

# Judicial Review of Prosecutorial Discretion in the Initiation of Investigations into Situations of ‘Sufficient Gravity’

Priya Urs\*

In the admissibility framework of the Rome Statute, the Prosecutor’s discretion whether to initiate an investigation into a situation includes the application of the open-textured requirement of ‘sufficient gravity’ specified in Article 17(1)(d) of the Statute. Pre-Trial Chamber oversight is designed to discipline the exercise of this discretion, but in the absence of statutory guidance the Pre-Trial Chambers are left themselves to articulate the standards of review of the Prosecutor’s admissibility assessments under relevant provisions, namely Article 53(3)(a) and Article 15(4) of the Statute. The confused body of Pre-Trial Chamber practice to date poses the question as to what ought to be the standard of review of the Prosecutor’s admissibility assessment under each provision. This paper teases apart and scrutinises the standards of review that the Pre-Trial Chambers have applied in practice. By disaggregating the procedural contexts in which the Prosecutor’s admissibility assessments are made and analysing in each context the underlying interests at stake, it seeks to arrive at the appropriate standard of judicial review of the Prosecutor’s gravity assessment under each provision.

## 1. Introduction

In accordance with Article 53(1)(b) of the Rome Statute, the Prosecutor of the International Criminal Court (ICC, the Court) is required to assess the admissibility of a situation when deciding whether to initiate an investigation into it. As indicated in Article 53(1)(b), admissibility falls to be assessed by reference to the criteria specified in Article 17 of the Statute, among them the criterion of sufficient gravity found in Article 17(1)(d).<sup>1</sup> Where a situation has been referred to the Prosecutor by a state party or the Security Council, any

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\* PhD Candidate at the Faculty of Laws, University College London. I am grateful to my supervisor, Roger O’Keefe, for his comments on the paper. I would also like to thank Kimberley Trapp, my secondary supervisor, Martins Paporinskis and Megan Donaldson for their comments. [priya.urs.17@ucl.ac.uk].

<sup>1</sup> If, on referral of a situation or *proprio motu*, the Prosecutor concludes that there is a reasonable basis to proceed with the investigation of a situation, she must notify relevant states of her intention to proceed, as stipulated in Art. 18(1) of the Rome Statute of the International Criminal Court 1998 (ICCSt). Having received such notification, a state may inform the Court that it is investigating or has investigated crimes in relation to the situation. On this basis, the Pre-Trial Chamber may, on the application of the Prosecutor, determine the admissibility of the situation under Art. 18(2). As per Rule 55(2) of the Rules of Procedure and Evidence 1998 (ICC RPE), this determination is, like the Prosecutor’s assessment, made by reference to the criteria in Art. 17(1) of the Statute. As Art. 18(2) relates to challenges on the basis of ongoing or complete investigations at the national level, an admissibility determination under this provision does not include considerations of gravity.

decision by the Prosecutor not to initiate an investigation, including any decision taken on the basis of inadmissibility, may be reviewed by the Pre-Trial Chamber at the request of the referring state or the Council, as provided for in Article 53(3)(a).<sup>2</sup> Where the Prosecutor decides to initiate an investigation into a situation *proprio motu*,<sup>3</sup> Pre-Trial Chamber authorization is required, as provided for in Article 15(3) and (4) of the Statute, the latter of which logically requires the Pre-Trial Chamber to review the Prosecutor's admissibility assessment.

To initiate an investigation into a situation, whether under Article 53(1) alone or by additional reference to Article 15(3), the Prosecutor must have concluded that there exists a 'reasonable basis to proceed' with the investigation. This assessment, in particular the application of the open-textured requirement of 'sufficient gravity' in Article 17(1)(d), involves the exercise of discretion on the part of the Prosecutor. Pre-Trial Chamber oversight in Articles 53(3)(a) and 15(4) respectively is designed to discipline the exercise of this discretion. What is lacking, however, in the admissibility framework of the Rome Statute is any explicit indication of the standard of review to be applied in the course of judicial oversight of the Prosecutor's exercise of her discretion to initiate an investigation. That is, the Statute does not expressly direct the Pre-Trial Chamber only to ask, for example, whether the Prosecutor's assessment constitutes an abuse of discretion or reflects a manifest error of law or fact or is reasonable or instead to go further and engage in *de novo* assessment or 'correctness' review by reference to the legal test applied by the Prosecutor herself, effectively substituting its forensic analysis and legal characterization of the facts for those of the Prosecutor. In the absence of any such explicit indication, the various Pre-Trial Chambers have themselves sought to articulate appropriate

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<sup>2</sup> Where the Prosecutor's decision not to initiate an investigation is based solely on the interests of justice in Art. 53(1)(c), the decision may be reviewed at the initiative of the Pre-Trial Chamber under Art. 53(3)(b) and 'shall be effective only if confirmed by the Pre-Trial Chamber'.

<sup>3</sup> See Art. 15(1), ICCSt.

standards of judicial review under Articles 53(3)(a) and 15(4) respectively of the Prosecutor's admissibility assessment.

This paper teases apart and scrutinises what emerge as the distinct standards of review that the Pre-Trial Chambers purport to and actually apply when acting under Articles 53(3)(a) and 15(4) respectively. It disaggregates the procedural contexts in which the Prosecutor's respective admissibility assessments are made and analyses in each context the underlying interests at stake. Various considerations are weighed to strike what the paper suggests is a necessary balance between prosecutorial independence and prosecutorial accountability. On the one hand, the inherent subjectivity of the criterion of 'sufficient gravity' in Article 17(1)(d) of the Rome Statute justifies the recognition of a broad discretion on the part of the Prosecutor. The Prosecutor's exclusive fact-finding mandate vis-à-vis the Pre-Trial Chamber during the preliminary examination<sup>4</sup> of a situation and the limited resources at her disposal in the conduct of investigations similarly support judicial deference. On the other hand, the desiderata of prosecutorial accountability and predictability in the application of the criterion of 'sufficient gravity' favour closer scrutiny by the Pre-Trial Chambers, as does states' interest in restraining the Prosecutor from proceeding with frivolous or politically-motivated investigations. Whether the Prosecutor is bound to comply with the Pre-Trial Chamber's determinations under Articles 53(3)(a) and 15(4) respectively is also relevant to the analysis of their respective roles in the initiation of investigations.<sup>5</sup>

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<sup>4</sup> The term 'preliminary examination' appears in Art. 15(6). It refers to the initial evaluation of a situation that serves as the basis for the Prosecutor's conclusion as to whether an investigation shall commence under Art. 53(1) and Art. 15(3).

<sup>5</sup> A related question is whether it is permissible for the Chamber in its review under Art. 53(3)(a) or Art. 15(4) to go beyond the crimes identified by the Prosecutor and to order her to expand the scope of her investigation accordingly. The question is addressed in the paper only to the extent that it assists in clarifying the respective roles of the Prosecutor and Pre-Trial Chamber in the initiation of investigations and in identifying the appropriate standards of judicial review of the Prosecutor's admissibility assessment.

Part 2 of the paper examines the Pre-Trial Chambers' exercise of judicial review to date under Articles 53(3)(a) and 15(4) respectively of the Rome Statute. Part 3 highlights certain problems with the exercise of review by the Pre-Trial Chambers and offers to resolve them.

## **2. Pre-Trial Chamber Review of the Prosecutor's Assessment of Admissibility**

### ***A. Pre-Trial Chamber Review under Article 53(3)(a)***

#### *1. Article 53(3)(a)*

In the application of Article 53(1)(b) of the Rome Statute, the Prosecutor may, having evaluated the information available to her,<sup>6</sup> consider that a situation is inadmissible and that there is as a result 'no reasonable basis to proceed under [the] Statute'. The provision is unclear on its face as to whether proceeding 'under [the] Statute' means proceeding with an investigation. This is particularly so when it is contrasted with Article 15(3), the provision addressing the Prosecutor's initiation of an investigation *proprio motu*, which requires explicitly that the Prosecutor establish a reasonable basis to proceed 'with an investigation'.<sup>7</sup> The title of Article 53 ('Initiation of an Investigation') and the substance of Article 53(1), which addresses the initiation or not of an investigation by the Prosecutor, nonetheless suggest that a reasonable basis to proceed 'under [the] Statute' in Article 53(1) refers to proceeding 'with an investigation'. Moreover, Rule 48 of the Rules of Procedure and Evidence, by requiring that the Prosecutor's assessments under Article 15(3) be made by reference to the criteria specified in Article 53(1)(a)–(c), confirms that the applicable standard is the same under Article 53(1) and Article 15(3). In short, there is no material distinction between establishing a reasonable basis to proceed 'under [the] Statute', as per Article 53(1), and a reasonable basis to proceed

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<sup>6</sup> See also Rule 104(1), ICC RPE, speaking of an 'analys[is] [of] the seriousness of the information received'.

<sup>7</sup> The Pre-Trial Chamber reviewing the Prosecutor's request under Art. 15(4) is similarly required to determine whether there is a reasonable basis to proceed 'with an investigation'.

‘with an investigation’, as per Article 15(3).<sup>8</sup> This minor textual disparity may be attributed to an oversight during the fragmented drafting of the Rome Statute.<sup>9</sup>

Where the situation was referred to the Prosecutor by a state party or the Security Council, any decision by the Prosecutor, on the basis of inadmissibility or otherwise, not to proceed with an investigation into it is subject to judicial review pursuant to Article 53(3)(a), which provides:

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.<sup>10</sup>

Article 53(3)(a) does not specify the standard of judicial review that the Pre-Trial Chamber is expected to apply when reviewing the Prosecutor’s decision under Article 53(1) that there is

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<sup>8</sup> H. Olásolo, *The Triggering Procedure of the International Criminal Court* (Leiden, Boston: Martinus Nijhoff Publishers, 2005), at 71–72; M.J. Ventura, ‘The “Reasonable Basis to Proceed” Threshold in the Kenya and Côte d’Ivoire *Proprio Motu* Investigation Decisions: The International Criminal Court’s Lowest Evidentiary Standard?’ 12 *The Law and Practice of International Courts and Tribunals* (2013) 49–80; I. Stegmiller, ‘Article 15’, in M. Klamberg (ed.), *Commentary on the Law of the International Criminal Court* (Brussels: Torkel Opsahl Academic EPublisher, 2017), at 188; K. De Meester, ‘Article 53’, in M. Klamberg (ed.), *Commentary on the Law of the International Criminal Court* (Brussels: Torkel Opsahl Academic EPublisher, 2017), at 388.

<sup>9</sup> Draft Art. 12 of the Draft Statute for the International Criminal Court prepared by the Preparatory Committee required the Prosecutor to establish a ‘sufficient basis to proceed’ with an investigation *proprio motu*. A note made alongside that text indicated an intention to harmonize its use of this term with the term ‘reasonable basis’ in Draft Art. 54, which, like Art. 53 of the Rome Statute, addressed the initiation of investigations generally. The distinction was rectified in the final draft. The remaining distinction discussed here is likely a result of the preparation of the text of the Rome Statute by different working groups of different Committees set up by the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/CONF.183/2/Add.1, 14 April 1998, at 37, 75.

