitute a lower threshold than the "reasonable grounds" test to be applied under article 58 para. 1 (a). This is indeed what appears from the three factors in subparagraphs (a), (b) and (c) of article 53 para. 1 which the Prosecutor is directed to consider when assessing the information. The "reasonable basis" element of the test would require that the Prosecutor, upon due application of his mind, be satisfied with regard to these three factors. In the *first* place he or she must be satisfied that a reasonable basis exists to believe that a crime within the jurisdiction of the Court has been committed. *Secondly*, the Prosecutor must be satisfied that the case is or would be admissible in terms of the criteria laid down in article 17. Finally, having considered the gravity of the crime and the interests of the victims, he or she must be

⁹ See the options for an article 26 para. 1 (b) (i), Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. II (Compilation of Proposals), U.N. Doc. A/51/22, p. 112.

¹⁰ Article 15 para. 3 requires that the Prosecutor has a "reasonable basis to proceed with an investigation". For the Pre-Trial Chamber to authorise the Prosecutor to continue, article 15 para. 4 requires that it considers there to be "a reasonable basis to proceed with an investigation". See article 15 para. 6 as well.

¹¹ Apart from appearing in the chapeau, article 53 para. 1 (a) requires that 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". The final subparagraph of article 53 para. 1 concerns what happens if the Prosecutor determines that there is "no reasonable basis to proceed" pursuant to subparagraph (c).

¹² Article 58 para. 1 (a) provides for the Pre-Trial Chamber to have "reasonable grounds to believe that the person has committed a crime within the jurisdiction of the court".

¹³ In this regard it should be noted that the criterion used in article 53 para. 2 is "sufficient basis for a prosecution". As this refers to an assessment of the result of the investigation, the question may be asked whether it would not have been better, in the interest of clarity and consistency, to use the same terminology in articles 53 para. 2 and 58 para. 1, using "sufficient basis" in article 58 para. 1 (a) as well.

satisfied that there are no substantial reasons to believe that an investigation would not serve the interests of justice.

e) "shall consider"

In determining whether to proceed with an investigation, the Prosecutor is required to take certain factors into account. The list of factors is cumulative, so the Prosecutor is obliged to consider all three. The third factor, through the use of the term "substantial reasons", enables the Prosecutor to take additional aspects into consideration. However, as explained above, the test at this stage is not a stringent one. It is not necessary for the Prosecutor to go beyond the listed factors to meet the test of "reasonable basis to proceed under this Statute". It is, however, imperative that each of these factors be satisfied. If one is lacking, no reasonable basis to proceed can be found to exist. 13

2. The different subparagraphs

(a) "reasonable basis to believe"

The factor "reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed" is one of three factors to be considered in determining whether a "reasonable basis to proceed under this Statute" exists. The use of the expression "reasonable basis" twice within the ambit of one provision was flagged at the Inter-Sessional Meeting held in Zutphen in January 1998¹⁴. However, the use of the "reasonable basis" test in the context of subparagraph 1 (a) does not conflict with the test in the chapeau. The former test refers only to one component of the latter test. 14

The "reasonable basis" test in subparagraph 1 (a) entails that the Prosecutor assesses the information placed before him or her. If it leads to the reasonable belief that a crime within the jurisdiction of the Court has been committed, a reasonable basis for such a belief naturally exists. It is not required at this stage that the information conclusively prove all the elements of the crime. 15

The necessity for the "reasonable basis" test in article 53 para. 1 (a) can be questioned. The Zutphen Report opened for it not to be retained¹⁵. Whilst draft article 47 para. 1 of the Zutphen text referred to "reasonable basis for a prosecution" (emphasis added), language kept in article 54 para. 1 of the Draft Statute of the Preparatory Committee, final article 53 para. 1 was, on the other hand, appropriately amended to refer to "reasonable basis to proceed under this Statute" (emphasis added). Likewise, Zutphen Draft article 47 para. 1bis (b) (i) and Draft article 54 para. 2 (b) (i) of the Preparatory Committee's proposed Statute both used the language "reasonable basis ... for proceeding with a prosecution", when final article 53 para. 1 (a) is more specific in that it refers to "reasonable basis to believe that a crime ... has been ... committed". The 16

