



**Article 15 Communication**

**Assessing gravity, jurisdiction and evidence in the Situation on Registered Vessels  
of Comoros, Greece and Cambodia**

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## 1. Introduction

1. The preliminary examination of the *Situation on Registered Vessels of Comoros, Greece and Cambodia* (the “Situation”) was opened by the Office of the Prosecutor (OTP) on 14 May 2013, following a referral “received on behalf of the authorities of the Union of the Comoros with respect to the 31 May 2010 Israeli interception of a humanitarian aid flotilla bound for the Gaza strip”.<sup>1</sup>
2. On 6 November 2014, the OTP issued an “Article 53(1) report” (hereinafter the “Article 53 Report”), which concluded that the opening of a formal investigation was not warranted because the events did not meet the gravity threshold of Article 17(1)(d). This decision has given rise to five years of litigation<sup>2</sup>.
3. On 16 July 2015, Pre-Trial Chamber I, having been seized by the Comoros pursuant to Article 53(3)(a) of the Rome Statute issued an decision (hereinafter the “2015 PTC I decision”) whereby it found that 1) the Prosecutor had erred in her legal interpretation of the standard of proof at the Preliminary Examination phase and 2) that the Prosecutor had erred in her material assessment of the gravity of the situation. As a consequence, the Judges, by majority, requested that the Prosecutor review her decision<sup>3</sup>.
4. On 29 November 2017, the Prosecutor issued her “final” decision on the matter and confirmed the initial decision not to proceed. In that decision (hereinafter the “2017 review decision”), the Prosecutor 1) rejected the legal interpretation put forward by the Pre-Trial Chamber of the applicable legal framework and 2) rejected the Pre-Trial Chamber’s assessment of the available information<sup>4</sup>.
5. On 15 November 2018, Pre-Trial Chamber I, having once again been seized by the Comoros, considered that the Prosecutor was not free to set aside the legal and factual findings laid down in the 2015 PTC I decision. The Judges requested once

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<sup>1</sup> ICC, *Situation on the Registered Vessels of the Union of Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Article 53(1) Report, OTP, 6 November 2014, para. 2.

<sup>2</sup> For a comprehensive procedural history, see : ICC, *Situation on the Registered Vessels of the Union of Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Judgment on the appeal of the Prosecutor against Pre-Trial Chamber I’s ‘Decision on the “Application for Judicial Review by the Government of the Union of the Comoros”’, Appeals Chamber, 2 September 2019, para. 6-25.

<sup>3</sup> ICC, *Situation on the Registered Vessels of the Union of Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation, PTC I, 16 July 2015.

<sup>4</sup> ICC, *Situation On Registered Vessels Of The Union Of The Comoros, The Hellenic Republic Of Greece, And The Kingdom Of Cambodia*, Final decision of the Prosecution concerning the “Article 53(1) Report” (ICC-01/13-6-AnxA) dated 6 November 2014, OTP, 30 November 2017.



again that the Prosecutor review her decision not to proceed (hereinafter the “2018 PTC I decision”).<sup>5</sup>

6. This decision was appealed by the OTP and, on 2 September 2019, the Appeals Chamber issued its Judgment (hereinafter the “Appeals Chamber Judgment”) in which it found that the Prosecutor had erred by not applying the legal framework as interpreted by the Pre-Trial Chamber, and that therefore the Pre-Trial Chamber “did not err when it decided to direct the Prosecutor to carry out a new reconsideration of her Decision not to Investigate”.<sup>6</sup> The Appeals Chamber invited the Prosecutor to issue a final decision by 2 December 2019.<sup>7</sup>
7. This communication aims to assist the OTP settle its reconsideration decision. It is argued that nothing in the PTC decision or the Appeals Chamber Judgment warrants a change in the Prosecutor’s decision not to commence an investigation based on an assessment of the gravity of the situation.
8. Moreover, this communication suggests that the reconsideration decision is an opportunity for the OTP to clarify a number of legal questions which were underdeveloped in the initial decision not to open an investigation, such as the definition and scope of the situation and the basis for the exercise of territorial jurisdiction.
9. Finally, it should be noted that, while this communication is focused on a selected number of discrete issues which are central to the actual reconsideration of its Prosecutor’s decision, this is without prejudice to the question of whether the ICC is permitted to exercise jurisdiction over nationals of a non-State Party to the Rome Statute absent a Security Council referral pursuant to Article 13(b) of the Rome Statute<sup>8</sup>.

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<sup>5</sup> ICC, *Situation on the Registered Vessels of the Union of Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Decision on the “Application for Judicial Review by the Government of the Union of the Comoros”, PTC I, 15 November 2018.

<sup>6</sup> ICC, *Situation on the Registered Vessels of the Union of Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Judgment on the appeal of the Prosecutor against Pre-Trial Chamber I’s ‘Decision on the “Application for Judicial Review by the Government of the Union of the Comoros”’, Appeals Chamber, 2 September 2019, para. 94.

<sup>7</sup> While Chambers obviously have some discretion in setting time-limits for the deposit of filings, one may wonder to what extent it was within the purview of the Appeals Chamber, seized of a very specific appeal, to intervene in the timing of the subsequent review process which should be entirely at the discretion of the Prosecutor.

<sup>8</sup> S. Kay QC and J. Kern, Preconditions to the exercise of jurisdiction over nationals of non-States Parties, Article 15 Communication, 19 August 2019.



10. One particular procedural aspect of this case needs to be highlighted from the start. The 2015 PTC I decision presents a number of difficulties in terms of the interpretation of both the general legal framework applicable to the exercise by the Prosecutor of her discretion under article 53 of the Rome Statute, more particularly in relation to the assessment of evidence,<sup>9</sup> and the legal framework applicable to the assessment of the gravity of a situation under article 53(1)(b) of the Rome Statute<sup>10</sup>. Yet, because the Prosecutor's appeal of that request was rejected *in limine* on 6 November 2015<sup>11</sup>, it has become final for the purposes of the current situation<sup>12</sup>. The consequence of this procedural situation is that the Prosecutor is currently bound to apply a legal framework that is subject to caution, might not be followed by subsequent Pre-Trial Chambers and might not survive appellate review in future situations.
11. The OTP must therefore make clear in its upcoming final decision that, while it might be legally obligated to apply the interpretation of the law given by Pre-Trial Chamber I in its 16 July 2015 request in the *Comoros Situation*, as per the recent Appeals Chamber Judgment, it will be free to put forward *de novo* its own understanding of the legal framework in any future request to open an investigation or decision not to open an investigation.
12. In that spirit, this communication also raises some of the more troublesome issues relating to the 2015 PTC I decision which it is submitted, as both a matter of law and policy, should not be followed in the future.

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<sup>9</sup> See *infra*, section 4.

<sup>10</sup> See *infra*, section 5.

<sup>11</sup> ICC, *Situation on the Registered Vessels of the Union of Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Decision on the admissibility of the Prosecutor's appeal against the "Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation", Appeals Chamber, 6 November 2015. The Prosecutor had appealed directly under article 82(1)(a) of the Rome Statute, considering that it had an appeal of right due to the fact that the challenged decision related to admissibility. The Appeals Chamber found on the contrary that the decision was not one directly finding that a situation was or not admissible and as a consequence considered that the Prosecutor should have sought leave to appeal the decision under Article 82(1)(d) of the Statute.