<sup>10</sup> Some commentators suggest that any decision by the Prosecutor not to proceed with an investigation on the ground of insufficient gravity is reviewable not only at the request of a referring state party or the Security Council under Art. 53(3)(a) but also at the initiative of the Pre-Trial Chamber under Art. 53(3)(b). G. Turone, ‘Powers and Duties of the Prosecutor’, in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court II* (Oxford: Oxford University Press, 2002), at 1154; M.M. deGuzman, ‘Gravity and the Legitimacy of the International Criminal Court’ 32(5) *Fordham International Law Journal* (2008) 1400–1465, at 1414. With respect, it is the Prosecutor’s assessment of the interests of justice under Art. 53(1)(c), which includes, inter alia, consideration of ‘the gravity of the crime’, that is reviewable by the Pre-Trial Chamber under Art. 53(3)(b). The requirement of ‘sufficient gravity’ in relation to the situation is a discrete admissibility criterion under Art. 53(1)(b) that cannot be equated with ‘the gravity of the crime’, an indicator of the interests of justice, under Art. 53(3)(b). In accordance with the maxim ‘*expressio unius exclusio alterius*’, moreover, the express mention of Art. 53(1)(c) in Art. 53(3)(b) – to the exclusion of Art. 53(1)(b) – excludes review of the Prosecutor’s admissibility assessment under Art. 53(1)(b) at the initiative of the Pre-Trial Chamber under Art. 53(3)(b).

‘no reasonable basis’ to proceed with an investigation into the situation and when determining whether to request that she reconsider that decision.<sup>11</sup>

## 2. *Pre-Trial Chamber Review to Date under Article 53(3)(a)*

### (a) Overview

To date, the Pre-Trial Chamber has had only two occasions to review a prosecutorial decision not to proceed with an investigation into a situation, both in relation to the situation on the registered vessels of The Comoros, Greece and Cambodia (the ‘Mavi Marmara’ incident) and both focusing on the gravity of the situation. In both of these decisions, only the first of which is directly relevant, Pre-Trial Chamber I in effect overruled the Prosecutor. Although this first decision formally enunciates a deferential standard of review to be applied by the Pre-Trial Chamber, in substance both reflect intense judicial scrutiny amounting in effect to *de novo* assessment of whether there existed a reasonable basis to proceed with an investigation into the situation.

### (b) In detail

Following the referral by The Comoros in 2013 of the situation on the registered vessels of The Comoros, Greece and Cambodia, the Prosecutor published a report under Article 53(1) declining to initiate an investigation into the situation, including on the ground that the gravity requirement in Article 17(1)(d) was not met.<sup>12</sup> In accordance with Article 53(3)(a), the referring state requested the Pre-Trial Chamber to review the Prosecutor’s conclusion on several grounds, including that the Prosecutor had wrongly applied the gravity threshold in her

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<sup>11</sup> Rule 108(2) of the ICC RPE requires that the Prosecutor on the request of the Pre-Trial Chamber under Art. 53(3)(a) reconsider her decision ‘as soon as possible’. Rule 108(3) requires further that she notify the Pre-Trial Chamber of her ‘final decision’ whether to proceed with the investigation.

<sup>12</sup> The Prosecutor also considered that the policy indication in relation to war crimes in Art. 8(1) was not met. Art. 8(1) confers jurisdiction over war crimes ‘in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes’. Article 53(1) Report, Office of the Prosecutor, 6 November 2014.

assessment of the admissibility of the situation under Article 53(1)(b).<sup>13</sup> In its decision of 2015, the Pre-Trial Chamber ruled that the Prosecutor had erred in several ways in her application of the gravity threshold<sup>14</sup> and requested her to reconsider her decision ‘as soon as possible’.<sup>15</sup>

In elaborating what it saw as the appropriate standard of review, the Pre-Trial Chamber sought to draw a distinction between its powers of review under Article 53(3)(a) and Article 15(4) respectively, characterizing the former as ‘fundamentally different in that it is triggered only by the existence of a disagreement between the Prosecutor (who decides not to open an investigation) and the referring entity (which wishes that such an investigation be opened), and is limited by the parameters of this disagreement’.<sup>16</sup> On the basis of this distinction, the Pre-Trial Chamber suggested that Article 53(3)(a) did not require a *de novo* or correctness-based review of the Prosecutor’s decision that there was no reasonable basis to proceed with an investigation. Instead, the Court was to determine only whether the Prosecutor’s decision was ‘materially affected by ... an error of procedure, an error of law, or an error of fact’.<sup>17</sup>

When addressing, however, whether the Prosecutor’s application of the gravity threshold in Article 17(1)(d) was materially affected by any such error, the Pre-Trial Chamber (Judge Kovács dissenting) applied what in substance was a far more stringent standard of review. The majority asserted that Article 53(1)(b) imposed ‘exacting legal requirements’ on the

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<sup>13</sup> Application for Review Pursuant to Article 53(3)(a) of the Prosecutor’s Decision of 6 November 2014 Not to Initiate an Investigation in the Situation, *Mavi Marmara Incident* (ICC-01/13-3-Red), Government of the Union of The Comoros, 29 January 2015.

<sup>14</sup> In addition to finding the Prosecutor’s application of various indicators of gravity within the meaning of Art. 17(1)(d) problematic, the Pre-Trial Chamber considered that all facts other than those that were ‘manifestly false’ should have contributed to her gravity assessment under Art. 53(1)(b), including allegations marred by conflicting accounts. Decision on the Request of the Union of the Comoros to Review the Prosecutor’s Decision Not to Initiate an Investigation, *Mavi Marmara Incident* (ICC-01/13-34), Pre-Trial Chamber I, 16 July 2015, § 35 (hereafter ‘Comoros Decision 2015’). The Chamber’s approach is problematic as the admissibility threshold in Art. 53(1)(b) would be rendered ineffective if satisfied by allegations without some affirmative basis in fact. M.E. Cross, ‘The Standard of Proof in Preliminary Examinations’, in C. Stahn and M. Bergsmo (eds), *Quality Control in Preliminary Examinations: Vol. 2* (Brussels: Torkel Opsahl Academic EPublisher, 2018), at 238.

<sup>15</sup> See Rule 108(2), ICC RPE. Comoros Decision 2015, *ibid.*, § 50.

<sup>16</sup> Nothing in the text of Art. 53(3)(a) requires that the Pre-Trial Chamber limit its review to the grounds raised by the referring entity. Comoros Decision 2015, *ibid.*, § 9.

<sup>17</sup> Comoros Decision 2015, *ibid.*, § 12.

Prosecutor<sup>18</sup> and, contradicting in substance its prior statement that its task was not to review the Prosecutor's decision *de novo*, examined in detail the manner in which the Prosecutor applied the gravity threshold before arriving at its own findings.<sup>19</sup> In dissent, Judge Kovács disagreed with the standard of review effectively applied by the majority. For him, a 'full-fledged review' of this kind was 'neither a duty nor automatic'.<sup>20</sup> Adopting a more deferential standard, he recognised that the Prosecutor enjoyed a degree of discretion in the application of Article 53(1). For him, the role of the Pre-Trial Chamber was only 'to ensure that the Prosecutor ha[d] not abused her discretion in arriving at her decision not to initiate an investigation'.<sup>21</sup>

Appealing the Pre-Trial Chamber's decision, the Prosecutor echoed Judge Kovács's 'abuse of discretion' standard, contending that the majority's approach threatened 'the careful balance ... between prosecutorial independence and accountability'.<sup>22</sup> While the Appeals Chamber declined in the event to comment on the standard of review applied by the Pre-Trial Chamber

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<sup>18</sup> Comoros Decision 2015, *ibid.*, § 14.

<sup>19</sup> The Pre-Trial Chamber found that the Prosecutor had erred in her application of various indicators of gravity within the meaning of Art. 17(1)(d). Confirming The Comoros' view that the number of victims satisfied the requirements of scale, the Chamber concluded that the Prosecutor had committed a material error in her own evaluation that it did not. When addressing the nature of the crimes, even in the absence of information establishing a reasonable basis to believe that the war crimes of torture or inhuman treatment had been committed, the Chamber considered that the Prosecutor should have concluded that there was a reasonable basis to believe that these crimes had been committed, and on that basis that a finding of sufficient gravity was justified. This raises the question whether the Pre-Trial Chamber may, on the basis of additional crimes it has identified, deem admissible a situation that the Prosecutor has considered to be inadmissible. The approach is less problematic in the exercise of review under Art. 15(4), where the Pre-Trial Chamber's inclusion of additional crimes would only reinforce, if superfluously, the Prosecutor's affirmative finding as to the admissibility of the situation. On the other hand, the identification of additional crimes by the Pre-Trial Chamber under Art. 53(3)(a) interferes with the Prosecutor's discretionary gravity assessment under Art. 53(1)(b). Finally, contradicting the Prosecutor's assessment of the impact of the crimes, the Pre-Trial Chamber found the impact on victims and their families to be an indicator of sufficient gravity, and that the Prosecutor erred by failing to account for the potential impacts of the crimes on the situation in Gaza. Comoros Decision 2015, *supra* note 14, §§ 22–23, 26, 28–30, 47–48.

<sup>20</sup> Partly Dissenting Opinion of Judge Péter Kovács, *Mavi Marmara Incident* (ICC-01/13-34-Anx-Corr), Pre-Trial Chamber I, 16 July 2015, §§ 2–3 (hereafter 'Kovács Dissent 2015').

<sup>21</sup> Kovács Dissent 2015, *ibid.*, §§ 7–8. See also K.J. Heller, 'The Pre-Trial Chamber's Dangerous Comoros Review Decision', *Opinio Juris*, 17 July 2015, available at <http://opiniojuris.org/2015/07/17/the-pre-trial-chambers-problematic-comoros-review-decision/> (last visited 1 December 2019); A. Whiting, 'The ICC Prosecutor Should Reject the Judges' Decision in Mavi Marmara', *Just Security*, 20 July 2015, available at <https://www.justsecurity.org/24778/icc-prosecutor-reject-judges-decision-mavi-marmara/> (last visited 1 December 2019). Judge Kovács also considered that the majority had erred in 'enter[ing] new findings under jurisdiction ... instead of reviewing the existing ones'. Kovács Dissent 2015, *ibid.*, § 11.