¹⁴ A note was inserted after article 47 para. 1 in the Zutphen Draft, providing that "[t]he term 'reasonable basis' in the opening clause is also used in the criteria listed in 1bis (i). If the latter is retained, a broader term in the opening clause might be necessary in order to cover all the criteria listed under paragraph 1bis", see the Zutphen Report, *supra* note 3, pp. 86-87.

¹⁵ *Ibid.* ("If the latter is retained ...").

Rome Statute has, in other words, reduced the scope of the convergence between what is now articles 53 para. 1 and 53 para. 1 (a) *vis-à-vis* earlier drafts.

(b) "... is or would be admissible under article 17"

17 This criterion requires that the Prosecutor consider whether any of the grounds for inadmissibility of the case bar, or would bar, the Court from exercising jurisdiction. If one or more national criminal justice systems are genuinely investigating or prosecuting the crimes in question, the Prosecutor must conclude that there is no reasonable basis to proceed with an investigation. That is the effect of the primacy of national jurisdictions which the complementarity principle entails.

18 Article 18 of the Statute, on preliminary rulings regarding admissibility, places an obligation on the Prosecutor to notify States Parties and other States "which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned". If a State informs the Prosecutor within one month of receipt of the notice that it is investigating the crimes in question and requests the Prosecutor to defer, he or she must do so, unless the pre-Trial Chamber, on the application of the Prosecutor, decides to authorise the investigation. Article 18 para. 1 explicitly provides that the Prosecutor's notification obligation is only activated *when* the Prosecutor "has determined that there would be a reasonable basis to commence an investigation", in cases where the situation has been referred to the Court by a State Party pursuant to article 13 (a). This means that the Prosecutor is only obliged to notify States as required by article 18 *after* he or she has made a determination that there is a "reasonable basis to proceed" pursuant to article 53 para. 1. It would seem that this is also the rule when the Prosecutor is acting *proprio motu* on the basis of article 13 (c), albeit article 18 para. 1 is ambiguous in that it says that the same applies when "the Prosecutor initiates an investigation pursuant to articles 13 (c) and 15". The fact that the Prosecutor has obtained the authorisation of the Pre-Trial Chamber under article 15 para. 4 does not obviate his or her obligation to consider whether an investigation would serve the interests of justice as required by article 53 para. 1 (c). Article 53 para. 1 does not require that the Prosecutor must go through any formal procedure supervised by the Court. Although the relationship between articles 15 and 53 was not completely thought through by the delegates, it seems obvious that the burden of the Prosecutor under articles 13 (c) and 15 cannot be less stringent than in the situations of article 13 (a) and (b).

(c) Elements to be considered under subparagraph 1 (c)

a) "*gravity of the crime*"

19 Consideration of the "gravity" of the case is one of the criteria to be assessed in determining the admissibility of a case before the Court in terms of article 17¹⁶. As admissibility pursuant to article 17 has been included by article 53 para. 1 (b) as one of the considerations to be taken into account in ascertaining the existence of a reasonable basis to proceed, the need for a repetition may be questioned. Its inclusion may be seen

¹⁶ See article 17 para. 1 (d).

as a reflection of the concern of many delegations to the Preparatory Committee and the Rome Conference that the interests underlying the complementarity principle sufficiently permeate the Statute. Preambular paragraph nine refers to "the most serious crimes of concern to the international community as a whole", whilst article 1 confirms that the Court's jurisdiction covers "the most serious crimes of international concern"¹⁷. Crimes that are not of sufficient gravity for the ICC will be left to possible domestic investigation and prosecution.