<sup>12</sup> As confirmed by the most recent Appeals Chamber Judgment: "At the outset, the Appeals Chamber notes the finding of the Pre-Trial Chamber that the 16 July 2015 Decision had 'acquired the authority of a final decision'. In the view of the Appeals Chamber, this finding was correct. The Prosecutor had unsuccessfully tried to appeal that decision under article 82(1)(a) of the Statute, an appeal which the Appeals Chamber had dismissed in limine, and the time limits for any other potential avenues for appeal had expired. Therefore, the Prosecutor could no longer challenge the 16 July 2015 Decision, which had become final. Consequently, the Prosecutor had to conduct her reconsideration on the basis of the 16 July 2015 Decision." (ICC, *Situation on the Registered Vessels of the Union of Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Judgment on the appeal of the Prosecutor against Pre-Trial Chamber I's 'Decision on the "Application for Judicial Review by the Government of the Union of the Comoros"', Appeals Chamber, 2 September 2019, para. 84)



## 2. The need to revisit the territorial precondition to the exercise of jurisdiction

13. The Prosecutor's upcoming final decision could be an opportunity to clarify whether in fact the preconditions for the exercise of jurisdiction were satisfied in the present situation.
14. In its Article 53(1) Report, the Prosecutor approached the matter in the following way:<sup>13</sup>

“The events under examination primarily occurred on board the *Mavi Marmara*, a vessel registered in the Comoros at the time of the incident. Comoros is a State Party to the Rome Statute since 18 August 2006. The Court may therefore exercise jurisdiction over Rome Statute crimes committed on the territory of, or on vessels and aircraft registered in, the Comoros on or after 1 November 2006. The Court thus has jurisdiction *ratione loci* under article 12(2)(a) (“State of registration of that vessel”) over conduct or crimes committed on board the *Mavi Marmara*.”
15. It appears from the Article 53(1) Report that the Prosecutor relied entirely on a (purported) registration certificate appended to the Comoros referral<sup>14</sup> and did not seem to have made any independent verification of the legal registration of the *Mavi Marmara* before, during or after the alleged incidents. Yet, this is a crucial issue, as only through satisfaction of the territorial precondition to the exercise of jurisdiction could the ICC even begin to consider exercising jurisdiction over the incident.
16. Exploring this issue further now would also be an appropriate policy choice because, since that initial decision, the ICC has been presented with some elements that may cast doubt on whether the territorial precondition was in fact satisfied in this case.
17. Indeed, it appears that the ship was acquired by the IHH, as the main organiser of the flotilla, in April 2010 (a mere few months before the relevant events) and at the

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<sup>13</sup> ICC, *Situation on the Registered Vessels of the Union of Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Article 53(1) Report, OTP, 6 November 2014, para. 17.

<sup>14</sup> *Id.*, footnote 20.



time of purchase it was registered as a Turkish vessel.<sup>15</sup> It seems to have been registered in Comoros on 1 May 2010 before being reflagged in Turkey a few months later, on 1 February 2011<sup>16</sup>.

18. If verified, this sequence of events casts doubt on the actual relationship between Comoros and the *Mavi Marmara* at the time of the events. This is an important point, because an established rule of the law of the sea is that there must exist a “genuine link” between a ship and the flag State for conferral of nationality to that ship. This rule is enshrined in the 1982 Convention on the Law of the Sea which provides that: “Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship”.<sup>17</sup> The 1958 Convention on the High Seas clarifies what this “genuine link” might entail: “in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag”.<sup>18</sup>
19. In the current Situation, it would be perfectly reasonable to raise questions on the actual existence of a “genuine link” between Comoros and the *Mavi Marmara*, and it is incumbent on the OTP to make the appropriate verifications into whether Comoros was in a position to “effectively exercise its jurisdiction” over the ship at the material time.
20. In such ambiguous factual circumstances, it is crucial that the Prosecutor demonstrates an autonomous capacity to satisfy the requisite precondition to the exercise of jurisdiction, as well as the existence of the Court’s jurisdiction in order to avoid any perception that the ICC can be manipulated, for example through the use of flags of convenience, into intervening in a situations where it would not otherwise be permitted to exercise jurisdiction.
21. While there is some debate on the exact consequences of the absence of such a “genuine link” between a ship and the ship of registration<sup>19</sup>, here, the absence of a

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<sup>15</sup> ICC, *Situation on the Registered Vessels of the Union of Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Application pursuant to Article 119(1) of the Rome Statute, Shurat Ha-Din – Israel Law Center, 31 January 2019, para. 30.

<sup>16</sup> ICC, *Situation on the Registered Vessels of the Union of Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Application pursuant to Article 119(1) of the Rome Statute, Shurat Ha-Din – Israel Law Center, 31 January 2019, Annex 3.

<sup>17</sup> 1982 United Nations Convention on the Law of the Sea, Article 91(1).

<sup>18</sup> 1958 United Nations Convention on the High Seas, Article 5(1).

<sup>19</sup> On this, see Richard A Barnes, “Flag States”, in Donald R. Rothwell, Alex G. Oude Elferink, Karen N. Scott, Tim Stephens (eds), *The Oxford Handbook of the Law of the Sea* (OUP, 2015), p. 306-309.



“genuine link” between the *Mavi Marmara* and Comoros could have - as a logical consequence - the effect that the Comorian nationality of the ship is not be recognised by the Prosecutor, with the result that the territorial precondition to the exercise of jurisdiction under Article 12(2)(a) would not be satisfied with respect to incidents occurring on that vessel.

### 3. The scope of the “situation”

22. A particular aspect of the *Comoros Situation* that could be clarified in the Prosecutor’s upcoming final decision is the nature of a “situation” in the Rome Statute context.
23. Indeed, the referral by Comoros is arguably the narrowest referral ever received by the OTP, in terms of its geographical, temporal, material and personal scope<sup>20</sup>. It essentially relates to one incident, which in all other “situations” investigated by the Court thus far would be but one among many alleged incidents considered in the context of a broader situation.
24. It is acknowledged here that the Rome Statute itself does not define the scope of a “situation”. The case law of the ICC has so far provided only generic definitions of a situation. For example, in the *Situation in the Democratic Republic of Congo*, Pre-Trial Chamber I presented situations as “generally defined in terms of temporal, territorial and in some cases personal parameters”.<sup>21</sup> No further explanation of the concept of a “situation” is provided in any other Court documents, be it from the Registry or the OTP. Indeed, neither the Policy Paper on Preliminary Examinations<sup>22</sup> nor the Policy Paper on Case Selection and Prioritisation<sup>23</sup> define a “situation”.
25. Commentators who discuss this matter seem not to advance a clear definition of a “situation”. For example, Antonio Marchesi and Eleni Chaitidou state that “the concept of a ‘situation’ must be understood in a general and broad fashion: a description of facts defined by space and time, which circumscribe the prevailing

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<sup>20</sup> The exact scope of the “referred situation” was the object of some confusion in the early stages of the proceedings, and was only settled after some clarifications were requested from the Comoros by the OTP.

<sup>21</sup> ICC, *Situation in the Democratic Republic of Congo*, Decision on the Applications for Participation in the Proceedings of VPRS-1, VPRS-2, VPRS-3, VPRS-4, VPRS-5, VPRS-6, VPRS-7, PTC I, 17 January 2006, para. 65.

<sup>22</sup> ICC, *Policy Paper on Preliminary Examinations*, OTP, November 2013.

<sup>23</sup> ICC, *Policy Paper on Case Selection and Prioritisation*, OTP, 15 September 2016.



circumstances at the time”.<sup>24</sup> Nor do authors always differentiate between “situations” and “cases” with clarity. William Schabas notes that “the line between a ‘situation’ and a ‘case’ does not have precise boundaries, however, to the extent that there is no sense defining a ‘situation’ in the absence of some indication that there are ‘potential cases’ involving the individual accused”.<sup>25</sup> Mohammad Zakerhossein takes a more procedural approach, stating that “the dividing line between the phase of a situation and the stage of a case is drawn by the issuance of a warrant of arrest or a summons”.<sup>26</sup> This is of course technically true, but does not provide an actual definition of either a ‘situation’ or a ‘case’.

26. Despite this absence of clear definitions, it should be acknowledged that accepting the *Comoros Situation* as a “situation” raises a number of difficulties. Firstly, legally, one can wonder whether to accept what is essentially one incident as a “situation” creates a risk of blurring the line between a “situation” and a “case” in a potentially dangerous manner. Indeed, opening an investigation into such a narrowly defined “situation” would be equivalent to the opening of investigation into a “situation” solely constituted of the attack on Bogoro,<sup>27</sup> rather than in the DRC, or over alleged attacks on African Union Peacekeepers,<sup>28</sup> rather than in Darfur.<sup>29</sup>
27. The fact is that the flotilla event clearly falls under the definition of a case, as opposed to the broader context of a situation. Indeed, a ‘case’ has been described in the following way at the ICC: “specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects.”<sup>30</sup>

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<sup>24</sup> Antonio Marchesi and Eleni Chaitidou, “Article 14”, in Triffterer and Ambos, *The Rome Statute of the International Criminal Court, a Commentary, Third Edition* (Nomos, 2016), para. 25.

<sup>25</sup> William Schabas, “Selecting situations and cases”, in Stahn, *The Law and Practice of the International Criminal Court* (OUP, 2015), p. 366.

<sup>26</sup> Mohammad Hadi Zakerhossein, *SITUATION SELECTION REGIME AT THE INTERNATIONAL CRIMINAL COURT* (Intersentia, 2017), p. 28.