<sup>22</sup> Notice of Appeal of 'Decision on the Request of the Union of the Comoros to Review the Prosecutor's Decision Not to Initiate an Investigation', *Mavi Marmara Incident* (ICC-01/13-35), Office of the Prosecutor, 27 July 2015, § 17.



and dismissed the appeal *in limine*,<sup>23</sup> it nonetheless noted that Article 53(3)(a) reflected ‘a conscious decision on the part of the drafters to preserve a higher degree of prosecutorial discretion regarding decisions not to investigate’ based on considerations of admissibility.<sup>24</sup>

Following the publication by the Prosecutor of a ‘Final Decision’ in which she refused, upon reconsideration, to initiate an investigation into the situation,<sup>25</sup> the Pre-Trial Chamber at the request of the referring entity issued in 2018 a second decision in which it found that the Prosecutor had been required to and had failed to ‘comply with’ its earlier decision of 2015.<sup>26</sup> Judge Kovács partially dissented on the basis that the Prosecutor retained the discretion not to proceed with an investigation. In his view, reconsideration ‘does not mean *per se* that the Prosecutor is obliged to reach a different conclusion than the one she initially reached’.<sup>27</sup>

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<sup>23</sup> Observing that the Pre-Trial Chamber had requested the Prosecutor only to ‘reconsider’ her initial assessment under Art. 53(3)(a) and could not, under that provision, compel her to investigate, the Appeals Chamber concluded that the Pre-Trial Chamber’s decision was not one pertaining to admissibility for the purpose of Art. 82(1)(a), the provision permitting appeal of admissibility decisions. In doing so, it drew a distinction between Pre-Trial Chamber review under Art. 53(3)(a) and (b) respectively. 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’, *Mavi Marmara Incident* (ICC-01/13-51), Appeals Chamber, 6 November 2015, § 58 (hereafter ‘Comoros Appeal Decision 2015’). For their part, dissenting Judges Fernández de Gurmendi and van den Wyngaert believed that the Prosecutor’s appeal was justified by the fact that, when reconsidering her initial admissibility assessment, the Prosecutor would no doubt be guided by the Pre-Trial Chamber’s decision. Joint Dissenting Opinion of Judge Silvia Fernández de Gurmendi and Judge Christine van den Wyngaert, *Mavi Marmara Incident* (ICC-01/13-51-Anx), Appeals Chamber, 6 November 2015, § 35 (hereafter ‘Gurmendi and Wyngaert Dissent’).

<sup>24</sup> Comoros Appeal Decision 2015, *ibid.*, § 59.

<sup>25</sup> Final Decision of the Prosecution concerning the ‘Article 53(1) Report’ (ICC-01/13-6-AnxA), dated 6 November 2014, *Mavi Marmara Incident* (ICC-01/13-57/Anx1), Office of the Prosecutor, 29 November 2017, § 22 (hereafter ‘Final Decision 2017’).

<sup>26</sup> The concerns of the dissenting judges of the Appeals Chamber proved justified in the proceedings that followed the Prosecutor’s publication of her ‘Final Decision’. The referring state sought a second review under Art. 53(3)(a) and the Pre-Trial Chamber in its second decision found that the Prosecutor had been obliged to reconsider her initial decision ‘based on’ its 2015 decision, and had failed to do so. Decision on the ‘Application for Judicial Review by the Government of the Union of the Comoros’, *Mavi Marmara Incident* (ICC-01/13-68), Pre-Trial Chamber I, 15 November 2018, §§ 87, 95–96. Notwithstanding the Appeals Chamber’s observation that the final decision lay with the Prosecutor, the Pre-Trial Chamber’s *de novo* review of the Prosecutor’s admissibility assessment in 2015, combined with its insistence in 2018 that the Prosecutor’s reconsideration be ‘based on’ that decision, restricted the Prosecutor’s discretion to arrive at any conclusion that deviated from the Pre-Trial Chamber’s own conclusion as to the threshold of ‘sufficient gravity’ in Art. 17(1)(d). See P. Urs, ‘Some Concerns with the Pre-Trial Chamber’s Second Decision in Relation to the Mavi Marmara Incident’, EJIL Talk! Blog of the European Journal of International Law (EJIL), 5 December 2018, available at <https://www.ejiltalk.org/some-concerns-with-the-pre-trial-chambers-second-decision-in-relation-to-the-mavi-marmara-incident/> (last visited 1 December 2019).

<sup>27</sup> Partly Dissenting Opinion of Judge Péter Kovács, *Mavi Marmara Incident* (ICC-01/13-68-Anx), Pre-Trial Chamber I, 15 November 2018, § 16.

Appealing the Pre-Trial Chamber’s second decision, the Prosecutor raised among others the question ‘whether the Prosecutor, in carrying out a reconsideration ... [wa]s obliged to accept particular conclusions of law or fact’ in the Pre-Trial Chamber’s 2015 decision.<sup>28</sup> Issuing its decision in 2019, the Appeals Chamber clarified that the Pre-Trial Chamber should not have, in the exercise of its review under Article 53(3)(a), ‘direct[ed] the Prosecutor as to the *result* of her reconsideration’.<sup>29</sup> Drawing a distinction between questions of law and questions of fact, the Appeals Chamber considered that while the Prosecutor had been obliged to follow the Pre-Trial Chamber’s interpretation on questions of law, including the articulation by the Pre-Trial Chamber of the standard of review under Article 53(3)(a),<sup>30</sup> Pre-Trial Chamber scrutiny of questions of fact in respect of the Prosecutor’s gravity assessment was more limited. The latter required a determination only of whether the Prosecutor had accounted for ‘certain available information’.<sup>31</sup> This did not include ‘direct[ing] the Prosecutor as to how to assess this information and which factual findings she should reach’.<sup>32</sup> Thus, while ultimately concluding that the Prosecutor had been required to reconsider her initial assessment on the basis of the Pre-Trial Chamber’s 2015 decision, the Appeals Chamber considered that it had been ‘inappropriate for the Pre-Trial Chamber to direct the Prosecutor as to ... what factual findings she should reach and to suggest the weight to be assigned to certain factors affecting the gravity assessment’.<sup>33</sup> Judges Eboe-Osuji and Ibáñez partially dissented, both disagreeing with the majority’s restriction of Pre-Trial Chamber review of questions of fact.<sup>34</sup> When it came to

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<sup>28</sup> Request for Leave to Appeal the ‘Decision on the “Application for Judicial Review by the Government of the Union of the Comoros”’, *Mavi Marmara Incident* (ICC-01/13-69), Office of the Prosecutor, 21 November 2018, § 13.

<sup>29</sup> 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”’, *Mavi Marmara Incident* (ICC-01/13-98), Appeals Chamber, 2 September 2019, § 76 (hereafter ‘Comoros Appeal Decision 2019’).

<sup>30</sup> Comoros Appeal Decision 2019, *ibid.*, §§ 78–79, 87–90.

<sup>31</sup> Comoros Appeal Decision 2019, *ibid.*, § 80.

<sup>32</sup> Comoros Appeal Decision 2019, *ibid.*, § 80. The Appeals Chamber referred, for example, to the Pre-Trial Chamber’s disagreement with the Prosecutor as to the sufficiency of the scale and the impact of the crimes. Comoros Appeal Decision 2019, *ibid.*, § 93.

<sup>33</sup> Comoros Appeal Decision 2019, *ibid.*, § 94.

<sup>34</sup> Partly Dissenting Opinion of Judge Eboe-Osuji, *Mavi Marmara Incident* (ICC-01/13-98/Anx), Appeals Chamber, 2 September 2019, § 26 (hereafter ‘Eboe-Osuji Dissent’); Separate and Partly Dissenting Opinion of

gravity, Judge Ibáñez insisted on the Chamber's competence 'to consider the specific weight of factors such as the scale and impact of the crimes on victims in applying the law to the factual submissions of the parties'.<sup>35</sup>

(c) Recapitulation

If only formally, the Pre-Trial Chamber's 2015 decision in relation to the Mavi Marmara incident recognised that the applicable standard of review under Article 53(3)(a) must be one that allows a degree of deference to the Prosecutor. The standard articulated by the majority of the Pre-Trial Chamber was one of material error, while Judge Kovács in his dissent preferred an even more deferential 'abuse of discretion' formulation. Both positions excluded *de novo* review by the Pre-Trial Chamber under Article 53(3)(a). The Appeals Chamber in its dictum of 2015 also effectively excluded the *de novo* application of Article 53(1)(b) by the Pre-Trial Chamber, recognising the Prosecutor's particular discretion under that provision in relation to admissibility and affirming that the decision whether to investigate ultimately lay with her. In practice, however, the Pre-Trial Chamber's effective *de novo* review of the Prosecutor's decision in 2015 contradicted its professed deference to prosecutorial discretion and flew in the face of the Appeals Chamber's statement. The Appeals Chamber in its decision of 2019, while not explicitly addressing the question of the standard of review under Article 53(3)(a), clarified that Pre-Trial Chamber review under that provision excluded *de novo* review of the Prosecutor's application of the gravity criterion to the facts.

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Judge Luz del Carmen Ibáñez Carranza, *Mavi Marmara Incident* (ICC-01/13-98-AnxI), Appeals Chamber, 4 November 2019, §§ 44, 62 (hereafter 'Ibáñez Dissent').

<sup>35</sup> Ibáñez Dissent, *ibid.*, § 85.

## **B. Pre-Trial Chamber Review under Article 15(4)**

### *1. Article 15(4)*

The initiation of an investigation into a situation by the Prosecutor *proprio motu* must be authorized by a Pre-Trial Chamber acting in accordance with Article 15(4) of the Rome Statute, which states:

If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.<sup>36</sup>

Before making a request for authorization to initiate an investigation *proprio motu*, which Article 15(3) obliges her to do, the Prosecutor must herself have concluded – as indicated in Article 15(3), echoing Article 53(1), by reference to which the Prosecutor’s decision whether or not to initiate an investigation *proprio motu* is actually taken<sup>37</sup> – that there exists a ‘reasonable basis to proceed with an investigation’. Just like Article 53(1), Article 15(1) and (2) specify that the Prosecutor have arrived at her conclusion on the basis of and having analysed the seriousness of information she has received pertaining to crimes within the jurisdiction of the Court. Rule 48 of the Rules of Procedure and Evidence specifies further that the Prosecutor must, when assessing the existence or not of a reasonable basis to proceed with an investigation *proprio motu*, apply the criteria laid down in Article 53(1)(a)–(c), including

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<sup>36</sup> The use of the term ‘case’ in this provision is an anomaly. The Pre-Trial Chambers have applied the provision in relation to ‘potential cases’ arising out of the situation. Decision Pursuant to Article 15 of the Rome Statute on the Authorization on an Investigation into the Situation in the Republic of Kenya, *Situation in Kenya* (ICC-01/09-19), Pre-Trial Chamber II, 31 March 2010, § 64 (hereafter ‘Kenya Authorization Decision’); Olásolo, *supra* note 8, at 67.

