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A Practice-based Analysis of the Relationship between the Prosecutor and Judges

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a Raffaella, per la pazienza e il sostegno nei momenti di sconforto
e per la condivisione di quelli di gioia

ai miei genitori, per la fiducia incondizionata
e per aver compreso qualche silenzio di troppo

ai miei nonni

infine, al mio Paese

PROSECUTORIAL DISCRETION AND ITS JUDICIAL REVIEW AT THE INTERNATIONAL CRIMINAL COURT: A PRACTICE-BASED ANALYSIS OF THE RELATIONSHIP BETWEEN THE PROSECUTOR AND JUDGES

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ABSTRACT

Prosecutorial discretion—i.e. a prosecutor's ability to choose among different courses of action with regard to the opportunity of opening (or not opening) an investigation or starting (or not starting) a prosecution—has been a constant feature of international criminal justice throughout its momentous evolution in the past decades. This prosecutorial *selective* power is inextricably linked to the concept of judicial oversight of discretionary choices as a necessary antidote against arbitrariness in the enforcement of international criminal law.

The permanent system of international criminal justice created through the Rome Statute envisages a wide margin of discretion for prosecutorial action, under the constraint of various forms of judicial supervision. Nevertheless, legal texts provide only very limited guidance to the Office of the Prosecution and judges as to the concrete exercise of these powers and responsibilities. For this reason, prosecutorial and judicial *dynamic practice* plays a fundamental creative role in integrating—and sometimes transforming—the ICC *static legal framework*.

The present research has aimed at analysing the patterns of prosecutorial and judicial practice at the pre-trial stage of the proceedings of the ICC, with a view to comparing the law in the books and the law in action in this area of crucial importance for the legitimacy of the Court. The hypothesis that in this field there are areas of interpretive agreement (*smooth relationship*) and disagreement (*open clash*) between the relevant actors, as well as a certain degree of *dissociation* between the textual formant and the prosecutorial/judicial formant has been tested against the relevant practice. These empirical phenomena have then been assessed as to their possible institutional causes and (potentially detrimental) consequences, with a view to proposing institutional, procedural, administrative and legislative adjustments that may help fostering the predictability and consistency of the system.

The conclusion is that practice in this field is a fundamental test-bench for the institutional functioning of the ICC, and that it is still in the process of establishing—by means of the interplay between the OTP and judges—a satisfactory balance among the conflicting needs of flexibility and predictability; one that only pragmatic interpretive compromises can bring about in the future.

TABLE OF ABBREVIATIONS

AC	Appeals Chamber
ACHR	American Convention on Human Rights
ANSC	Afghan National Security Forces
ASP	Assembly of the State Parties to the Rome Statute
AU	African Union
CoE	Council of Europe
DCC	Document Containing the Charges
EC	Elements of Crimes
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
FEC	Far Eastern Commission
GC	Grand Chamber of the ECtHR
HRC	Human Rights Committee
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICL	International Criminal Law
ICRC	International Committee of the Red Cross
ICTJ	International Center for Transitional Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
ILC	International Law Commission
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far-East
IO	International Organization
IPS	International Prosecution Section

IR	Internal Rules
JCCD	Jurisdiction Complementarity and Cooperation Division (of the OTP)
NATO	North Atlantic Treaty Organization
NGO	Non-Governmental Organization
OHCHR	Office of the High Commissioner for Human Rights
OPCD	Office of the Public Counsel for Defence
OPCV	Office of the Public Counsel for Victims
OTP	Office of the Prosecutor
PE	Preliminary Examination
PP	Policy Paper
PTC	Pre-Trial Chamber
Reg.	Regulations
RoC	Regulations of the Court
RPE	Rules of Procedure and Evidence
SAS	Situation Analysis Section
SCAP	Supreme Commander of the Allied Powers
SCSL	Special Court for Sierra Leone
SG	Secretary General of the United Nations
SOFA	Status of Forces Agreement
SPSC	Special Panels for Serious Crimes (East-Timor)
STL	Special Tribunal for Lebanon
SWNCC	State War Navy Co-ordinating Committee
TC	Trial Chamber
TFV	Trust Fund for Victims
UNGA	United Nations General Assembly
UNIIIC	United Nations International Independent Investigative Commission on Lebanon
UNSC	United Nations Security Council
UNWCC	United Nations War Crimes Commission
VCLT	Vienna Convention on the Law of Treaties
VWU	Victims and Witnesses Unit

"The notion of the perfect whole, the ultimate solution, in which all good things coexist, seems to me to be not merely unattainable—that is a truism—but conceptually incoherent; I do not know what is meant by a harmony of this kind. Some among the Great Goods cannot live together. That is a conceptual truth. We are doomed to choose, and every choice may entail an irreparable loss.