β) *"interests of victims"*

Although the victims of the crimes falling within the jurisdiction of the Court, and members of their families, may have a paramount interest in the investigation and prosecution of the perpetrators of the crimes, this provision recognises that there are factors which may outweigh this interest. The presence of such factors would exclude a finding that there is a reasonable basis to proceed. 20

γ) *"substantial reasons to believe"*

It would seem that this phrase opens the possibility for using any available ground as a basis for the argument that further investigation would not serve the interests of justice. Although the exact content of the phrase "substantial reasons" is indeterminate, the Prosecutor may not arbitrarily determine the existence of such a reason in order to avoid an investigation by invoking this provision. He or she would have to be able to advance convincing arguments to show the existence of such a reason. The discretionary power which this provision grants the Prosecutor is judicially supervised by article 53 para. 1 *if*, which requires the Prosecutor to notify the Pre-Trial Chamber of such a determination. In such an event the Pre-Trial Chamber is empowered to review the determination *ex officio*¹⁸. If it decides to do so, the Prosecutor's decision requires confirmation by the Pre-Trial Chamber. 21

δ) *"interests of justice"*

As in the discussion on "substantial reasons", the exact content of "interests of justice" is not defined. This does not, however, open the door for the Prosecutor to escape investigation by invoking arbitrary grounds under this provision. In view of the authority of the Pre-Trial Chamber to review such a decision on its own initiative¹⁹, or at the request of the Security Council or referring State Party, the Prosecutor must exercise the discretion in a reasonable manner and be able to substantiate a decision not to proceed. 22

Article 53 para. 2 (c) refers to the age and infirmity of the alleged perpetrator as relevant factors in the determination of whether a prosecution is in the interests of justice. The non-inclusion of the two factors in article 53 para. 1 (c) has no significance 23

¹⁷ The reference to the commission "as part of a plan or policy or as part of a large-scale commission of such crimes" in article 8 para. 1 can also be read in this light.

¹⁸ See article 53 para. 3 (b).

¹⁹ *Ibid.*

beyond the fact that it will often not be known at the article 53 para. 1 stage of the process who the suspected perpetrator is.

3. Final subparagraph

- 24 As indicated above, a decision of the Prosecutor not to proceed with an investigation which is based solely on article 53 para. 1 (c) cannot be made on arbitrary grounds. That could amount to abuse of prosecutorial discretion. The Prosecutor is obliged to notify the Pre-Trial Chamber of such a decision. The Pre-Trial Chamber, which has certain powers to function as a safeguard for the responsible exercise by the Prosecutor of his or her powers, is then empowered to review the decision of the Prosecutor²⁰. If the Prosecutor's finding of no reasonable basis to proceed is based on any of the other two criteria provided for in this provision, it is not required that the Prosecutor inform the Pre-Trial Chamber. This is irrespective of whether such a determination is also based on the provision currently under discussion, which the word "solely" clearly indicates.
- 25 Although the Prosecutor is obliged to inform not only the Pre-Trial Chamber but either the Security Council or the referring State Party pursuant to article 53 para. 2 *i.f.* about his conclusion not to prosecute, a similar extension of the Prosecutor's notification duty does not apply to article 53 para. 1. The fact that article 53 para. 3 (a) provides that the Security Council and the referring State may request the Pre-Trial Chamber to review a decision of the Prosecutor under both article 53 paras. 1 and 2 not to proceed, does not affect the scope of the Prosecutor's obligation to inform.

II. Paragraph 2

1. Chapeau ^y

- 26 Paragraph 2 deals with the situation where the Prosecutor has completed the formal investigation. He or she must consider the evidence gathered, weigh it and determine whether it provides "a sufficient basis for a prosecution". The test "sufficient basis" essentially entails considering whether the evidence gathered would provide a basis on which a court can convict the suspect. In certain jurisdictions this is referred to as the *prima facie* test. Guidance for the determination of sufficiency is provided for in three criteria listed as subparagraphs (a) to (c) in the provision. The Prosecutor may use any of these three separately or in combination to justify a decision not to proceed to a prosecution.