<sup>37</sup> A prosecutorial decision to initiate an investigation *proprio motu* is taken under Art. 53(1), the provision governing the initiation of investigations generally, while under Art. 15(3) the existence of a ‘reasonable basis to proceed’ serves as a condition precedent to the Prosecutor’s request for Pre-Trial Chamber authorization (‘If the Prosecutor concludes that there is a reasonable basis to proceed ...’).

the criterion of admissibility, and consequently of gravity, stipulated in Article 53(1)(b). Having examined the Prosecutor's request and supporting material, the Pre-Trial Chamber must then determine whether there is indeed a 'reasonable basis to proceed with an investigation'. Since both the Prosecutor as indicated in Article 15(3) and the Pre-Trial Chamber under Article 15(4) must conduct their assessments by reference to the same 'reasonable basis to proceed' standard, the Pre-Trial Chamber's assessment must by implication be by reference to the same criteria as those applied by the Prosecutor, namely those specified in Article 53(1)(a)–(c), including the criterion of admissibility, and thereby of gravity, in Article 53(1)(b).

In contrast to Article 53(3)(a), which permits the Pre-Trial Chamber to 'review [the] decision of the Prosecutor', Article 15(4) does not mention the Prosecutor's decision, let alone specify that the Pre-Trial Chamber's task under the provision is to 'review' this decision. It states simply, in relevant part, that '[i]f the Pre-Trial Chamber considers ... that there is a reasonable basis to proceed with an investigation, ... it shall authorise the commencement of an investigation'. This textual distinction could be taken to suggest that the Pre-Trial Chamber's task under Article 15(4) is not to review the Prosecutor's conclusion that there exists a reasonable basis to proceed with an investigation *proprio motu* but to conduct an independent assessment, without regard to the Prosecutor's, as to the existence of such a basis. On balance, however, the text and context of Article 15(4) indicate sufficiently persuasively that the Pre-Trial Chamber's task under Article 15(4) is, like its task under Article 53(3)(a), to review the Prosecutor's conclusion that there exists a reasonable basis to proceed with an investigation *proprio motu*. Article 15(4) requires that the Pre-Trial Chamber have examined the Prosecutor's request and its supporting material, which are tailored to disclose the situation's satisfaction, in the Prosecutor's opinion, of the 'reasonable basis to proceed' threshold; and, in accordance with the maxim of construction '*expressio unius exclusio alterius*', the implication

is that the Prosecutor's request and its supporting material are the only materials that the Pre-Trial Chamber is required to examine when determining under Article 15(4) whether there exists a reasonable basis to proceed with an investigation.<sup>38</sup> Restriction of the material basis of the Pre-Trial Chamber's determination under Article 15(4) to the Prosecutor's request and its supporting material suggests that what the Chamber is directed to do under Article 15(4) is to review the Prosecutor's conclusion, reached on the basis of the criteria in Article 53(1)(a)–(c), that there exists a reasonable basis to proceed with an investigation *proprio motu*. Such a characterization is lent further support by Rule 50(5) of the Rules of Procedure and Evidence, which requires that the Pre-Trial Chamber issue its decision 'with respect to all or any part of the request by the Prosecutor'.<sup>39</sup>

## 2. Pre-Trial Chamber Review to Date under Article 15(4)

### (a) Overview

With the exception of the Prosecutor's request in relation to the situation in Afghanistan, to date all of the Prosecutor's requests for authorization to initiate an investigation into a situation *proprio motu* have been granted by the Pre-Trial Chambers under Article 15(4). Relying on the text of the provision, all of the Pre-Trial Chambers except for the Chambers that authorized the initiation of investigations in Georgia and Bangladesh/Myanmar have assessed *de novo* the existence or not of a reasonable basis to proceed with an investigation, even if some individual

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<sup>38</sup> In accordance with Art. 15(3) of the Statute and Rule 50(3) of the RPE, victims who have been informed by the Prosecutor of the request for authorization may make written representations to the Pre-Trial Chamber. There is no corresponding obligation on the Chamber to examine these representations in its decision under Art. 15(4), though the Chamber is permitted, under Rule 50(4), to request additional information from any victims making representations. The inclusion of victims' participation in Art. 15(3) compared with its exclusion from Art. 15(4) suggests a limited role for victims in support of the Prosecutor's request.

<sup>39</sup> The related question of whether the Pre-Trial Chamber is limited to the crimes identified by the Prosecutor in her request and supporting material or whether it is permitted to identify and direct the Prosecutor to investigate additional crimes depends on the characterization of the Pre-Trial Chamber's role under Art. 15(4). The latter approach would be consistent with the articulation of the Pre-Trial Chamber's role under Art. 15(4) as an independent assessment of the existence or not of a reasonable basis to proceed with an investigation *proprio motu*, but is less convincing if Art. 15(4) is envisaged, as proposed here, as requiring review of the Prosecutor's assessment, including her identification of crimes.

judges have questioned this standard of review. When specifically addressing, however, the criterion of sufficient gravity, the Pre-Trial Chambers have not engaged in any serious *de novo* consideration, instead merely endorsing the Prosecutor's gravity analysis.<sup>40</sup>

(b) In detail

According to the Pre-Trial Chamber that authorized the initiation of the investigation into the situation in Kenya in 2010, the Prosecutor's first *proprio motu* investigation, Article 15(4) confers on the Pre-Trial Chamber 'a supervisory role over the *proprio motu* initiative of the Prosecutor' that is intended to 'prevent the Court from proceeding with unwarranted, frivolous, or politically motivated investigations that could have a negative effect on its credibility'.<sup>41</sup> In the Chamber's view, the fulfilment of this objective requires a *de novo* assessment by reference to 'the exact standard on the basis of which the Prosecutor arrived at his conclusion' under Article 53(1), namely whether there is a 'reasonable basis to proceed' with an investigation.<sup>42</sup> Judge Kaul, while dissenting from the majority's authorization of the investigation, agreed with its *de novo* assessment, asserting that the Pre-Trial Chamber's determination under Article 15(4) 'is not of a mere administrative or procedural nature but requires a substantial and genuine examination'.<sup>43</sup> His disagreement with the majority's decision was in part due to what he saw in practice as its 'somewhat generous or only summary evaluation whereby any information, of even fragmentary nature, may satisfy the standard' of reasonableness in Article 15(4).<sup>44</sup>

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<sup>40</sup> In requests for the authorization of investigations *proprio motu*, the Prosecutor has offered detailed gravity assessments, first in relation to the situation as a whole, as in Kenya, and then, on the instruction of the Pre-Trial Chamber that authorized the initiation of that investigation, in relation to 'potential cases' within each situation.

<sup>41</sup> Art. 15(4) was included to allay the fears of states reluctant to confer on the Prosecutor the power to initiate an investigation in the absence of a referral by a state party or the Security Council. Kenya Authorization Decision, *supra* note 36, §§ 24, 32.

<sup>42</sup> Kenya Authorization Decision, *supra* note 36, § 24.

<sup>43</sup> Dissenting Opinion of Judge Hans-Peter Kaul, *Situation in Kenya* (ICC-01/09-19), Pre-Trial Chamber II, 31 October 2010, § 19 (hereafter 'Kaul Dissent').

<sup>44</sup> Kaul Dissent, *ibid.*, § 15. Judge Kaul's dissent raises an issue that arose also in relation to the Mavi Marama incident and in subsequent Pre-Trial Chamber decisions under Art. 15(4), that is, if it is permissible for a Pre-Trial

In its subsequent first decision authorizing an investigation into post-election violence in Côte d'Ivoire since 2010, Pre-Trial Chamber III likewise assessed *de novo* the existence or not of a reasonable basis to proceed with an investigation into the situation, reiterating that the objective of Article 15(4) was to prevent 'unwarranted, frivolous or politically motivated investigations'.<sup>45</sup> It undertook an expansive examination of the Prosecutor's request, the material supporting it and, for good measure, victims' representations which went beyond the confines of the request to examine additional crimes and to conclude that there existed a reasonable basis to believe that these additional crimes had been committed.<sup>46</sup> Based on the Prosecutor's observation that Côte d'Ivoire had 'repeatedly experienced violence' even before 2010,<sup>47</sup> the Pre-Trial Chamber also ordered the Prosecutor to 'revert to the Chamber within one month with any additional information that [wa]s available to him on potentially relevant crimes committed between 2002 and 2010', authorizing in a second decision the expansion of the investigation to include additional crimes committed during this period.<sup>48</sup> Judge Fernández

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Chamber, whether under Art. 53(3)(a) or Art. 15(4), to justify the initiation of an investigation with a view to clarifying relevant facts. See *supra* note 14. Initiating an investigation on this basis would allow the Prosecutor greater investigative powers with which to establish relevant facts, but such an approach would in practice almost always favour the initiation of an investigation, calling into question the effectiveness of the Prosecutor's admissibility assessment as part of her decision whether to initiate an investigation. When invoked in the exercise of Pre-Trial Chamber review under Art. 53(3)(a), such an approach would limit excessively the Prosecutor's discretion to decline to initiate an investigation under Art. 53(1)(b), leaving little regard for the practical considerations that underlie the selectivity of the Prosecutor's investigations. Conversely, when applied by the Pre-Trial Chamber under Art. 15(4), it would ease the Prosecutor's burden to an extent that would almost always favour the initiation of an investigation, frustrating the filtering mechanism in Art. 15(4).

<sup>45</sup> Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Côte d'Ivoire, *Situation in Côte d'Ivoire* (ICC-02/11-14), Pre-Trial Chamber III, 3 October 2011, § 21 (hereafter 'Côte d'Ivoire Authorization Decision I').

<sup>46</sup> Contrary to the Prosecutor's assessment, the Pre-Trial Chamber found a reasonable basis to believe that additional crimes against humanity allegedly perpetrated by pro-Gbagbo forces and crimes against humanity allegedly perpetrated also by pro-Ouattara forces had been committed since the 2010 presidential election. Côte d'Ivoire Authorization Decision I, *ibid.*, §§ 83–86, 93–95.

<sup>47</sup> Request for Authorisation of Investigation Pursuant to Article 15, *Situation in Côte d'Ivoire* (ICC-02/11-3), Office of the Prosecutor, 23 June 2011, § 42.