These collisions of values are of the essence of what they are and what we are."

(Isaiah Berlin, *The Pursuit of the Ideal*,
in *The Crooked Timber of Humanity*, 1959)

INTRODUCTION[*]

The Statute of the International Criminal Court (ICC), in setting up the most advanced mechanism for the judicial enforcement of international criminal law (ICL), endows the Prosecutor with a wide—albeit not unlimited and judicially supervised—margin of discretion both as to the selection of *situations* (i.e. whether or not to open an investigation once the Court's jurisdiction has been triggered with regard to a certain set of facts falling under the material, temporal, territorial and personal jurisdiction of the Court) and of *cases* (i.e. whether or not to prosecute specific individuals within a given situation, and for which crimes and modes of responsibility)[†].

Despite the centrality of prosecutorial discretion for the functioning of the Court, legal texts governing the ICC (Statute, Rules of Procedure and Evidence and Regulations of the Office of the Prosecutor, Registry and Court), provide only very limited guidance for its concrete exercise, leaving the development of principled selection criteria—as well as of an overarching and coherent prosecutorial strategy—to the practice of the Office of the Prosecutor (OTP), in constant *dialectic* with the Judiciary (in particular the Pre-Trial Chamber) in the exercise of its supervisory powers.

Sixteen years after the entry into force of the Rome Statute, the growing practice of the OTP—in the form of specific prosecutorial choices as well as with the

[*] This introduction is only meant to synthetically present the justification, objectives, methodology and prospective outcomes of the research. For this reason bibliographical references are limited, leaving the punctual analysis of the relevant doctrinal and jurisprudential sources to the parts and chapters to follow.

[†] On the distinction between 'situations' and 'cases' in the ICC regime see, generally, H. OLÁSOLO, *Essays on International Criminal Justice*, Oxford, 2012, pp. 22-26; R. RASTAN, *What is a 'Case' for the Purpose of the Rome Statute?*, in *Criminal Law Forum*, vol. 19, issue 3, 2008, 435-436; W. A. SCHABAS, *Prosecutorial Discretion v. Judicial Activism at the International Criminal Court*, in *Journal of International Criminal Justice*, vol. 6, issue 4, 2008, 734-736. The distinction has been extensively discussed at the preparatory stage, with particular regard to the breadth of the UN Security Council's power to trigger the Court's jurisdiction. See, Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, United Nations, General Assembly Official Records, Fiftieth Session, A/50/22, Supplement No. 22, 1995 par. 120-121 and Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume I (Proceedings of the Preparatory Committee during March-April and August 1996), United Nations, General Assembly Official Records, Fifty-first Session, A/51/22, Vol. 1 Supplement No. 22, par. 132-136.

adoption of various documents containing prosecutorial strategies and policies[‡]—and of the Chambers (Pre-Trial Chambers and Appeals Chamber in particular), has shed some light on the empirical functioning of prosecutorial discretion at the ICC. A number of legal and institutional issues have emerged with respect to the coherence of the Prosecutor's choices, the degree and latitude of judicial oversight of his or her selection decisions and ultimately the overall functioning of the *checks and balances* mechanism with regard to prosecutorial discretion at the ICC. It is of immediate evidence that the solution of said issues is of fundamental importance for the credibility, viability and effectiveness of the Court's mandate, in the pursuit of its statutory goal to "put an end to impunity", while guaranteeing full respect of internationally recognized human rights (among which are those accruing to the Accused and victims).

The theoretical, legal and institutional rationales for a reasonably wide margin of prosecutorial discretion have been the object of a significant body of scientific enquiry both at the time of the adoption of the Rome Statute and in the subsequent years. There have been various academic attempts to provide the OTP with more precise legal criteria for the exercise of prosecutorial discretion, with authors polarizing between those supportive of a more principled and constrained exercise of discretion and those in favour of a wider and substantially unfettered margin of discretion. Academic discussion has nevertheless been mainly confined to the theoretical justifications for discretion in international criminal prosecutions, only very recently focusing on the empirical dimension of its exercise at the ICC. In addition, research so far has sometimes relied on potentially misleading analogies between domestic and international prosecutions, therefore failing to underline the unique features of international criminal law—and of the ICC in particular—as to the exercise of prosecutorial discretion and judicial oversight thereof.