2. The different subparagraphs

- (a) "not a sufficient legal or factual basis to seek a warrant or summons under article 58"
- 27 *Subparagraph* (a) is not a mere repetition of the sufficient basis test in the chapeau, insofar as it brings in the "reasonable grounds" standard in article 58 para. 1 (a). The latter provides that the Pre-Trial Chamber can only issue an arrest warrant if it is satisfied that there are "reasonable grounds to believe that the person has committed a

²⁰ See article 53 para. 3 (b).

crime within the jurisdiction, of the Court". In other words, unless the Prosecutor concludes that there are reasonable grounds to believe that the suspect has committed a crime within the Court's jurisdiction, there is not a sufficient basis for a prosecution. This provision entails that the Prosecutor assesses in detail the result of the investigation. It must be ascertained whether the collected evidence satisfies the elements of a crime falling within the jurisdiction of the Court and links one or more perpetrators to the crime. If this is the case, a sufficient legal and factual basis exists. The Prosecutor may then, as a first step in the initiation of the actual prosecution, seek the issue of a warrant of arrest with a view to obtaining the presence of the suspect before the Court for prosecution.

(b) "inadmissible under article 17"

If any of the inadmissibility grounds listed in article 17 para. 1 bar, or would bar, the Court from exercising jurisdiction, the Prosecutor must conclude that there is not a sufficient basis for a prosecution. This will typically be the situation where the case is being investigated or prosecuted genuinely in a State which has jurisdiction.

(c) Elements to be considered under subparagraph 2 (c)

α) "age or infirmity of the alleged perpetrator"

The terms "interests of justice", "the gravity of the crime" and "the interests of victims" referred to in article 53 para. 2 (c) have been considered above in the section on article 53 para. 1 (c), see margin Nos. 19 et seq. As their content in the context of this provision is essentially the same, they will not be dealt with again. Subparagraph 2 (c) does, however, contain an open reference to all circumstances, and it mentions two criteria which do not appear in the wording of article 53 para. 1 (c). The first is that of the age or infirmity of the alleged perpetrator. An alleged perpetrator may be so old or ill that it may not serve the interests of justice to proceed to a prosecution. Each case will have to be determined on its own merits.

β) "his or her role in the alleged crime"

This is the second criterion that is not included in article 53 para. 1 (c). As is the case with all the other criteria, this is also not absolute. It is possible that the role of a suspect, while satisfying all the elements of the crime, was so insignificant as to make it counter to the interests of justice to proceed with a prosecution. This could be the case where, for instance, it would be possible to institute a prosecution against an abettor of the alleged crime whilst the true perpetrator remained beyond the reach of justice. To proceed with the prosecution of the abettor could lead to the exposure, including exposure to personal danger, of witnesses who are important to the case against the main perpetrator.

3. Final subparagraph

- 31 As to the final part of this paragraph, the Prosecutor is obliged to notify the Pre-Trial Chamber as well as the Security Council or the referring State Party, depending on who referred the situation to the Prosecutor, of his or her determination that there is not a sufficient basis for a prosecution. The Prosecutor must provide reasons for the conclusion, which indicates that the decision must not be arbitrary.

III. Paragraph 3

1. Subparagraph (a)

- 32 Subparagraph 3 (a) grants the Pre-Trial Chamber a conditional discretion to review decisions by the Prosecutor not to proceed with investigation or prosecution pursuant to article 53 paras. 1 and 2. Following the review, the Pre-Trial Chamber may request the Prosecutor to reconsider his or her decision.

α) "at the request"

- 33 The power of the Pre-Trial Chamber to review a decision not to investigate or prosecute must be triggered by a request from the entity which originally referred the situation to the Prosecutor, *i.e.*, either the Security Council or a State Party.

β) "may review"

- 34 Once a request to review a decision by the Prosecutor has been lodged by the referring party, the Pre-Trial Chamber has discretion whether to proceed to a review or not. No guidance is given on what considerations the Chamber must base its decision to accede to the review request or not.