<sup>27</sup> Which was the basis of the *Katanga and Chui* case.

<sup>28</sup> Which was the basis for the *Abu Garda* case.

<sup>29</sup> It is acknowledged here that the Special Tribunal for Lebanon was created to essentially deal with one “case”. However, putting aside the question of whether this was in fact good policy, the difference with the ICC is that the latter was explicitly set up with a legal framework providing for a sequence of procedural steps distinguishing “situations” from “cases”. That distinction needs to be made operational.

<sup>30</sup> ICC, *Situation in the Democratic Republic of Congo*, Decision on the Applications for Participation in the Proceedings of VPRS-1, VPRS-2, VPRS-3, VPRS-4, VPRS-5, VPRS-6, VPRS-7, PTC I, 17 January 2006, para. 65. See also ICC, *Prosecutor v. Saif al-Islam Gaddafi and Abdullah al-Senussi*, Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled ‘Decision on the admissibility of the case against Saif Al-Islam Gaddafi’, Appeals Chamber, 21 May 2014 (finding that



28. Secondly, maintaining a clear distinction between a 'situation' and a 'case' is all the more important when considering the reason why this distinction was included in the Rome Statute in the first place.
29. Article 25(2) of the 1994 Draft Statute had proposed a complaints system whereby States would bring specific crimes to the attention of the Prosecutor<sup>31</sup>. However, during the Preparatory Committee discussions "some delegations were uneasy with a regime that allowed any State party to select individual suspects and lodge complaints with the Prosecutor with respect to them, for this could encourage politicization of the complaint procedure".<sup>32</sup> As a result, the notion of a 'situation' was introduced, to avoid the "awkwardness of States, as such, selecting individual persons suspected perpetrators for prosecution by the ICC"<sup>33</sup> and therefore ultimately "to prevent States from referring specific crimes or cases against specific suspects and thus use the Court for political agendas".<sup>34</sup>
30. From this drafting history, it emerges clearly that the choice of the word "situation" during the Rome Conference was motivated by the idea of preventing a State from filing strategic referrals that would only target certain groups for

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for the purposes of defining a case, "Incident" is understood as referring to a historical event, defined in time and place, in the course of which crimes within the jurisdiction of the Court were allegedly committed by one or more direct perpetrators." (para. 62.)). It should be noted that the Prosecutor's finding, in the Article 53(1) Report that the flotilla incident is, according to her, linked to the broader context of what she calls "Israel's occupation of the Gaza Strip and the naval blockade pertaining to it", should logically have led her, in order to be consistent with that finding, to conclude that what happened on board the *mavi marmara* is one incident in this broader context (i.e. a 'case') and therefore cannot be considered a standalone "situation" (ICC, *Situation on the Registered Vessels of the Union of Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Article 53(1) Report, OTP, 6 November 2014, para. 128).

<sup>31</sup> A "State Party which accepts the jurisdiction of the Court under Article 22 with respect to a crime may lodge a complaint with the Prosecutor alleging that such a crime appears to have been committed" (Article 25(2), Report of the International Law Commission on the Work of its Forty-sixth Session, 2 May – 22 July 1994, Official Records of the General Assembly. p. 45).

<sup>32</sup> Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume I, 1996, par. 146.

<sup>33</sup> Antonio Marchesi and Eleni Chaitidou, "Article 14", in Triffterer and Ambos, *The Rome Statute of the International Criminal Court, a Commentary, Third Edition* (Nomos, 2016), para. 6. On this see also, Mohammad Hadi Zakerhossein, *SITUATION SELECTION REGIME AT THE INTERNATIONAL CRIMINAL COURT* (Intersentia, 2017), p. 27-28: "In fact, the ability to target specific incidents and persons could direct the Court into one-sided prosecutions and consequently could damage the reputation of the Court due to infamous selective justice. To avoid this undesirable consequence, the possibility of referring specific cases to the ICC for prosecution was rejected."

<sup>34</sup> Antonio Marchesi and Eleni Chaitidou, "Article 14", in Triffterer and Ambos, *The Rome Statute of the International Criminal Court, a Commentary, Third Edition* (Nomos, 2016), para. 25.



certain crimes. In this respect, accepting the Comoros referral is antinomic with this intent of the drafters.

31. Thirdly, from a policy and operational perspective, acceptance of the Comoros referral potentially opens the door to fragmented OTP investigative practices, requiring devotion of considerable resources to investigation of isolated incidents around the world identified under the label of “situations”.

#### 4. The evaluation of evidence

32. A key consideration in the current litigation has been how evidence should be assessed at the preliminary examination phase.

##### *4.1. The Prosecutor’s assessment of the available information in the current situation*

33. This communication agrees that, in the current situation, the Prosecutor adopted the appropriate standard to review the information at her disposal. More particularly, in her 2017 review decision the Prosecutor adopted a welcome critical approach to the elements in her possession. This critical approach was applied to both legal and factual determinations.
34. In relation to legal determinations, for example, the Prosecutor explained that she had an autonomous duty to assess the legal qualification of alleged incidents and was not bound by the legal arguments put forward by outside organisations.<sup>35</sup>
35. In relation to factual determinations, the Prosecutor assessed in detail the evidence provided in witness statements, identifying inconsistencies and possible improbable claims.
36. For example, regarding the allegation that there was live fire before boarding of the ship, the Prosecutor provides a detailed analysis of the credibility of the 10 eye-witnesses put forward by the Comoros and their lawyers, noting for example that

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<sup>35</sup> ICC, *Situation On Registered Vessels Of The Union Of The Comoros, The Hellenic Republic Of Greece, And The Kingdom Of Cambodia*, Final decision of the Prosecution concerning the “Article 53(1) Report” (ICC-01/13-6-AnxA) dated 6 November 2014, OTP, 30 November 2017, para. 163: “The Comoros and the victims represented by OPCV referred to the assessment of the UN Human Rights Council that the mistreatment was ‘cruel and inhuman in nature’. However, the assessment of a third party cannot replace the Prosecution’s own obligations under the Statute. Article 53(1) requires that the Prosecution is satisfied that the requisite criteria for initiating an investigation are met, based on its own appreciation of the law and facts, applying the appropriate standard of proof”.



one of them was on another ship, that another claimed to be below deck when the boarding occurred so could not possibly see if the IDF had started shooting before boarding the ship, or that some have made obvious material mistakes in their recollection of the order of events. The Prosecutor also notes that 4 eye-witnesses *“were actively participating in the resistance aboard the Mavi Marmara at the material times”* and that therefore *“there is also a heightened risk of bias, both to justify their own actions and potentially to impugn the conduct of the IDF”*.<sup>36</sup>

37. The Prosecutor properly made the following general finding regarding witness statements received: *“As a preliminary matter, the Prosecution notes that many of the personal accounts appear to reflect some form of contact or link between their authors. In particular, the information available may lead to the conclusion that some persons who have sought to participate in these proceedings as victims have not only received some organised assistance in the practical arrangements to submit their applications, but also some forms of assistance related to the content or presentation of the accounts that they provide”*.<sup>37</sup> The Prosecutor then provides a list of examples of apparent similarities as to the content of the applications, which are also the object of an annex to the Report.<sup>38</sup>
38. The Prosecutor also noted that *“the vast majority of victim applications in its possession declare, contrary to the impression given by their content, that the applicant is applying on their own behalf, without any assistance other than that of an interpreter, where required. The Prosecution is mindful that victim applications are not sworn statements, and are neither intended nor used as such. However, as a matter of good practice, it underlines its view that any organisation assisting persons to come into contact with the Court—a practice which is welcomed and encouraged—should ensure that the nature and extent of their role in assisting the applicant is made clear in the manner required”*.<sup>39</sup>
39. In other words, the Prosecutor, without explicitly saying it, suggested that witnesses were coached when drafting their witness statement, thereby affecting the plausibility of their testimony and their credibility as witnesses.

#### *4.2. A professional obligation to apply rigorous methodological tools during the Preliminary Examination*

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<sup>36</sup> *Id.*, para. 122.

<sup>37</sup> *Id.*, para. 182.

<sup>38</sup> *Id.*, Annex G.

<sup>39</sup> *Id.*, paras. 184-185.