<sup>48</sup> The Pre-Trial Chamber relied on Rule 50(4) of the RPE to do so. Côte d'Ivoire Authorization Decision I, *supra* note 45, §§ 183–185. The additional information submitted by the Prosecutor excluded any characterization of conduct as crimes within the jurisdiction of the Court. While not binding the Prosecutor to its characterization of conduct, it was the Pre-Trial Chamber that established, on the basis of the information supplied, a reasonable basis to believe that war crimes and crimes against humanity had been committed between 2002 and 2010. Notably, neither the Prosecutor in his submission of additional information nor the Pre-Trial Chamber in its second decision conducted a gravity assessment to support the broader scope of the investigation. Decision on the 'Prosecution's Provision of Further Information Regarding Potentially Relevant Crimes Committed Between 2002 and 2010', *Situation in Côte d'Ivoire* (ICC-02/11-36), Pre-Trial Chamber III, 22 February 2012, § 38.



de Gurmendi dissented from the Pre-Trial Chamber's first decision in relation to the situation on the ground that the majority's application of Article 15(4) amounted to an unwarranted duplication of the Prosecutor's preliminary examination.<sup>49</sup> '[G]uided by the underlying purpose of providing a judicial safeguard against frivolous or politically-motivated charges', she warned that the Pre-Trial Chamber must limit itself to the supervisory role it purported to exercise.<sup>50</sup> Considering that Article 15(4) required the Pre-Trial Chamber to review the Prosecutor's decision and not to conduct an independent examination, she disagreed with the majority's *de novo* assessment, preferring an 'abuse of discretion' standard of review.<sup>51</sup>

Conversely, in the subsequent Pre-Trial Chamber decision authorizing an investigation into the situation in Georgia, it was the Chamber that adopted a 'strictly limited' approach to Article 15(4), while a lone judge favoured more probing scrutiny. Pre-Trial Chamber I considered that Article 15(4) 'serves no other purpose than to prevent the abuse of power on the part of the Prosecutor'.<sup>52</sup> It consequently limited its assessment to the crimes specified in the Prosecutor's request, taking note of the Prosecutor's prerogative to investigate additional crimes and observing that 'it [was] unnecessary and inappropriate for the Chamber to go beyond the submissions in the request in an attempt to correct any possible error on the part of the Prosecutor'.<sup>53</sup> In his separate opinion, Judge Kovács found himself alone in the view that the Pre-Trial Chamber's mandate in Article 15(4) to 'consider', combined with its prerogative of

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<sup>49</sup> Judge Fernández de Gurmendi objected, for instance, to the majority's conclusion that there was a reasonable basis to believe that crimes against humanity had been committed by pro-Ouattara forces despite the fact that the Prosecutor had submitted that the information available to that point was insufficient to support such a conclusion. Separate and Partially Dissenting Opinion of Judge Silvia Fernández de Gurmendi, *Situation in Côte d'Ivoire* (ICC-02/11-15), Pre-Trial Chamber III, 3 October 2011, §§ 15, 41 (hereafter 'Gurmendi Dissent').

<sup>50</sup> Gurmendi Dissent, *ibid.*, § 16.

<sup>51</sup> Gurmendi Dissent, *ibid.*, §§ 12, 15–16. In her view, the 'early and necessarily non-comprehensive identification of incidents serve[d] only as the basis for determining whether the requirements of Article 53 of the Statute [were] met'. Gurmendi Dissent, *ibid.*, § 34.

<sup>52</sup> Decision on the Prosecutor's Request for Authorization of an Investigation, *Situation in Georgia* (ICC-01/15-12), Pre-Trial Chamber I, 27 January 2016, § 3 (hereafter 'Georgia Authorization Decision').

<sup>53</sup> Georgia Authorization Decision, *ibid.*, § 35.

requesting additional information,<sup>54</sup> demanded a more far-reaching examination.<sup>55</sup> Arguing that the Pre-Trial Chamber had a duty ‘to reach its own conclusions on whether an investigation [was] warranted or not, and not merely examine the Prosecutor’s conclusions’,<sup>56</sup> he went beyond the crimes identified in the Prosecutor’s request to find a reasonable basis to proceed with an investigation in relation to additional crimes.<sup>57</sup>

The Pre-Trial Chamber that subsequently authorized the initiation of an investigation in Burundi agreed that the objective of Article 15(4) was to prevent abuse of the Prosecutor’s discretion in the initiation of investigations, but considered, as Judge Kovács did, that this required *de novo* assessment by the Pre-Trial Chamber.<sup>58</sup> As opposed to the Pre-Trial Chamber that authorized the investigation in Georgia, and resembling more closely the approach taken in relation to the situation in Côte d’Ivoire, Pre-Trial Chamber III identified crimes additional to those enumerated in the Prosecutor’s request in relation to Burundi.<sup>59</sup> It concluded that the Prosecutor had acted ‘too restrictively’ in limiting herself to crimes against humanity and obliged her also to ‘enquire during her investigation whether a non-international armed conflict existed in Burundi during the relevant period and whether war crimes [had been] committed’.<sup>60</sup>

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<sup>54</sup> Rule 50(4), RPE.

<sup>55</sup> Separate Opinion of Judge Péter Kovács, *Situation in Georgia* (ICC-01/15-12-Anx1), Pre-Trial Chamber I, 27 January 2016, § 5 (hereafter ‘Kovács Separate Opinion’).

<sup>56</sup> Kovács Separate Opinion, *ibid.*, § 20.

<sup>57</sup> Judge Kovács found a reasonable basis to believe that the war crimes of indiscriminate or disproportionate attacks, rape, unlawful confinement and hostage-taking and the crimes against humanity of imprisonment or other deprivation of liberty, rape, torture and inhumane treatment had been committed. While ultimately arriving at the same conclusion as that of the majority, he considered that the majority’s decision was insufficiently persuasive, preferring to have authorized the investigation on the broader basis he identified. Unlike the Pre-Trial Chamber that authorized the investigation in Côte d’Ivoire, however, Judge Kovács did not specify that the Prosecutor was obliged to investigate the additional crimes he had identified. Kovács Separate Opinion, *ibid.*, §§ 17, 26–30, 34–36.

<sup>58</sup> Public Redacted Version of ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi’, *Situation in Burundi* (ICC-01/17-9-Red), Pre-Trial Chamber III, 9 November 2017, § 28 (hereafter ‘Burundi Authorization Decision’).

<sup>59</sup> Having concluded that the threshold for a non-international armed conflict had not been met, the Prosecutor’s request had excluded any characterization of conduct as war crimes and instead sought authorization only in relation to the alleged commission of crimes against humanity. Public Redacted Version of ‘Request for Authorisation of an Investigation Pursuant to Article 15’, 6 September 2017, ICC-01/17-5-US-Exp, *Situation in Burundi* (ICC-01/17-5-Red), Office of the Prosecutor, 15 November 2017, § 6.

<sup>60</sup> Burundi Authorization Decision, *supra* note 58, § 141.

When in 2019 Pre-Trial Chamber II issued its unanimous decision refusing authorization for the Prosecutor’s initiation of an investigation in Afghanistan, the Chamber undertook the first judicial assessment *de novo* of ‘the interests of justice’ within the meaning of Article 53(1)(c).<sup>61</sup> In doing so, it considered that its function under Article 15(4) was ‘to set boundaries to and restrain the discretion of the Prosecution acting *proprio motu*, in order to avoid manifestly ungrounded investigations due to lack of adequate factual or legal fundamentals’.<sup>62</sup> For the Chamber, this required an assessment of the credibility of the information made available by the Prosecutor, including ‘its completeness, relevance and consistency’.<sup>63</sup> Judge Mindua in his separate opinion endorsed the majority’s *de novo* assessment,<sup>64</sup> the objective of which was, in his view, ‘to limit extravagant politically motivated investigations’.<sup>65</sup>

In contrast, Pre-Trial Chamber III in its authorization in 2019 of an investigation into the situation in Bangladesh/Myanmar reverted to a deferential review of the Prosecutor’s assessment. Reiterating earlier decisions that had articulated the objective of Article 15(4) as preventing ‘unwarranted, frivolous, or politically motivated investigations’,<sup>66</sup> the Chamber considered that

[t]his objective is achieved as soon as it can be established, based on the available information, that there is a reasonable basis to believe that ‘at least one crime within the jurisdiction of the Court has been committed’ and the potential case(s) are admissible .... If and once this is

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<sup>61</sup> Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, *Situation in Afghanistan* (ICC-02/17-33), Pre-Trial Chamber II, 12 April 2019, §§ 34–35, 87 (hereafter ‘Afghanistan Authorization Decision’).

<sup>62</sup> Afghanistan Authorization Decision, *ibid.*, § 32.

<sup>63</sup> Afghanistan Authorization Decision, *ibid.*, § 38.

<sup>64</sup> Concurring and Separate Opinion of Judge Antoine Kesia-Mbe Mindua, *Situation in Afghanistan* (ICC-02/17-33-Anx), Pre-Trial Chamber II, 31 May 2019, § 7 (hereafter ‘Mindua Separate Opinion’).

<sup>65</sup> Mindua Separate Opinion, *ibid.*, § 6.

<sup>66</sup> Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar, *Situation in Bangladesh/Myanmar* (ICC-01/19-27), Pre-Trial Chamber III, 14 November 2019, § 127 (hereafter ‘Bangladesh/Myanmar Authorization Decision’).

established, it can no longer be said that an investigation would be unwarranted or politically motivated.<sup>67</sup>

The Pre-Trial Chamber thus authorized the investigation ‘on the basis of the material provided by the Prosecutor’ and limited itself to a deferential review of the Prosecutor’s application of the criteria in Article 53(1)(a)–(c), including admissibility.<sup>68</sup>

Yet despite the fact that all of the Pre-Trial Chambers that have rendered decisions under Article 15(4) have purported to conduct their assessments by reference to the criteria in Article 53(1)(a)–(c), including admissibility, in practice they have rarely assessed *de novo* the criterion of gravity, the only exception being the Kenya authorization decision.<sup>69</sup> In the decisions relating to the situations in Côte d’Ivoire,<sup>70</sup> Georgia,<sup>71</sup> Burundi,<sup>72</sup> Afghanistan<sup>73</sup> and Bangladesh/Myanmar,<sup>74</sup> the Pre-Trial Chambers all relied heavily on and in effect simply endorsed the Prosecutor’s submissions in respect of gravity, turning only selectively to supporting materials and victims’ representations.

### (c) Recapitulation

The majority of the Pre-Trial Chambers rendering decisions under Article 15(4) have assessed *de novo* the existence or not of a ‘reasonable basis to proceed’ with an investigation into the situation. Only the Pre-Trial Chambers that authorized the investigations in Georgia and Bangladesh/Myanmar and Judge Fernández de Gurmendi in her partial dissent from the first

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<sup>67</sup> Bangladesh/Myanmar Authorization Decision, *ibid.*, § 127.

<sup>68</sup> Bangladesh/Myanmar Authorization Decision, *ibid.*, § 19.

<sup>69</sup> By requiring that admissibility be assessed in relation to ‘potential cases’ within the situation rather than the situation taken as a whole, it was necessary for the Pre-Trial Chamber not only to identify potential cases from the Prosecutor’s request and supporting material, but also to assess their gravity *de novo*. Kenya Authorization Decision, *supra* note 36, §§ 189–200.

<sup>70</sup> Côte d’Ivoire Authorization Decision I, *supra* note 45, § 205.

<sup>71</sup> Georgia Authorization Decision, *supra* note 52, §§ 52, 54–55.

<sup>72</sup> Burundi Authorization Decision, *supra* note 58, §§ 185–188.