In the review of the decision of the Prosecutor, the Chamber would seem to be restricted to the written record of the investigation and the reasons advanced for the Prosecutor's decision.

The provision gives no direct guidance as to what the Pre-Trial Chamber should take into consideration when conducting its review. It could be expected that the Chamber would take into consideration the same criteria provided for the Prosecutor in article 53 para. 1 when reviewing a decision not to institute an investigation. Likewise, when reviewing a decision not to proceed with a prosecution, the Chamber can be expected to base its review on the same criteria that are set for the Prosecutor in article 53 para. 2.

γ) "request the prosecutor"

- 35 The Pre-Trial Chamber may not, upon review of the Prosecutor's decision, substitute its own decision for that of the Prosecutor. That would violate the fundamental concept of prosecutorial independence. The Chamber may only request the Prosecutor to reconsider the decision not to prosecute.

8) "reconsider that decision"

The provision is silent on whether the Prosecutor is bound by a request of the Pre-Trial Chamber. The intention of the provision, however, is not in any way to infringe on the independence of the Prosecutor. Whilst the Prosecutor will indeed be bound to reconsider his or her decision not to investigate or prosecute, he or she would not be obliged to come to a different conclusion. If the reconsideration would lead to the same conclusion as before,²¹ this would be a permissible exercise of prosecutorial independence, provided the Prosecutor had properly applied his or her mind in coming to the conclusion. 36

In reconsidering the decision, the Prosecutor would be guided by the same considerations contained in paragraphs 1 or 2 of article 53. The decision arrived at then would be delivered pursuant to a paragraph 3 review. This would mean that it could not be said that the decision upon reconsideration was a decision under paragraphs 1 or 2. As such the Security Council or the referring State Party would not be entitled to request a further review. 37

2. Subparagraph (b)

This paragraph provides an automatic right for the Pre-Trial Chamber to review a decision of the Prosecutor not to investigate or prosecute, if the decision is based solely on considerations of interests of justice²¹. 38

The use of the phrase "own initiative" denotes an automatic right of review for the Pre-Trial Chamber. Although the Provision is couched in discretionary terms, it is questionable whether the Chamber does indeed have a real discretion. A decision by the Prosecutor not to institute an investigation or prosecution solely based on respectively paragraphs 1 (c) or 2 (c) of article 53 is not effective *per se*. In order to be valid such decisions must be confirmed by the Pre-Trial Chamber. This conflicts with the indication in the previous sentence of the provision that affords the Chamber a discretion to decide whether or not to review such a decision. If the Prosecutor's decision has no validity unless confirmed by the Pre-Trial Chamber, the Chamber is necessarily bound to review all such decisions of the Prosecutor. A different interpretation would result in the potential paralysis of the Court were the Pre-Trial Chamber to refrain from reviewing such a decision.

IV. Paragraph 4

This provision grants the Prosecutor a discretionary power to resurrect an investigation or prosecution that he or she had previously decided had no reasonable basis or sufficient basis on which to proceed. A prior decision not to proceed does not therefore have the effect of making the Prosecutor *functus officio*. 39

There is no explicit empowerment in article 53 for the Prosecutor to decide to indeed prosecute and proceed with the initiation thereof. This power is also not explicitly provided for elsewhere in the Statute. The manner in which subparagraph 4 is worded,

²¹ See respectively article 53 paras. 1 (c) and 2 (c).

however, confirms that article 53 is based on the obvious presumption that the outcome of the investigation may be a decision by the Prosecutor to initiate a prosecution²².

40 The only requirement for the Prosecutor to be able to reconsider a prior decision is that new facts or information become available. If this were the case, they would have to be of such a nature as to create the possibility that they could eliminate the former shortfall in the information which led to the decision.

The provision refers to "a decision *whether* to initiate" (emphasis added), which includes reconsideration by the Prosecutor of positive decisions to investigate and prosecute, not only determinations that there is no reasonable or sufficient basis.

²² See the formulation "... a decision whether to initiate [a] ... prosecution".