[‡] In recent years the OTP issued a number of documents of this sort. Among them the most relevant are the so-called Strategic Plan (once referred to as Prosecutorial Strategy), a document issued every three years and indicating the broad strategic objectives of the OTP's activities for the years to come, and the so-called Policy Papers, a wide range of public documents stating the position of the OTP on specific issues relevant to the work of the Office, such as preliminary examinations, case selection and prioritisation, victims' participation, the interests of justice, gender-based crimes, etc. These documents, notwithstanding their lack of binding force, are an important source for the evaluation of prosecutorial practice and raise interesting questions as regards their legal nature and relationship with the primary legal sources applicable at the ICC. An analysis of the theoretical and practical relevance of these documents will be provided in Chapter Two of Part Two of this work.

In the light of the aforementioned current state of development of the international debate on prosecutorial discretion at the ICC, the scope of the present study is essentially to analyse—based on a solid theoretical background in international and criminal law—how the *practice* of the relevant actors (namely the OTP and PTC) has contributed to concretely shape the legal dimension of prosecutorial discretion with particular regard to the preliminary examination and pre-investigation stage of the proceedings at the ICC, and how these actors interact with each other in the implementation of the statutory and regulatory provisions that have a bearing on the selection mechanism of the ICC. In contrast with other scientific contributions on the subject, the present study relied on an institutional approach (in conjunction with a strictly procedural one) to said prosecutorial practice, focusing on the *dialectical relationship* between the Prosecutor and Judges, in order to elucidate the current functioning of the *checks and balances* system at the ICC and to clarify its normative structure. In particular, the legal and institutional boundaries of prosecutorial discretion, as well as the degree and latitude of judicial oversight on its exercise, have been tested through a comparison between the *law in the books* and the *law in action*.

It is purported that a comprehensive practice-based enquiry into the discretionary practice of the OTP—with a particular focus on its somehow problematic relationship with the PTC during the preliminary examination and investigative stage—needs to be developed in order to assess (if any) the degree of *dissociation* between the statutory model of prosecutorial discretion and the way in which the relevant actors have concretely interpreted and implemented it. It is maintained that such an enquiry would not only be beneficial in terms of increased knowledge of the institutional balance between the various actors of the Court, but could also form the basis for prospective adjustments in their course of action and/or to the legal standards they act (or pretend to act) upon, with a view to securing the institutional goals of the Court.

Objectives of the research

In line with the abovementioned conceptual framework and justification of the research project, the present study aims to attain the following objectives.

First, to establish a more accurate understanding of the theoretical, legal and institutional structure of the model of prosecutorial discretion at the ICC.

Second, to understand the creative/transformative role of *practice* as to the concrete functioning of such mechanism, with a specific attention to the degree and latitude of judicial interference with the Prosecutor's choices, through a comprehensive analysis of said practice.

Third, to provide a quantitative and qualitative analysis of the degree of *dissociation*—if any—between the static legal framework and its practical implementation, with particular emphasis on patterns of cases showing conflicting behaviour ('*open clash*') or cooperation ('*smooth relationship*') on the part of the relevant actors.

Fourth, to assess whether the degree of such dissociation is physiologic or if it reveals normative, procedural or institutional shortcomings that may have adverse consequences in terms of consistency, coherence, viability and credibility of the Court.

Fifth and last, to propose any legal, regulatory and institutional adjustments that may help to advance the goals of the ICC, stabilising the relationships between Prosecutors and Judges, without encroaching on potentially competing rights (such as those of the Accused and victims) and preserving the principle of complementarity.

Delimitation of the study

In order to deliver consistent research results it is of utmost importance to carefully and reasonably delimit the scope of the proposed enquiry. Since the study aims at analysing an already wide—and continuously expanding—body of prosecutorial and judicial practice, the choice has been made to mainly focus on the procedural phase of preliminary examination and its possible outcomes—namely the decision to open (or not to open) an investigation, or to ask judicial authorisation to

do so in case of *proprio motu*. The decision to limit the enquiry to this segment of the proceedings needs further elaboration. The proposed delimitation can be justified on grounds of both logical-chronological and normative considerations.

With regard to the logical-chronological aspect of the question, it seems reasonable to start a practice-based enquiry on prosecutorial discretion from the early manifestations of the OTP's selection powers, which undoubtedly take place at the pre-investigation stage. Obviously, it cannot be denied that a significant amount of discretion is also exercised at later procedural stages, such as at the time of the formulation of and eventual amendment to the Document Containing the Charges; the conduct of trial proceedings; the decision to appeal judicial decisions; the sentencing stage; reparations; etc., but it is fair to conclude that any prosecutorial choice at those later stages is heavily influenced by the initial determinations made at the time of preliminary examination and opening of an investigation.