<sup>73</sup> Afghanistan Authorization Decision, *supra* note 61, §§ 80–86.

<sup>74</sup> Bangladesh/Myanmar Authorization Decision, *supra* note 66, § 118.

decision authorizing the investigation in Côte d'Ivoire have supported deferential review of the Prosecutor's conclusion, with each favouring an 'abuse of discretion' standard of review. When it has come, however, to admissibility and specifically to the criterion of gravity, most of the Pre-Trial Chambers have in practice merely rubber-stamped the Prosecutor's conclusion rather than undertake any genuine *de novo* assessment of the gravity of the situation.

### **3. The Appropriate Limits of Pre-Trial Chamber Review in the Initiation of Investigations**

In the absence of statutory guidance, the Pre-Trial Chambers have articulated different standards of judicial review under Articles 53(3)(a) and 15(4) respectively,<sup>75</sup> which in turn they have not applied in practice, at least in relation to the gravity of the situation. Under Article 53(3)(a), the Pre-Trial Chamber that reviewed the Prosecutor's decisions declining to investigate the Mavi Marmara incident purported to apply an error-based standard but effectively engaged in *de novo* review of the Prosecutor's gravity assessment. Conversely, under Article 15(4), the Pre-Trial Chambers have claimed to assess *de novo* the existence or not of a reasonable basis to proceed, but have been inconsistent in doing so in their application of the gravity criterion. This confused body of Pre-Trial Chamber practice under Articles 53(3)(a) and 15(4) poses the question as to what, subject to the text of the Rome Statute and any relevant Rules of Procedure and Evidence, ought to be the standard of review applied by the Pre-Trial Chamber when reviewing the Prosecutor's admissibility assessment under each provision. The answer in turn depends on the functions served in the context of the ICC by prosecutorial discretion and by judicial scrutiny of its exercise, and on the institutional competences of the Prosecutor and Pre-Trial Chamber respectively in fulfilling these functions.

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<sup>75</sup> In support of this distinction, see G.A. Knoops and T. Zwart, 'The *Flotilla Case* before the ICC: The Need to Do Justice While Keeping Heaven Intact' 15 *International Criminal Law Review (ICLR)* (2015) 1069–1097, at 1076–1077.

### *A. Prosecutorial Discretion in the Initiation of Investigations*

The Prosecutor’s discretion to assess the existence or not of a ‘reasonable basis to proceed’ with an investigation under Articles 53(1) and 15(3) is justified by the Court’s limited resources, which necessitate selectivity in the initiation of investigations into situations.<sup>76</sup> This discretion manifests itself in the application of the open-textured criterion of ‘sufficient gravity’, a component of the Prosecutor’s admissibility assessment in relation to the situation under Article 53(1)(b).<sup>77</sup> As the Prosecutor explained in her ‘Final Decision’ declining to investigate the Mavi Marmara incident,

[a]ny investigation requires considerable investment of limited resources and operational assets which may not otherwise be used for other situations under investigation, where the article 53(1) standard was clearly met. Thus, although the drafters of the Statute did not expressly include the proper allocation of the Court’s resources among the article 53(1) criteria, such considerations cannot be ignored when considering the merits of an expansive reading of article 53(1). Indeed, it may be in precisely this context, at least in part, that the ‘sufficient gravity’ requirement was included as an express criterion for initiating any investigation.<sup>78</sup>

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<sup>76</sup> C. Stahn, ‘Damned If You Do, Damned If You Don’t: Challenges and Critiques of Preliminary Examinations at the ICC’ 15(3) *Journal of International Criminal Justice (JICJ)* (2017) 413–434, at 432; W.A. Schabas, ‘Victor’s Justice: Selecting “Situations” at the International Criminal Court’ 43 *John Marshall Law Review* (2010) 535–552, at 541; H. Olásolo, ‘The Prosecutor of the ICC Before the Initiation of Investigations: A Quasi-Judicial or a Political Body?’ 3 *ICLR* (2003) 87–150, at 142–143. Additional practical considerations justifying the selectivity of investigations include difficulties in securing states’ cooperation and in the collection of evidence, both contributing to the feasibility of an eventual prosecution. Cross, *supra* note 14, at 235–237; Knoops and Zwart, *ibid.*, at 1090–1091. On the need for discretion in ‘allocative decisions’, see H.K. Woolf et al., *De Smith’s Judicial Review* (8<sup>th</sup> edn., London: Sweet and Maxwell, 2019) §§ 1.041, 1.044–1.048.

<sup>77</sup> F. Mégret, ‘Three Dangers for the International Criminal Court: A Critical Look at a Consensual Project’ 12 *Finnish Yearbook of International Law* (2001) 193–247, at 213; A. Poes, ‘Discretion and the Gravity of Situations at the International Criminal Court’ 17 *ICLR* (2017) 960–984, at 962.

<sup>78</sup> Final Decision 2017, *supra* note 14, § 25. Similarly, Rastan argues that ‘[t]he reference to admissibility in the Article 53(1) stage should be viewed as a self-regulating procedure designed to encourage the Prosecutor to pre-emptively avoid challenges from competent jurisdictions so as to facilitate considerations as to viability and the optimal allocation of Court resources’. R. Rastan, ‘Situation and Case: Defining the Parameters’, in C. Stahn and M. El Zeidy (eds), *The International Criminal Court and Complementarity* Vol. I (New York: Cambridge University Press, 2011) 421–459, at 455–456.

During the Rome Conference, moreover, the conferral on the Prosecutor of the discretion to decide whether to initiate an investigation, including *proprio motu*, was deemed necessary to ensure the independence of her investigations from the political motivations of referring states parties and the Security Council.<sup>79</sup> Article 42(1) thus confers on the Prosecutor primary authority for the conduct of investigations, whether on referral or *proprio motu*,<sup>80</sup> with the Appeals Chamber confirming that ‘[m]anifestly, authority for the conduct of investigations vests in the Prosecutor’.<sup>81</sup> That it is the Prosecutor upon whom the discretion whether to initiate an investigation is conferred is evidenced by the Prosecutor’s exclusive fact-finding mandate vis-à-vis the Pre-Trial Chamber and by the Prosecutor’s application, in the first instance, of the criteria in Article 53(1)(a)–(c) when deciding whether there is a reasonable basis to proceed with an investigation.<sup>82</sup> It is the Prosecutor who must ascertain the facts by evaluating independently the information that is ‘made available to him or her’,<sup>83</sup> and who must apply the criteria in Article 53(1)(a)–(c) to those facts, including by selecting the potential cases to be weighed in the gravity assessment under Article 53(1)(b).

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<sup>79</sup> See e.g. representations of Jordan and Malta. Official Records, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, UN Doc. A/CONF.183/13 (Vol. II), 15 June – 17 July 1998, at 114–115 (hereafter ‘Rome Conference’); Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/51/22, March–April and August 1996, at 49.

<sup>80</sup> Gurmendi Dissent, *supra* note 49, §§ 18–20; G.M. Pikis, *The Rome Statute of the International Criminal Court: Analysis of the Rome Statute, the Rules of Procedure and Evidence, the Regulations of the Court and Supplementary Instruments* (Leiden, Boston: Martinus Nijhoff, 2010), at 243–244; K.J. Heller, ‘The Role of the International Prosecutor’, in C.P. Romano, K.J. Alter and Y. Shany (eds), *The Oxford Handbook of International Adjudication* (Oxford: Oxford University Press, 2013) 669–690, at 679; S. De Smet, ‘A Structural Analysis of the Role of the Pre-Trial Chamber in the Fact-Finding Process of the ICC’, in C. Stahn and G. Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Leiden, Boston: Martinus Nijhoff Publishers, 2009) 405–440, at 422–423.

<sup>81</sup> Judgment on Victim Participation in the Investigation Stage of the Proceedings in the Appeal of the OPCD against the Decision of Pre-Trial Chamber I of 7 December 2007 and in the Appeals of the OPCD and the Prosecutor against the Decision of Pre-Trial Chamber I of 24 December 2007, *Situation in the Democratic Republic of the Congo* (ICC-01/04-556), Appeals Chamber, 19 December 2008, § 52.

<sup>82</sup> At the Rome Conference, the French proposal for judges to ‘participate in investigating cases in cooperation with the Prosecutor from the preliminary stage’ was rejected. Rome Conference, *supra* note 79, at 101.

<sup>83</sup> Art 53(1), ICCSt; see also Art 15(1)-(2), ICCSt.

## ***B. Judicial Review of Prosecutorial Discretion in the Initiation of Investigations***

Under Article 53(3)(a), Pre-Trial Chamber review of the Prosecutor's exercise of discretion is tailored to give effect to the interest of the referring state party or the Security Council in the event that the Prosecutor has declined, including on the basis of inadmissibility under Article 53(1)(b), to initiate an investigation into the situation referred by it.<sup>84</sup> That this is the sole purpose underlying Pre-Trial Chamber review under Article 53(3)(a) has been confirmed by the Appeals Chamber in its 2015 decision relating to the Mavi Marmara incident.<sup>85</sup> The accountability of the Prosecutor in respect of a decision not to initiate an investigation into a situation is secured by allowing the Pre-Trial Chamber to review the sufficiency of the reasons underlying a prosecutorial decision not to proceed.<sup>86</sup> The limited extent to which the Rome Statute gives effect to this interest vis-à-vis prosecutorial independence is shown by the fact that the Pre-Trial Chamber reviewing the Prosecutor's admissibility assessment under Article 53(3)(a) cannot compel her to initiate an investigation into the situation.<sup>87</sup> Instead, it is for the Prosecutor to 'reconsider', at the request of the Pre-Trial Chamber, whether to initiate an investigation.<sup>88</sup> As such, the Prosecutor retains broad discretion to decline to initiate an investigation into a situation on the basis of its inadmissibility.

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<sup>84</sup> Comoros Appeal Decision 2015, *supra* note 23, § 9.

<sup>85</sup> Comoros Appeal Decision 2015, *supra* note 23, § 56.

<sup>86</sup> Stahn notes that this '[i]nternal accountability might even serve [sic] protect the Prosecutor from claims of biased or partisan investigation or prosecution'. C. Stahn, 'Judicial Review of Prosecutorial Discretion: Five Years On', in C. Stahn and G. Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Leiden, Boston: Martinus Nijhoff Publishers, 2009) 247–279, at 255. In support, see Eboe-Osuji Dissent, *supra* note 34, § 8; Ibáñez Dissent, *supra* note 34, § 70; D.D.N. Nsereko, 'Prosecutorial Discretion before National Courts and International Tribunals' 3(1) *JICJ* (2005) 124–143, at 141–142.