40. Such an approach to the evidence in the current situation is justified in light of the Prosecutor's legal and professional obligations at this stage of the proceedings. Indeed, at each stage, meticulous scrutiny of available evidence is essential and should represent a gold standard in preliminary examinations - not an extraordinary measure that the OTP happens to undertake. This constitutes a professional obligation of the Prosecutor and her staff and should properly operate on her consideration of the information by reference to the statutory standard of proof.<sup>40</sup>
41. The "reasonable basis to believe" standard does not free the Prosecutor from applying rigorous methodological tools during the preliminary examination. It cannot be that any information will do. The Prosecutor needs to keep in mind that over-reliance on third-party reports at an early stage of the proceedings can have the consequence that it is more difficult to build concrete cases in later stages of the proceedings, given the often unverifiable nature of information contained in such reports.
42. Beyond the standard of proof, it is crucial to stress the importance of relying on credible and reliable evidence from the beginning of the investigative process, as early as the preliminary examination, irrespective of the threshold to open an investigation. Indeed, analysis performed during a preliminary examination will set out the framework of a future formal investigation. This means that the factual narrative arising from and the potential perpetrators identified during a preliminary examination will form the factual foundation of cases to be further built during the OTP's formal investigation. Because the OTP will be building cases from the very beginning, it will be identifying during the preliminary examination not only contextual elements and details of possible crimes, but also information relating to possible perpetrators.<sup>41</sup>
43. As Carsten Stahn has commented:  
"the connection between preliminary examination and investigation needs to be improved. The Statute seems to imply that there is a clear-cut distinction between preliminary examination and investigation, according to which preliminary examination focuses on situation-related analysis while investigations involve the framing and testing of cases. Practice has shown that boundaries are more fluid. As part of the gravity test, the OTP has to make an assessment of

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<sup>40</sup> Dov Jacobs, Methodological challenges relating to the use of third-party Human Rights Fact-Finding in Preliminary Examinations, Article 15 Communication, 27 May 2019.

<sup>41</sup> On this, see Dov Jacobs and Jennifer Naouri, *Making Sense of the Invisible: The Role of the 'Accused' during Preliminary Examinations*, in Morten Bergsmo and Carsten Stahn (editors), *Quality Control in Preliminary Examination: Volume 2*, Torkel Opsahl Academic EPublisher, Brussels, 2018, pp. 469-519.



hypothetical cases. There is a need to draw connections between incidents and suspects, even before the formal start of investigations. In ‘hard cases’, a preliminary examination may require onsite presence on the ground, and deeper engagement with the situational context. This would improve the quality of assessment and allow better hypotheses”.<sup>42</sup>

44. Thinking of preliminary examinations not as an end in itself, to enable opening a formal investigation, but rather as a first investigative step in building cases, means that the Prosecutor should endeavour actively to identify during the preliminary examination issues that are likely to be inherently difficult to prove at a later stage of the proceedings, and should apply a more robust methodology to such issues. In assessing the available information, the Prosecutor should assess the feasibility of obtaining solid evidence on these issues during a formal investigation. If this assessment leads to a negative conclusion, the Prosecutor should consider using her discretion not to open an investigation.
45. This need to consider preliminary examinations as part of the overall investigative process is reflected in the OTP’s draft Strategic Plan 2019-2021:

“Preliminary examinations, besides serving a necessary analytical function in determining whether there is sufficient basis to proceed in a given situation, help to prepare the ground for future investigations, including by identifying potential cases, building cooperation networks and gathering critical information and potential evidence. The Office will endeavour to further exploit their value and build upon their momentum. In particular, it will further adapt the analytical products and information databases used during preliminary examinations to better reflect and anticipate investigative needs, and consider means and opportunities for preserving evidence at the earliest stage, as appropriate—e.g. through increased interaction with first responders, preservation requests, statement-taking at the seat of the Court, etc.”<sup>43</sup>

46. It should be noted that the OTP itself states that its policy is to assess open source material, including therefore human rights reports, following a certain methodology. This methodology is reflected both in the OTP policy paper on

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<sup>42</sup> Carsten Stahn, *Damned if you do, Damned if you don’t, Challenges and Critiques of Preliminary Examinations at the ICC*, in *Journal of International Criminal Justice*, 2017, vol. 15, p. 413.

<sup>43</sup> OTP, Draft Strategic Plan 2019-2021, p. 14 (available at <https://www.justsecurity.org/wp-content/uploads/2019/05/20190514-Draft-OTP-Strategic-Plan-2019-2021-launch-of-external-con...pdf>, last visited 28 May 2019).



preliminary examinations<sup>44</sup> and in requests submitted to Pre-Trial Chambers to authorise the opening of investigations. For example, in her most recent request to open an investigation in a situation, in relation to Afghanistan, the Prosecutor explained that:<sup>45</sup>

The Prosecution has evaluated sources and their information following a consistent methodology based on criteria such as relevance (usefulness of the information to determine the commission of crimes within the jurisdiction of the Court), reliability (trustworthiness of the provider of the information as such), credibility (quality of the information in itself, to be evaluated by criteria of immediacy, internal consistency and external verification), and completeness (the extent of the source's knowledge or coverage vis-à-vis the whole scope of relevant facts). It has endeavoured to corroborate the information provided with information available from reliable open and other sources.

47. The position of the Prosecutor was set out in even clearer terms in her request to open an investigation in the *Situation in Georgia*:<sup>46</sup>

“Notwithstanding the low threshold that is applicable at this stage, neither the Prosecution nor the Chamber should rely on information that is not credible or reliable. This is clear from the statutory requirement of determining whether the information available establishes a reasonable basis to believe that one or more crimes within the jurisdiction of the Court have been committed. Similarly, the Prosecutor, and the Chamber, must analyse and evaluate the seriousness of the information and the reliability of the source. To hold otherwise would require the Court to take any allegation made by any source at face value”.

48. This principled claim to following a rigorous methodology is to be welcomed, even if it is not always apparent from the remainder of the Prosecutor's various requests how exactly it was implemented on a case-by-case (or, more correctly,

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<sup>44</sup> ICC OTP, *Policy Paper on Preliminary Examinations*, November 2013 (available at <https://www.legal-tools.org/en/doc/acb906/>, last visited on 15 May 2019), at para. 31: “As information evaluated at the preliminary examination stage is largely obtained from external sources, rather than through the Office's own evidence-gathering powers, (which are only available at the investigation stage), the Office pays particular attention to the assessment of the reliability of the source and the credibility of the information”.

<sup>45</sup> ICC, *Situation in the Islamic Republic of Afghanistan*, Public redacted version of “Request for authorisation of an investigation pursuant to article 15”, 20 November 2017, ICC-02/17-7-Conf-Exp, OTP, 20 November 2017, para. 29.

<sup>46</sup> ICC, *Situation in Georgia*, Corrected Version of “Request for authorisation of an investigation pursuant to article 15”, 16 October 2015, ICC-01/15-4-Corr, OTP, 17 November 2015, para. 48. It can only but appear that this strong statement not only with respect to the obligations resting on the Prosecutor but also on the Chamber is a direct response to the above mentioned decision in the Comoros situation which had been issued a mere three months prior by the same Chamber before which the Prosecutor was now submitting her Georgia request.



situation-by-situation) basis. The OTP should always endeavour to apply such methodology in a serious manner, even at the preliminary examination phase, in order to avoid building future cases on empty allegations<sup>47</sup>.

#### 4.3. *Standard of proof at the preliminary examination stage*

49. The level of scrutiny of the evidence is necessarily linked to the standard of proof to be applied at the preliminary examination phase.

50. Guidance as to the applicable standard of proof can be found in prior decisions by the Judges when ruling on a request to open an investigation under Article 15. This standard has generally been considered to be relatively low. For example, in the decision authorising the Prosecutor to open an investigation in the *Situation in the Republic of Kenya*, the Pre-Trial Chamber found that:<sup>48</sup>

As for the "reasonable basis to believe" test referred to in article 53(l)(a) of the Statute, the Chamber considers that this is the lowest evidentiary standard provided for in the Statute. This is logical given that the nature of this early stage of the proceedings is confined to a preliminary examination. Thus, the information available to the Prosecutor is neither expected to be "comprehensive" nor "conclusive", if compared to evidence gathered during the investigation. This conclusion also results from the fact that, at this early stage, the Prosecutor has limited powers, which cannot be compared to those provided in article 54 of the Statute at the investigative stage.

51. This standard has been confirmed in subsequent decisions by the Court.<sup>49</sup> In practice, an analysis of Pre-Trial Chamber decisions authorising the opening of an investigation shows that, while judges present general considerations on the standard of proof, they never contain a specific section explaining how the information presented is actually assessed. This suggests that such information is taken at face value by the Judges, or receives little scrutiny on their part<sup>50</sup>.