<sup>87</sup> Draft Art. 26(5) of the International Law Commission's Draft Statute for an International Criminal Court 1994 included a similar provision for reconsideration by the Prosecutor of a decision not to initiate an investigation into a situation, with the Commission noting in relation to the provision that any requirement that the Prosecutor initiate an investigation on the instruction of the Court would be inconsistent with prosecutorial independence. Report of the Commission to the General Assembly on the Work of Its Forty-Sixth Session, Vol. II(2) Yearbook of the International Law Commission UN Doc. A/CN.4/SER.A/1994/Add.1 (Part 2), 1994, at 47.

<sup>88</sup> Rule 108(3), RPE. The Appeals Chamber has confirmed that 'the "ultimate decision" as to whether to initiate an investigation is that of the Prosecutor'. Comoros Appeal Decision 2019, *supra* note 29, §§ 58–59. See also Whiting, *supra* note 21.



When it comes to Article 15(4), the justification given by the Pre-Trial Chambers for what is at least said to be *de novo* assessment under Article 15(4) has been the putative object and purpose of the provision, namely to prevent the Court from proceeding with ‘unwarranted, frivolous, or politically motivated investigations’.<sup>89</sup> Similarly, some Pre-Trial Chambers and individual judges have suggested that Pre-Trial Chamber review under Article 15(4) is intended to prevent abuse of the Prosecutor’s discretion in the initiation of investigations *proprio motu*,<sup>90</sup> including through the initiation of ‘manifestly ungrounded investigations’.<sup>91</sup> Crucially, as Judge Fernández de Gurmendi noted in her partial dissent from the Côte d’Ivoire authorization decision, the exercise of Pre-Trial Chamber review under Article 15(4) ‘was not meant to affect ... the exclusive functions of the Prosecutor to investigate and prosecute under the Statute’ and ‘there is nothing in the terms of Article 15 (or any other provisions of the Statute) to suggest otherwise’.<sup>92</sup> As noted by the Pre-Trial Chamber that authorized the initiation of an investigation in Bangladesh/Myanmar, this negative framing of the objectives underlying Article 15(4) suggests that the Pre-Trial Chamber must authorize the investigation as long as the Prosecutor has, in the exercise of her discretion, provided a reasonable basis to proceed.

### ***C. Standards of Review under Article 53(3)(a) and Article 15(4)***

In light of the various functions served by prosecutorial discretion in the initiation of investigations and of the more limited functions served by judicial review of that discretion under Articles 53(3)(a) and 15(4) respectively, it is sufficiently clear that some deference to the Prosecutor is required, excluding *de novo* review under both provisions. This is also necessitated by the institutional competence of the Prosecutor vis-à-vis the Pre-Trial Chamber. International courts have expressed an overwhelming preference for deferential review in

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<sup>89</sup> Kenya Authorization Decision, *supra* note 36, § 32.

<sup>90</sup> Georgia Authorization Decision, *supra* note 52, § 3.

<sup>91</sup> Afghanistan Authorization Decision, *supra* note 61, § 32.

<sup>92</sup> Gurmendi Dissent, *supra* note 49, § 10.

instances in which the primary decision-maker is in a better position to ascertain the facts and apply the law to those facts. An assessment of both public international law and national legal systems led one arbitral tribunal to conclude, for instance, that ‘patterns of deference to the decisions of expert bodies are widespread and general’.<sup>93</sup> It is, in other words, necessary ‘to lean on the assessment of facts that are given by those in a better position to know about them’.<sup>94</sup>

Under Article 53(3)(a), the limits of the Pre-Trial Chamber’s competence preclude it from undertaking its own forensic analysis and characterization of conduct based on the limited information disclosed by the Prosecutor under Article 53(1).<sup>95</sup> By effectively exercising *de novo* review, or what has been characterized as a ‘correctness’ standard of review,<sup>96</sup> the Pre-Trial Chamber in relation to the Mavi Marmara incident, showing no deference to the Prosecutor in her application of the gravity criterion, excessively restricted the Prosecutor’s legitimate exercise of her discretion under Article 53(1) to decline to initiate an investigation into the situation under Article 53(1). As the Appeals Chamber stipulated in that context, ‘it is

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<sup>93</sup> *Abyei Arbitration (Sudan v The Sudan People’s Liberation Movement/Army)*, award of 22 July 2009, at 402 (hereafter ‘Abyei Arbitration’). This has been an important justification for the ‘margin of appreciation’ doctrine, which the Appeals Chamber invoked in relation to the Prosecutor’s application of gravity under Art. 53(1)(b) in the Mavi Marmara proceedings. Comoros Appeal Decision 2019, *supra* note 29, § 81. In support of this general principle of international procedural law across international courts, see Y. Shany, ‘All Roads Lead to Strasbourg?: Application of the Margin of Appreciation Doctrine by the European Court of Human Rights and the UN Human Rights Committee’ 9 *Journal of International Dispute Settlement (JIDS)* (2018) 180–198; *Whaling in the Antarctic (Australia v Japan, New Zealand intervening)*, judgment of 31 March 2014, § 67; C. Henckels, ‘The Role of the Standard of Review and the Importance of Deference in Investor-State Arbitration’, in L. Gruszczynski and W. Werner (eds), *Deference in International Courts and Tribunals* (Oxford: Oxford University Press, 2014) 113–134; J. Bohanes and N. Lockhart, ‘Standard of Review in WTO Law’, in D. Bethlehem et al. (eds), *The Oxford Handbook of International Trade Law* (Oxford: Oxford University Press, 2009) 379–436, at 391–395; Y. Shany, ‘Toward a General Margin of Appreciation Doctrine in International Law?’ 16(5) *EJIL* (2006) 907–940, at 916 (hereafter ‘Shany 2006’); M. Oesch, *Standards of Review in WTO Dispute Resolution* (Oxford: Oxford University Press, 2003), at 105–106; *The ‘Volga’ Case (Russian Federation v Australia)*, separate opinion of Judge Cot of 23 December 2002, at §§ 14–20.

<sup>94</sup> A. Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (Oxford: Oxford University Press, 2012), at 26.

<sup>95</sup> Under Rule 107(2) of the RPE, the Pre-Trial Chamber may ‘request the Prosecutor to transmit the information or documents in his or her possession, or summaries thereof, that the Chamber considers necessary for the conduct of the review’. This provision cannot be equated to the more comprehensive preliminary examination of the situation conducted by the Prosecutor under Art. 53(1).

<sup>96</sup> Knoops and Zwart, *supra* note 75, at 1078.

primarily for the Prosecutor to evaluate the information made available to her and [to] apply the law ... to the facts found',<sup>97</sup> preventing the Pre-Trial Chamber from 'direct[ing] the Prosecutor as to what result she should reach in the gravity assessment or what weight she should assign to the individual factors'.<sup>98</sup> Nor is *de novo* review under Article 53(3)(a) justified on the ground that the ultimate decision whether to initiate an investigation remains with the Prosecutor. As Judges Fernández de Gurmendi and van den Wyngaert pointed out in relation to the Mavi Marmara incident, the exercise of *de novo* review restricts the Prosecutor's discretion under Article 53(1)(b) irrespective of whether the Pre-Trial Chamber's admissibility assessment is binding.<sup>99</sup> In other words, the Prosecutor should not be required to reconsider her decision under Article 53(1) merely because the Pre-Trial Chamber, in the exercise of the same discretion, would have arrived at a different conclusion as to the admissibility of the situation. That a deferential approach is required under Article 53(3)(a) was acknowledged not only by the Appeals Chamber but also by the Pre-Trial Chamber in relation to the Mavi Marmara incident, the latter's justification for the ostensible application of an error-based review being the limited function it ascribed to Article 53(3)(a), namely to satisfy the interest of the referring entity.<sup>100</sup>

Turning to Article 15(4), it is even less clear that *de novo* review is necessary to give effect to what the Pre-Trial Chambers have considered to be the object and purpose of that provision, namely to prevent the abuse of the Prosecutor's discretion through the initiation of unwarranted, frivolous or politically-motivated investigations. Nor is the exercise of *de novo* review consistent with the institutional competences of the Prosecutor and Pre-Trial Chamber respectively in the initiation of investigations *proprio motu*.<sup>101</sup> When considering whether to

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<sup>97</sup> Comoros Appeal Decision 2019, *supra* note 29, § 80.

<sup>98</sup> Comoros Appeal Decision 2019, *supra* note 29, § 81.

<sup>99</sup> Gurmendi and Wyngaert Dissent, *supra* note 23, § 35.

<sup>100</sup> Comoros Appeal Decision 2015, *supra* note 23, § 59; Comoros Decision 2015, *supra* note 14, § 9–10.

<sup>101</sup> Heller considers that Arts 53 and 15 'quite plainly assign primary responsibility for assessing the interests of justice to the [Office of the Prosecutor]' and that *de novo* review of the interests of justice is 'inconsistent with

initiate an investigation into a situation *proprio motu*, it is the Prosecutor who must ‘analyse’ the seriousness of the information received.<sup>102</sup> Based on what is then distilled into the Prosecutor’s request and supporting materials, the Pre-Trial Chamber must consider whether a reasonable basis to proceed with the investigation has been established. As Judge Fernández de Gurmendi rightly observed in her opinion in relation to the first Côte d’Ivoire authorization decision, the Chamber has ‘no independent way to assess the reliability, credibility or completeness of the information available to it’ and must exercise ‘great caution ... in assessing the relevance and weight of the material provided’.<sup>103</sup> Any authorization by the Pre-Trial Chamber is thus based on the Prosecutor’s assessment that there exists a reasonable basis to proceed, with ‘the task of the Pre-Trial Chamber [being] to identify the outer parameters of the situation, not to fill in the individual pieces thereof’.<sup>104</sup> In other words, ‘an appropriate measure of deference on factual matters’ is warranted.<sup>105</sup> Viewed in this light, the Pre-Trial Chamber’s *de novo* assessment in relation to the situation in Afghanistan, which included considerations ranging from the effectiveness and feasibility of the proposed investigation to the ‘complexity and volatility of the political climate’ and the allocation of the Prosecutor’s budget, restricted the Prosecutor’s discretion in the application of open-textured admissibility criteria, including gravity, under Article 15(4), as did the decisions in relation to Côte d’Ivoire and Burundi.<sup>106</sup> The intensity of the Pre-Trial Chamber’s review must be suited to this allocation of responsibilities, excluding *de novo* review.

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the structural independence of the [Office of the Prosecutor]’. This applies equally to gravity. K.J. Heller, ‘One Word for the PTC on the Interests of Justice: Taliban’. *Opinio Juris*, 13 April 2019, available at <https://opiniojuris.org/2019/04/13/one-word-for-the-ptc-on-the-interests-of-justice-taliban/> (last visited 1 December 2019); See also Stahn, *supra* note 86, at 255–257.

<sup>102</sup> Art. 15(1)–(2), ICCSt.

<sup>103</sup> Gurmendi Dissent, *supra* note 49, §§ 36–37.

<sup>104</sup> R. Rastan, ‘The Jurisdictional Scope of Situations before the International Criminal Court’ 23 *Criminal Law Forum* (2012) 1–34, at 27.