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<sup>47</sup> Dov Jacobs, Methodological challenges relating to the use of third-party Human Rights Fact-Finding in Preliminary Examinations, Article 15 Communication, 27 May 2019.

<sup>48</sup> ICC, *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, PTC II, 31 March 2010, para. 27.

<sup>49</sup> See for example, ICC, *Situation in the Islamic Republic of Afghanistan*, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, Pre-Trial Chamber II, 12 April 2019; ICC, *Situation in the Republic of Côte d'Ivoire*, 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, Pre-Trial Chamber III, 3 October 2011.

<sup>50</sup> This is particularly important when it comes to the use of open source material, such as human rights reports, given the methodological difficulties relating to their drafting and use in a judicial context (Dov



52. Pre-Trial Chamber II's recent decision in the Afghanistan situation even seems to suggest that the absence of evaluation of the available information is justified by the fact that it is not yet formally "evidence" that might be used in the context of establishing individual criminal responsibility.<sup>51</sup> If this is what the Pre-Trial Chamber is saying (the phrasing is not entirely clear), this is misguided for two reasons. First of all, the existence of a legal standard of proof to be reached necessarily and logically implies some level of assessment of the evidence put forward to prove it. Secondly, it is short-sighted to segregate strictly the "information" forming the basis of a Preliminary Examination and the "evidence" forming the basis of subsequent judicial proceedings. The Preliminary Examination must be seen as an investigative continuum leading up to prosecutions. Poor quality information at the Preliminary Examination phase is likely to transform into poor evidence in the other phases leading up to the Trial and at the Trial itself.

53. Taking things further, in the 2015 PTC I decision the Judges asserted that:<sup>52</sup>

*"The Prosecutor's assessment of the criteria listed in this provision does not necessitate any complex or detailed process of analysis. ... Making the commencement of an investigation contingent on the information available at the pre-investigative stage being already clear, univocal or not contradictory creates a short circuit and deprives the exercise of any purpose. Facts which are difficult to establish, or which are unclear, or the existence of conflicting accounts, are not valid reasons not to start an investigation but rather call for the opening of such an investigation".*

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Jacobs, Methodological challenges relating to the use of third-party Human Rights Fact-Finding in Preliminary Examinations, Article 15 Communication, 27 May 2019). Indeed, virtually all supporting documentation brought forward by the OTP for opening an investigation, whether in relation to the general context, or the commission of particular crimes has historically come from third party sources (NGOs, United Nations, press). The proportion of open source human rights reports in relation to other sources will vary depending on the context of the Preliminary Examination. Indeed, while some investigations were opened quasi-exclusively on human rights reports (in the Ivory Coast for example), in other situations, the Prosecutor benefited from some State cooperation which led to the possibility for the OTP to use more diverse sources of information, in the Georgia situation for example (see ICC, *Situation in Georgia*, Corrected Version of "Request for authorisation of an investigation pursuant to article 15", 16 October 2015, ICC-01/15-4-Corr, OTP, 17 November 2015).

<sup>51</sup> ICC, *Situation in the Islamic Republic of Afghanistan*, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, Pre-Trial Chamber II, 12 April 2019, para. 35.

<sup>52</sup> ICC, *Situation on the Registered Vessels of the Union of Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation, PTC I, 16 July 2015, para. 13.



54. The Pre-Trial Chamber explains later that: “the availability of contradicting information should not mean that one version should be preferred over another, but both versions should be properly considered. Even more, if, as stated by the Prosecutor, the events are unclear and conflicting accounts exist, this fact alone calls for an investigation rather than the opposite. It is only upon investigation that it may be determined how the events unfolded”.<sup>53</sup>
55. This position of the Pre-Trial Chamber is untenable and would effectively remove the purpose of having a Preliminary Examination conducted by the Prosecutor in the first place. Indeed, if the submission of weak information (how else to describe information that does not clearly establish facts or providing conflicting accounts of the facts?) positively calls for the opening of an investigation, there will never be any reason not to open an investigation, and therefore no reason actually to assess facts during a Preliminary Examination. On the contrary, it is vital that the Preliminary Examination be performed with due regard to high professional standards in relation to the evaluation of the information – i.e. evidence - in the possession of the OTP to the statutory applicable standard of proof.
56. On this point, it is interesting to note that the Appeals Chamber Judgment of 2 September 2019, while finding that the OTP is generally bound by a Pre-Trial Chamber’s interpretation of the “legal standards to be applied to the evaluation of evidence”,<sup>54</sup> still very clearly preserved the Prosecutor’s discretion in how to assess evidence in relation to a specific factor of gravity. Indeed, in the Judgment, the Judges found that PTC findings telling the Prosecutor how to deal with contradictory evidence on particular issues were inappropriate. For example, the Appeals Chamber explicitly found that the Pre-Trial Chamber erred by making the above-quoted claim about having to give equal weight to conflicting accounts in order to decide whether to open an investigation.<sup>55</sup>
57. The Appeals Chamber Judgment can therefore be welcomed as not preventing the Prosecutor from applying her own methodology in assessing available information, notably in the context of the gravity assessment.

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<sup>53</sup> ICC, *Situation on the Registered Vessels of the Union of Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation, PTC I, 16 July 2015, para. 36.

<sup>54</sup> ICC, *Situation on the Registered Vessels of the Union of Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Judgment on the appeal of the Prosecutor against Pre-Trial Chamber I’s ‘Decision on the “Application for Judicial Review by the Government of the Union of the Comoros”’, Appeals Chamber, 2 September 2019, para. 78.

<sup>55</sup> Application for Judicial Review by the Government of the Union of the Comoros”, Appeals Chamber, 2 September 2019, para. 92.



## 5. The gravity assessment

58. Both in her first and second decisions, the Prosecutor found that the situation was not of sufficient gravity to warrant the opening of an investigation. The Pre-Trial Chamber disagreed with such an assessment and substituted its own understanding of the facts in order to instruct the Prosecutor to reconsider her decision<sup>56</sup>.
59. The current reconsideration process is guided by the findings of the 2 September 2019 Appeals Chamber Judgment.
60. First of all, for the Appeals Chamber, the Prosecutor is not free to ignore the interpretation of the law given by the Pre-Trial Chamber in its initial request for reconsideration. According to the Appeals Chamber Judges: “where the pre-trial chamber requests reconsideration of the Prosecutor’s decision not to investigate on the basis of its interpretation of the applicable law, the Prosecutor is bound to follow this interpretation”.<sup>57</sup>
61. Secondly, for the Appeals Chamber, the Prosecutor is bound to take into account all relevant information that the Pre-Trial Chamber might have guided the Prosecutor to consider as part of her evaluation of the gravity of the situation: “the Prosecutor is bound to adhere to any directions of the pre-trial chamber to consider certain available information. In addition, when assessing gravity, the Prosecutor is obliged to follow any directions of the pre-trial chamber to take into account certain factors or information relating thereto”.<sup>58</sup>
62. Thirdly, for the Appeals Chamber the Prosecutor is not bound by any factual findings made by the Pre-Trial Chamber or what weight should be assigned to certain factors in her gravity assessment: “the pre-trial chamber may not direct the Prosecutor as to how the information made available to her should be analysed, which factual findings she should reach, how to apply the law to the available

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<sup>56</sup> ICC, *Situation on the Registered Vessels of the Union of Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation, PTC I, 16 July 2015.

<sup>57</sup> ICC, *Situation on the Registered Vessels of the Union of Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Judgment on the appeal of the Prosecutor against Pre-Trial Chamber I’s ‘Decision on the “Application for Judicial Review by the Government of the Union of the Comoros”’, Appeals Chamber, 2 September 2019, para. 82.

<sup>58</sup> ICC, *Situation on the Registered Vessels of the Union of Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Judgment on the appeal of the Prosecutor against Pre-Trial Chamber I’s ‘Decision on the “Application for Judicial Review by the Government of the Union of the Comoros”’, Appeals Chamber, 2 September 2019, para. 82.



information, or what weight she should attach to the different factors in the course of a gravity assessment”.<sup>59</sup> This principle is material.

63. More importantly, though, the Appeals Chamber explicitly states that “it is not the role of the pre-trial chamber to direct the Prosecutor as to what result she should reach in the gravity assessment”<sup>60</sup>. This conclusion stems from the Appeals Chamber’s broader finding, in its Judgment, that the Prosecutor has the ultimate discretion to decide whether to open an investigation or not following a request for reconsideration: “As such, the pre-trial chamber, in requesting reconsideration, cannot direct the Prosecutor as to the result of her reconsideration, since the Prosecutor ‘retains ultimate discretion over how to proceed’”.<sup>61</sup>
64. This latter conclusion is crucial for the understanding of the scope of the current reconsideration process. Indeed, it is very clear from the 2015 PTC I decision that the Judges not only disagreed with the Prosecutor’s understanding of the applicable law, but also substituted their own assessment of the available information in determining whether the situation was of sufficient gravity. While the Prosecutor is bound by the interpretation given by the Pre-Trial Chamber of the applicable law, and must take into account any information that the Pre-Trial Chamber directs it to, the Prosecutor has discretion in how to assess the evidence, what weight to give particular factors in the gravity assessment, and ultimately to decide on which gravity assessment to reach. This conforms with the letter and spirit of the Appeals Chamber’s September 2019 ruling.
65. This section will next briefly reflect on the five identified criteria for gravity identified in the Article 53(1) Report and 2015 PTC I decision in light of the Appeals Chamber Judgment.

### *5.1. Consideration with respect to the potential perpetrators of the crimes<sup>62</sup>*

66. The consideration given to potential perpetrators of alleged crimes has gone through an evolutionary process in the Court’s practice, on both the Prosecutor’s and Chambers’ parts.

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<sup>59</sup> *Id.*, para. 82.

<sup>60</sup> *Id.*, para. 81.

<sup>61</sup> *Id.*, para. 76.

<sup>62</sup> For a comprehensive analysis of how potential perpetrators are and can be taken into account during a preliminary examination, see : Dov Jacobs and Jennifer Naouri, *Making Sense of the Invisible: The Role of the ‘Accused’ during Preliminary Examinations*, in Morten Bergsmo and Carsten Stahn (editors), *Quality Control in Preliminary Examination: Volume 2*, Torkel Opsahl Academic EPublisher, Brussels, 2018, pp. 469-519.



67. From the OTP's perspective, the Regulations of the OTP provide little guidance on how potential perpetrators are to be taken into account in a gravity assessment, and simply state that: "In order to assess the gravity of the crimes allegedly committed in the situation the Office shall consider various factors including their scale, nature, manner of commission, and impact".<sup>63</sup>
68. According to the 2013 preliminary examination policy paper: "The manner of commission of the crimes may be assessed in light of, *inter alia*, the means employed to execute the crime, the degree of participation and intent of the perpetrator (if discernible at this stage), the extent to which the crimes were systematic or result from a plan or organised policy or otherwise resulted from the abuse of power or official capacity, and elements of particular cruelty, including the vulnerability of the victims, any motives involving discrimination, or the use of rape and sexual violence as a means of destroying groups".<sup>64</sup>
69. This paragraph suggests that the conduct of the potential defendant could be taken into account in several ways: (1) "the degree of participation and intent of the perpetrator" and (2) "the abuse of power or official capacity". It is not entirely clear what these expressions mean, because there is no explanation of what a "degree of intent" is (presumably, there is either criminal intent, or no criminal intent) or what kind of intent would be more or less grave, nor is there a definition of what might constitute "abuse of power or official capacity". Moreover, the policy paper is very clear ("if discernible at this stage") that such determination of the conduct of the potential defendant is not a definitive prerequisite of a preliminary examination's gravity assessment.
70. Also interesting to note is that the Prosecutor never put forward as a distinct gravity criterion the fact that the person might "bear the greatest responsibility". In fact, the OTP, in the policy paper, relies on the case law of the Court to minimize this requirement: "The Appeals Chamber has dismissed the setting of an overly restrictive legal bar to the interpretation of gravity that would hamper the deterrent role of the Court. It has also observed that the role of persons or groups may vary considerably depending on the circumstances of the case and therefore should not be exclusively assessed or predetermined on excessively formulistic grounds".<sup>65</sup>
71. Indeed, in 2006, the Appeals Chamber had rejected the gravity criteria that the Pre-Trial Chamber had devised of focusing only on highest ranking perpetrators on

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<sup>63</sup> Regulation 29(2) of the Regulations of the OTP, ICC-BD/05-01-09, 23 Avril 2009.

<sup>64</sup> OTP, Policy Paper on Preliminary Examinations, November 2013, para. 64.

<sup>65</sup> *Ibid.*, para. 60.



the basis that: “The predictable exclusion of many perpetrators on the grounds proposed by the Pre-Trial Chamber could severely hamper the preventive, or deterrent, role of the Court which is a cornerstone of the creation of the International Criminal Court, by announcing that any perpetrators other than those at the very top are automatically excluded from the exercise of the jurisdiction of the Court. The particular role of a person or, for that matter, an organization, may vary considerably depending on the circumstances of the case and should not be exclusively assessed or predetermined on excessively formalistic grounds”.<sup>66</sup>

72. In the first decision by a Pre-Trial Chamber to authorise a *proprio motu* investigation under Article 15, in the “*Situation in the Republic of Kenya*”, despite the fact that this was not a criterion relied on by the OTP in its request, when deciding whether to open an investigation the Pre-Trial Chamber considered that: “As for the first element [“the groups of persons involved that are likely to be the object of an investigation for the purpose of shaping the future case(s)”], ... it involves a generic assessment of whether such groups of persons that are likely to form the object of investigation capture those who may bear the greatest responsibility for the alleged crimes committed. Such assessment should be general in nature and compatible with the pre-investigative stage into a situation”.<sup>67</sup>
73. There is some indication of what is meant by “those who may bear the greatest responsibility” later on in the decision, where the Court notes that: “With respect to the first element concerning the groups of persons likely to be the focus of the Prosecutor’s future investigations, the supporting material refers to their high-ranking positions, and their alleged role in the violence, namely inciting, planning, financing, colluding with criminal gangs, and otherwise contributing to the organization of the violence”.<sup>68</sup> This seems to suggest that the high-ranking position of the potential defendant is a key element in the determination made by the Chamber. This appears, on the face of it, at odds with the Appeals Chamber decision from 2006 quoted previously. The fact that the Pre-Trial Chamber was applying the test at the “situation” phase rather than at the “case” phase does not affect this apparent discrepancy in the case law, because the underlying rationale

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<sup>66</sup> ICC, *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled “Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58”, Appeals Chamber, 13 July 2006, paras. 75–76.

<sup>67</sup> ICC, *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, PTC II, 31 March 2010, para. 60.

<sup>68</sup> *Id.*, para. 198.



of the Appeals Chamber was to avoid sending out a message that lower level perpetrators would not be prosecuted before the ICC, a rationale which applies whether at the situation phase or the case phase.

74. Following this decision, the OTP logically adopted the criteria as its own in subsequent requests,<sup>69</sup> noting each time that potential defendants were high-ranking officials, persons in position of command or persons with levels of responsibility in the commission of the crimes.<sup>70</sup> And all decisions authorizing an investigation so far have applied this criterion consistently.
75. Therefore, it appears that the 2015 PTC I decision in the *Mavi Marmara* situation stands out in respect of what seemed like established practice at the Court.
76. Indeed, in line with past practice, the Prosecutor had indicated, when considering that the situation did not meet the gravity threshold, that no “senior IDF commanders and Israeli leaders’ were responsible as perpetrators or planners of the apparent war crimes”.<sup>71</sup> The 2015 PTC I decision did not find this determinative. It held instead that:

Contrary to the Prosecutor’s argument at paragraph 62 of her Response, the conclusion in the Decision Not to Investigate that there was not a reasonable basis to believe that “senior IDF commanders and Israeli leaders” were responsible as perpetrators or planners of the identified crimes does not answer the question at issue, which relates to the Prosecutor’s ability to investigate and prosecute those being the most responsible for the crimes under consideration and not as such to the seniority or hierarchical position of those who may be responsible for such crimes. [...] there appears to be no reason, in the present circumstances and in light of the parameters of the referral and scope of the Court’s jurisdiction, to consider that an investigation into the situation referred by the Comoros could not lead to the

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<sup>69</sup> ICC, *Situation in the Republic of Côte d’Ivoire*, Request for authorisation of an investigation pursuant to article 15, OTP, 23 June 2011, para. 55 ; ICC, *Situation in the Islamic Republic of Afghanistan*, Public redacted version of “Request for authorisation of an investigation pursuant to article 15”, OTP, 20 November 2017, para. 336.