<sup>105</sup> Cross, *supra* note 14, at 251. See also Shany 2006, *supra* note 93, at 918.

<sup>106</sup> Afghanistan Authorization Decision, *supra* note 61, §§ 89–90, 94–95; Heller, *supra* note 101; L.P. Rossetti, ‘The Pre-Trial Chamber’s Afghanistan Decision: A Step Too Far in the Judicial Review of Prosecutorial Discretion?’ 17 *JICJ* (2019) 585–608, at 598–599; but see Olásolo, *supra* note 8, at 68.

Having excluded *de novo* review under both Article 53(3)(a) and Article 15(4), the permissible standards of review that remain, from least to most deferential, are ‘reasonableness’ review, review for manifest error of law or fact, and ‘abuse of discretion’ review. Identifying the applicable standards of review under Articles 53(3)(a) and 15(4) respectively requires consideration not only of the degree of deference to the Prosecutor warranted by the object and purpose of each provision but also of the institutional competence of the Pre-Trial Chamber to review, with the degree of scrutiny that each standard of review demands, the decision of the Prosecutor.<sup>107</sup>

Under Article 53(3)(a), the Pre-Trial Chamber may, as Pre-Trial Chamber I claimed to do in relation to the Mavi Marmara incident, review against an error-based standard the commission by the Prosecutor of a manifest error of law or fact. It is necessary to distinguish, however, the commission by the Prosecutor of any such error, which relates more accurately to the satisfaction of jurisdictional requirements<sup>108</sup> and to the sufficiency of the evidence in support of the Prosecutor’s conclusions as to facts relevant to the gravity analysis<sup>109</sup> from the legitimate exercise of the Prosecutor’s discretion when assessing the gravity of the situation, which requires the articulation of various indicators of the gravity of crimes and their application to potential cases selected by her.<sup>110</sup> The exercise of this discretion is not amenable to an error-based standard of review. In the absence of an objective threshold of ‘sufficient gravity’, it is not clear what would constitute an ‘error’ in this respect.<sup>111</sup> Alternatively, it may be that the

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<sup>107</sup> Legg, *supra* note 94, at 145; Henckels, *supra* note 93, at 116.

<sup>108</sup> Under Art. 53(1)(a), the Prosecutor must establish that ‘[t]he information available ... provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed’.

<sup>109</sup> Comoros Appeal Decision 2019, *supra* note 29, § 80; M. Fordham, *Judicial Review Handbook* (6<sup>th</sup> edn., Oxford: Hart Publishing, 2012), at 508; Woolf et al., *supra* note 76, § 11.101.

<sup>110</sup> For example, the Pre-Trial Chamber’s finding in 2015 in relation to the Mavi Marmara incident that the Prosecutor had committed a ‘material error’ by considering that the number of victims was insufficient to satisfy the requirement of ‘sufficient gravity’ was an incorrect use of this standard of review. Comoros Decision 2015, *supra* note 14, § 26; see *supra* note 19.

<sup>111</sup> On one view of discretion, the indicators of the gravity of crimes, as articulated by the Prosecutor and as confirmed by the Pre-Trial Chambers, may crystallise over time and become binding on the Prosecutor in the exercise of her discretion. The application of the gravity criterion through the application of these indicators would thus become a question of law and not of discretion, warranting a ‘material error of law’ review. M.S. Davis,

Prosecutor’s exercise of discretion in the application of gravity is better reviewed against a standard of reasonableness. ‘Reasonableness’ review permits degrees of judicial scrutiny ranging from the more deferential ‘Wednesbury unreasonableness’ standard, which requires the Pre-Trial Chamber only to determine whether the Prosecutor’s decision was manifestly unreasonable, absurd, irrational, in bad faith or arbitrary, to a more onerous formulation that warrants a finding as to whether the Prosecutor’s decision fell within what the Chamber considers to be the range of reasonable decisions that might have been taken by a reasonable Prosecutor.<sup>112</sup> The Pre-Trial Chamber’s ability to review the Prosecutor’s decision against the latter, more demanding standard is limited by its capacity to determine, without undertaking its own preliminary examination of the situation, the range of permissible outcomes.<sup>113</sup> Judicial economy and consistency similarly support the exclusion of ‘reasonableness’ review of this intensity.<sup>114</sup> The more deferential ‘Wednesbury unreasonableness’, on the other hand, may be incorporated into an ‘abuse of discretion’ review of the kind contemplated by Judge Kovács, as the degree of judicial scrutiny it demands is compatible with the aim of preventing the abuse of the Prosecutor’s discretion to decline to initiate an investigation into a situation referred to her by a state party or the Security Council, a discretion manifest in, inter alia, the criterion of ‘sufficient gravity’.<sup>115</sup> This is not to say that the Prosecutor’s exercise of discretion in the application of gravity is non-justiciable. Under Article 53(3)(a), an ‘abuse of discretion’ standard allows the Pre-Trial Chamber to determine to the satisfaction of the referring entity

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‘Standards of Review: Judicial Review of Discretionary Decisionmaking’ 2(1) *Journal of Appellate Practice and Process* (2000) 47–84, at 50–51.

<sup>112</sup> Woolf et al., *supra* note 76, §§ 11.016, 11.019, 11.021–11.024, 11.093–11.099.

<sup>113</sup> ‘[J]udges ought not to imagine themselves as being in the position of the competent authority when the decision was taken and then test the reasonableness of the decision against the decision they would have taken. To do that would involve the courts in a review of the merits of the decision, as if they were themselves the recipients of the power.’ Woolf et al., *supra* note 76, § 11.016. Henckels, *supra* note 93, at 128.

<sup>114</sup> The application of an expansive ‘reasonableness’ standard is generally discouraged where more specific standards of scrutiny may be available. Fordham, *supra* note 109, at 320; Henckels, *supra* note 93, at 117–120, 125. See also S.R. Tully, “‘Objective Reasonableness’ as a Standard for International Judicial Review” 6 *JIDS* (2015) 546–567, at 552.

<sup>115</sup> On the blurring of the line between Wednesbury unreasonableness and abuse of discretion, see Fordham, *supra* note 109, at 491. Knoops and Zwart label this ‘patent unreasonableness’. Knoops and Zwart, *supra* note 75, at 1079–1081.

whether the Prosecutor abused her discretion by omitting to account for relevant indicators in her gravity analysis, by failing to consider information that might support a finding of ‘sufficient gravity’,<sup>116</sup> or by arriving at the decision on the basis of extraneous considerations,<sup>117</sup> including by acting in bad faith or on improper motives.<sup>118</sup> Not only is this ‘abuse of discretion’ review sufficient to balance the interest of the referring entity in securing prosecutorial accountability against prosecutorial discretion in the initiation of investigations under Article 53(3)(a), but it is also within the limits of the Pre-Trial Chamber’s institutional capacity vis-à-vis the Prosecutor and is consistent with the approach generally taken in international adjudication, with the primary decision-maker’s appreciation of the facts being subject to review only for *excès de pouvoir*.<sup>119</sup>

Under Article 15(4), Pre-Trial Chamber review is intended to prevent the initiation by the Prosecutor of an investigation into a situation that does not satisfy the requirement of a reasonable basis to proceed, which the Pre-Trial Chambers have described as unwarranted, frivolous or politically-motivated investigations. The ‘abuse of discretion’ standard of review described above in relation to Article 53(3)(a) is tailored to fulfil this task of the Pre-Trial Chamber under Article 15(4), notwithstanding that what constitutes an abuse of discretion may differ in relation to Article 53(3)(a) and Article 15(4) respectively. An abuse of the Prosecutor’s discretion under Article 15(3) includes the initiation by the Prosecutor – whether perfunctorily, without consideration of relevant indicators of gravity, or on the basis of politically motivated or other extraneous considerations – of an investigation into a situation that does not actually satisfy the requirement of ‘sufficient gravity’. As with Article 53(3)(a), review for abuse of discretion under Article 15(4) is appropriate in light of the Prosecutor’s

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<sup>116</sup> Comoros Appeal Decision 2019, *supra* note 29, § 80.

<sup>117</sup> This requires a determination of whether the Prosecutor’s considerations were ‘extraneous to the objects or purposes of the statute under which the power is being exercised’. Woolf et al., *supra* note 76, § 11.019. See also Davis, *supra* note 111, at 54–55.

<sup>118</sup> Fordham, *supra* note 109, at 491.

<sup>119</sup> Abye Arbitration, *supra* note 93, § 403.

independent and exclusive fact-finding mandate in the initiation of investigations and in light of the limited capability of the Pre-Trial Chamber, noted by Judge Fernández de Gurmendi, to review the decision of the Prosecutor against a more onerous standard. As under Article 53(3)(a), it does not preclude the identification by the Pre-Trial Chamber of a manifest error of law or fact on issues relevant to but nevertheless distinct from the Prosecutor's exercise of discretion in the application of the gravity criterion, including the sufficiency of the evidence in support of the Prosecutor's decision.

For these reasons, some deference to the Prosecutor is required under Article 53(3)(a) and Article 15(4), excluding *de novo* review under both provisions and requiring that Pre-Trial Chamber review of the Prosecutor's admissibility assessment, whether under Article 53(3)(a) or Article 15(4), be limited to a highly deferential review for abuse of discretion in respect of the application of the open-textured gravity criterion.

#### **4. Conclusion**

Under Article 53(3)(a), the Pre-Trial Chamber in relation to the Mavi Marmara incident ostensibly applied a deferential standard of review but effectively reviewed *de novo* the Prosecutor's application of the gravity criterion, substituting its own assessment for that of the Prosecutor. Under Article 15(4), the opposite has been true. The Pre-Trial Chambers have claimed to assess *de novo* the existence or not of a reasonable basis to proceed with an investigation, but have ultimately reviewed the Prosecutor's gravity assessments against a less onerous standard, if at all. By identifying the various considerations that underlie the balance between prosecutorial independence and prosecutorial accountability in the exercise of Pre-Trial Chamber review under Articles 53(3)(a) and 15(4) respectively, this paper has sought to illustrate the ways in which judicial review of the Prosecutor's gravity assessments under each of these provisions has been problematic, whether by excessively restricting under Article



53(3)(a) the Prosecutor's discretion to decline to initiate an investigation into a situation on the basis of its inadmissibility or by inadequately scrutinising under Article 15(4) her admissibility assessment when authorizing the initiation of an investigation *proprio motu*. For the reasons discussed, some of which pertain specifically to the distinct functions of Pre-Trial Chamber review under Article 53(3)(a) and Article 15(4), others of which go to the heart of the Pre-Trial Chamber's competence vis-à-vis the Prosecutor in the initiation of investigations and in the application of the gravity criterion, the paper concludes that an 'abuse of discretion' standard of review is most suitable under both Article 53(3)(a) and Article 15(4).