<sup>70</sup> ICC, *Situation in the Republic of Côte d’Ivoire*, Request for authorisation of an investigation pursuant to article 15, OTP, 23 June 2011, para. 57 ; ICC, *Situation in Georgia*, Corrected Version of “Request for authorisation of an investigation pursuant to article 15”, OTP, 17 November 2015, para. 337 ; ICC, *Situation in the Islamic Republic of Afghanistan*, Public redacted version of “Request for authorisation of an investigation pursuant to article 15”, OTP, 20 November 2017, para. 338.

<sup>71</sup> ICC, *Situation on registered vessels of the union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia*, Public Redacted Version of Prosecution Response to the Application for Review of its Determination under article 53(1)(b) of the Rome Statute, OTP, 30 March 2015, para. 62.



prosecution of those persons who may bear the greatest responsibility for the identified crimes committed during the seizure of the Mavi Marmara by the IDF.<sup>72</sup>

77. This clearly seems to be at odds with prior case law of the assessment of gravity at the situation phase. Moreover, the assertion that the investigation would lead to the prosecution of those who bear the greatest responsibility for the identified crimes, when stripped of any qualifier (such as rank), is somewhat empty. Indeed, it is obvious that, taken in its literal sense, an OTP investigation will focus on those most responsible for the commission of a crime (as opposed to those not responsible). That is not a gravity criterion, that is common sense. As a result, the Pre-Trial Chamber in the current Situation, rather than just doing away with the requirement that the investigation focus on “those who may bear the greatest responsibility”, kept it, but emptied it of any meaning.
78. This being said, as noted previously, the Prosecutor is bound in the current situation to follow the interpretation of this criteria given by the Pre-Trial Chamber. However, the Prosecutor has discretion on how to consider this point in the overall gravity assessment and to determine that, as defined by the Pre-Trial Chamber, this factor is of little weight in considering whether the situation meets the gravity threshold to be admissible.

#### *5.2. Scale of the crimes/nature of the crimes/manner of commission*

79. In the 2015 PTC I decision, the Judges 1) took issue with the way the Prosecutor assessed the information it possessed in relation to the scale of the crimes, the nature of the crimes and the manner of the commission of the crimes and 2) how it factored in this information in relation to its determination that the situation did not meet the threshold of gravity.<sup>73</sup>
80. On these two aspects, as noted previously, the 2 September 2019 Appeals Chamber decision is crystal clear on the fact that, while the Prosecutor is bound to take into account information highlighted by the Pre-Trial Chamber, it is not bound by the Pre-Trial Chamber’s own factual finding or its findings on gravity.

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<sup>72</sup> ICC, *Situation on the Registered Vessels of the Union of Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation, PTC I, 16 July 2015, paras. 23–24.

<sup>73</sup> ICC, *Situation on the Registered Vessels of the Union of Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation, PTC I, 16 July 2015.



81. In that respect, an analysis of both Prosecution reports shows that the OTP already took into account all the information that the Pre-Trial Chamber relied on its in 2015 decision to request review.
82. For example, the Pre-Trial Chamber took no issue on the Prosecutor's factual conclusions regarding the scale of crimes, but simply disagreed with how the Prosecutor used this information in its assessment of the gravity of the situation<sup>74</sup>. As per the Appeals Chamber Judgment, the Prosecutor is not bound by such disagreement and has full discretion to take into account the scale of the alleged crimes as she sees fit. In fact, the Appeals Chamber specifically took this example to illustrate the erroneous approach taken by the Pre-Trial Chamber in substituting its own understanding of the facts and its own assessment of gravity for that of the Prosecutor.<sup>75</sup>
83. Similarly, the Prosecutor did take into account the allegations that live fire was used prior to boarding of the *Mavi Marmara*, but gave this element little weight in the overall assessment of gravity, especially in light of the ambiguities surrounding such allegations, and the specific sequence of events surrounding the boarding of the ship<sup>76</sup>. The Pre-Trial Chamber's disagreement with how the Prosecutor took this point into consideration is not binding on the Prosecutor, as noted by the Appeals Chamber, which explicitly referred to the Pre-Trial Chamber's own findings as an example of error committed by the Judges.<sup>77</sup>
84. The same can be said about the legal qualification of the crimes. In the Article 53(1) Report, the Prosecutor indicated that the available information did not indicate that the crime of "inhuman treatment" had been committed<sup>78</sup>. The 2015 PTC I decision takes issue with the Prosecutor's approach, essentially finding that her

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<sup>74</sup> *Id.*, para. 25-26.

<sup>75</sup> ICC, *Situation on the Registered Vessels of the Union of Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Judgment on the appeal of the Prosecutor against Pre-Trial Chamber I's 'Decision on the "Application for Judicial Review by the Government of the Union of the Comoros"', Appeals Chamber, 2 September 2019, para. 93.

<sup>76</sup> ICC, *Situation on the Registered Vessels of the Union of Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Article 53(1) Report, OTP, 6 November 2014, para. 41 ; ICC, *Situation On Registered Vessels Of The Union Of The Comoros, The Hellenic Republic Of Greece, And The Kingdom Of Cambodia*, Final decision of the Prosecution concerning the "Article 53(1) Report" (ICC-01/13-6-AnxA) dated 6 November 2014, OTP, 30 November 2017, paras. 99-126.

<sup>77</sup> ICC, *Situation on the Registered Vessels of the Union of Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Judgment on the appeal of the Prosecutor against Pre-Trial Chamber I's 'Decision on the "Application for Judicial Review by the Government of the Union of the Comoros"', Appeals Chamber, 2 September 2019.

<sup>78</sup> ICC, *Situation on the Registered Vessels of the Union of Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Article 53(1) Report, OTP, 6 November 2014, para. 69.



conclusion on whether the “inhuman treatment” legal qualification was appropriate was “premature” and “cannot credibly be attempted on the basis of the limited information available at this stage, i.e. before the Prosecutor has even started an investigation”.<sup>79</sup> As a consequence, the PTC found that the Prosecutor should have concluded “that there is a reasonable basis to believe that acts qualifying as torture or inhuman treatment were committed, and to take this into account for the assessment of the nature of the crimes as part of the gravity test”<sup>80</sup> and that “the Prosecutor thus erred in not reaching this conclusion”.<sup>81</sup>

85. This reasoning was noted in the Appeals Chamber Judgment as an example of the Pre-Trial Chamber’s inappropriate application of the standard of proof to the facts,<sup>82</sup> and is therefore not binding on the Prosecutor. This is a welcome outcome, because if the Pre-Trial Chamber’s approach to evidence were to be followed, this would imply that the Prosecutor would need to make legal findings in the absence of any relevant evidence to support such findings. As noted by the OTP in its 2017 review decision: “the majority apparently considered that the same conduct should have been regarded as intrinsically more grave in nature because it could not be ruled out that *future information* (i.e., information not yet available to the Prosecution) might show that the elements of torture or inhuman treatment, instead of outrages upon personal dignity, are met. This is speculative”.<sup>83</sup>
86. Here, if one pushes the Pre-Trial Chamber’s approach to its logical conclusion, the *absence* of sufficient evidence would militate in *favor* of the opening of an investigation to find the evidence. This would evidently empty the preliminary examination of any substance.

### 5.3. *Impact of the crimes*

87. In the 2015 PTC I decision, the Judges found that: “The Prosecutor failed to consider that, before attempting a determination of the impact of the identified crimes on the lives of the people in Gaza, the significant impact of such crimes on

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<sup>79</sup> ICC, *Situation on the Registered Vessels of the Union of Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation, PTC I, 16 July 2015, para. 30.

<sup>80</sup> *Id.*, para. 30.

<sup>81</sup> *Id.*

<sup>82</sup> ICC, *Situation on the Registered Vessels of the Union of Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Judgment on the appeal of the Prosecutor against Pre-Trial Chamber I’s ‘Decision on the “Application for Judicial Review by the Government of the Union of the Comoros”’, Appeals Chamber, 2 September 2019, para. 92.

<sup>83</sup> ICC, *Situation On Registered Vessels Of The Union Of The Comoros, The Hellenic Republic Of Greece, And The Kingdom Of Cambodia*, Final decision of the Prosecution concerning the “Article 53(1) Report” (ICC-01/13-6-AnxA) dated 6 November 2014, OTP, 30 November 2017, para. 83.



the lives of the victims and their families, which she duly recognised, is, as such, an indicator of sufficient gravity.”<sup>84</sup>

88. This conclusion was explicitly listed by the Appeals Chamber as an example of an error committed by the Pre-Trial Chamber<sup>85</sup> and therefore need not be followed by the OTP.
89. It should be noted in that respect that while factoring in the impact on the alleged victims and their families in the gravity assessment is not per se controversial, considering, as was done in the 2015 PTC I decision, that it “is, as such, an indicator of sufficient gravity”<sup>86</sup> is somewhat problematic. Indeed, by definition, alleged crimes cause harm to alleged victims. If that is an indication of sufficient gravity, then all situations will be automatically deemed to be sufficiently grave, and the gravity requirement, as an additional condition for proceeding further, would be rendered meaningless.
90. In the 2015 PTC I decision, the Judges also found that: “ [The] international concern caused by the events at issue, which, inter alia, resulted in several fact-finding missions, including by the UN Human Rights Council and the UN Secretary General, is somehow at odds with the Prosecutor’s simplistic conclusion that the impact of the identified crimes points towards the insufficient gravity of the potential case(s) on the mere grounds that the supplies carried by the vessels in the flotilla were ultimately later distributed to the population in Gaza”.<sup>87</sup>
91. Firstly, it should be noted that this type of criterion has been rejected in previous case law of the Court. In 2006, after a Pre-Trial Chamber considered that “due consideration must be given to the social alarm such conduct may have caused in

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<sup>84</sup>ICC, *Situation on the Registered Vessels of the Union of Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation, PTC I, 16 July 2015, para. 47.

<sup>85</sup> ICC, *Situation on the Registered Vessels of the Union of Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Judgment on the appeal of the Prosecutor against Pre-Trial Chamber I’s ‘Decision on the “Application for Judicial Review by the Government of the Union of the Comoros”’, Appeals Chamber, 2 September 2019, para. 93.

<sup>86</sup> ICC, *Situation on the Registered Vessels of the Union of Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation, PTC I, 16 July 2015, para. 47.

<sup>87</sup> *Id.*, para. 48.



the international community”<sup>88</sup> when determining whether a case is admissible, the Appeals Chamber found that:<sup>89</sup>

As to the "social alarm" caused to the international community by the relevant conduct, which, in the Pre-Trial Chamber's opinion, is a consideration for the first prong of the Pre-Trial Chamber's test, the Pre-Trial Chamber has not explained from where it derived this criterion. It is not mentioned in the Statute at all. As the Prosecutor has correctly pointed out [...], the criterion of "social alarm" depends upon subjective and contingent reactions to crimes rather than upon their objective gravity.

92. The Judges in the 2015 PTC I decision in the current situation provide no discussion of how their finding on this matter is compatible with established case law, nor do they explain the basis for the adoption of such a legal criterion.
93. Secondly, the notion of “international concern” is an amorphous concept that is ill-suited as a legal criterion. The reality is that what creates “international concern” is dependent on a number of political, media-coverage and advocacy factors that will not necessarily have any relation to the actual gravity of an event. By that standard, some of the worst crises in the world would not be considered to be of the sufficient gravity, simply because they have not been deemed as legitimate causes by certain NGOs or international bodies such as the Human Rights Council.<sup>90</sup> Also, such a criterion gives disproportionate power to these NGOs and international bodies to dictate the agenda of the ICC, even though their motivations might not always be humanitarian in nature or grounded in proper

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<sup>88</sup> ICC, *Situation in the Democratic Republic of the Congo*, Decision on the Prosecutor's Application for Warrants of Arrest, Article 58, PTC I, 10 February 2006, para. 47.

<sup>89</sup> ICC, *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58", Appeals Chamber, 13 July 2006, para. 72.

<sup>90</sup> The Human Rights Council practice of selectivity in issues to address has in fact been regularly highlighted and criticised (HRW, *Curing the Selectivity Syndrome, The 2011 Review of the Human Rights Council*, 24 June 2010). In 2011, Ban Ki-Moon United Nations Secretary-General addressed the HRC in the following way: “Let us be frank. This body has come under criticism from various quarters. For this Human Rights Council to fulfil its mandate, it must be seen as impartial and fair. It cannot be seen as a place ruled by bias or special interests. It cannot be a place that targets some countries, yet ignores others. It cannot be a place where some members overlook the human rights violations of others so as to avoid scrutiny themselves” and cautioned the HRC on the fact that “we cannot be selective in promoting human rights. We must address the full spectrum of rights with equal force – civil, cultural, economic, social and political. Put simply, our watchword should be “all people, all countries, all rights””. (UN Press release, “Secretary-General Urges Human Rights Council to Avoid Narrow Considerations, Selectivity; Supports Independence while Condemning ‘Inflammatory Rhetoric’”, 25 January 2011, available at <https://www.un.org/press/en/2011/sgsm13366.doc.htm>).



consideration of human and affected communities' rights. Both the Prosecutor and the Chambers should therefore steer away from criteria inherently subject to political manipulation in order to safeguard the independence of the ICC as a neutral judicial body.

## 6. Conclusion

94. The present communication invites the Prosecution to confirm her initial decision not to proceed with an investigation in the Comoros situation. In addition, the communication provides a legal and conceptual framework allowing for the adoption of a methodology of thorough evaluation of available information at the preliminary examination phase based on the practice in the current Situation.
95. The Prosecutor is also invited clarify in her final decision a number of crucial questions that were not given sufficient consideration in the initial decision, namely: 1) whether Comoros in fact did refer a "situation" and 2) whether the territorial precondition for the exercise of jurisdiction was truly satisfied.
96. There is cause for concern. The Pre-Trial Chamber's understanding of the standard of review at the preliminary examination risks making this phase meaningless. The same holds true for the Pre-Trial Chamber's determination of the gravity of a situation for the purposes of admissibility, which makes it devoid of meaningful application. The Prosecutor should challenge these interpretations of the law in future situations.
97. Finally, this litigation has brought to the fore the risks of accepting what can be reasonably understood as a primarily politically-motivated referral. Already, the process has brought to the fore the motivations of the organisers of the flotilla in their political support for Hamas<sup>91</sup>, to the extent that the Prosecutor concluded that the operation could not be deemed to be humanitarian in nature<sup>92</sup>. The referral itself seems to have been orchestrated by a Turkish law firm which had filed a

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<sup>91</sup> ICC, *Situation on the Registered Vessels of the Union of Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Application pursuant to Article 119(1) of the Rome Statute, Shurat Ha-Din – Israel Law Center, 31 January 2019, para. 21.

<sup>92</sup> ICC, *Situation on the Registered Vessels of the Union of Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Article 53(1) Report, OTP, 6 November 2014, para. 125: "the flotilla does not appear to reasonably fall within the humanitarian assistance paradigm envisioned under article 8(2)(b)(iii), due to its apparent lack of neutrality and impartiality as evidenced in the flotilla's explicit and primary political objectives".



communication in 2010, before apparently convincing Comoros to file a referral<sup>93</sup>. Moreover, coordination is further demonstrated by the fact that both victims and the State of Comoros have the same legal representation.<sup>94</sup>

98. Of course, such political motivations and coordination is not per se directly legally determinative in the assessment of the substance of the referral. However, it can seriously affect the integrity of the procedure when it impacts on key aspects. As noted in this communication, the apparent strategic reflagging of the *Mavi Marmara* could impact the Prosecutor's assessment of the territorial exercise of jurisdiction. Equally, the one-sided referral might reasonably suggest that the *Mavi Marmara* incident falls outside the scope of a "situation" as understood by the drafters of the Rome Statute. Finally, political motivations might explain the concerns raised by the Prosecutor concerning the written statements of a number of alleged victims.
99. Ultimately, therefore, in confirming her initial decision (with the caveats addressed in the present communication), the Prosecutor will uphold the highest standards of independence and integrity of her office, and the legitimacy of the Court itself.

## 7. OFFER OF ASSISTANCE

100. The author stands ready to assist the OTP and the Court through further dialogue and communications with respect to the legal and factual matters arising from this communication.

## 8. ACKNOWLEDGMENTS

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**Dr. Dov Jacobs**

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<sup>93</sup> Interestingly, the referral was deposited and signed by this same Turkish Law firm, rather than distributed through official channels by Comorian officials.

<sup>94</sup> ICC, *Situation on the Registered Vessels of the Union of Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Application pursuant to Article 119(1) of the Rome Statute, Shurat Ha-Din – Israel Law Center, 31 January 2019, para. 29. According to the submissions by Shurat Hadin, two lawyers participating in the current proceedings were even on board the *Mavi Marmara* (para. 25).