With regard to strictly normative considerations, it must be observed that the preliminary examination procedure—and more generally the pre-investigation stage—is characterised by a degree of 'normative rarefaction', i.e. by the paucity of clear rules and directives for the OTP with regard to the concrete exercise of prosecutorial discretion, especially when compared to the more densely regulated phases of investigation, confirmation of charges, trial or appeals. The vague nature of evidentiary standards and the prevalence of *principles* on *rules* at the procedural phase considered emphasise the inherent discretionary power of the Prosecutor, as well as the gap-filling and creative function of both the Office's and judges' interpretive practices. Therefore, at these topical junctures of the proceedings prosecutorial discretion is probably exercised at its highest, also in the light of the limited—or sometimes virtually non-existent—judicial remedies available at these stages. This makes it all the more necessary to provide a careful assessment of the limits of prosecutorial discretion, as well as of the substantive and procedural obligations surrounding its exercise.

In any event, since prosecutorial discretion is undeniably exercised at subsequent stages of the proceedings, due consideration has been given to the downstream consequences of early prosecutorial selection choices—for instance as regards the rights of states, the right of victims to reparations, or the accused's fair

trial rights—in order to place them in the wider context of the proceedings at the ICC.

Despite the choice to limit the present enquiry to the pre-investigation stage, it is alleged that the analysis carried out in the present work could provide the methodological and empirical basis for a process of continued and incremental assessment of other aspects of prosecutorial practice.

Methodological approach

The study starts from the methodological premise that in the realm of international criminal justice the *practice* of the relevant institutional actors involved in the exercise of prosecutorial discretion—and control thereof—plays a decisive role in "[shaping] the path of law"[§].

A broad and inclusive understanding of the concept of prosecutorial and judicial *practice* constitutes the cornerstone of the study. The term is therefore intended as to designate any identifiable choice, decision, act, declaration or externally manifested behaviour of the relevant actors—namely the OTP and Chambers—bearing legal and/or institutional consequences as to the concrete functioning of the mechanism of prosecutorial discretion at the ICC. With regard to the OTP, the term encompasses first and foremost the publicly available decisions and motions (mostly concerning the preliminary examination and investigation phase) and in the second place—due consideration given to their general lack of binding force—positions, policies (policy papers), strategies, declarations and statements revealing a connection with the exercise of discretion. With regard to the Chambers (especially the Pre-Trial Chamber and Appeals Chamber), the term encompasses decisions directly or indirectly dealing with the most relevant aspects of prosecutorial discretion, with particular emphasis on those decisions adopted while carrying out the judicial review of prosecutorial choices (e.g., authorisation decisions under art. 15 of the Statute; review decisions under art. 53(3) of the Statute; etc.).

[§] See C. BURCHARD, *The International Criminal Legal Process: Towards a Realistic Model of International Criminal Law in Action*, in C. STAHN, L. VAN DEN HERIK (eds.), *Future Perspectives on International Criminal Justice*, The Hague, 2010, 96.

It is purported that such a broad understanding of the concept of *practice*, performs both an 'explicative/descriptive' and a 'normative/creative' function. As to the former, the concept enables the observer to track all the relevant behaviours of the concerned actors and to fit them within the underlying institutional and procedural scheme of interplay between such actors. As to the latter, the concept enables the observer, through careful assessment of the normative consequences of the decisions of the relevant actors, to evaluate their transformative capacity thereby elucidating the volatile boundaries of legally permissible prosecutorial discretion and of reasonable judicial oversight.

Therefore, the approach towards prosecutorial practice in the present study has been mainly—but not exclusively—an empirical, case-based and practice-driven one. The collection, cataloguing and quantitative-qualitative analysis of patterns of prosecutorial practice and their legal consequences have been at the heart of the work.

This *realistic and institutional* approach, aimed at the analysis of the international criminal law *in action*, builds on the methodological proposal of conceptualising the work of international criminal courts and tribunals—and of the "legal officialdom" through which they act—in terms of *legal process*, i.e. "a social process, and thus a sequence of interrelated *situation-sensitive*, *context dependent* as well as *historically contingent* . . . events and of interlinked operations, which legally transform an input in an output" [**]. Attention has been mainly devoted to a specific set of "sub-processes"[††] in the context of the ICC's pertinent practice, namely those relating to the selection activities performed by the OTP, and to the judges' activities in the exercise of judicial supervision of prosecutorial discretionary choices. Nevertheless, reference to the explicative language of legal process theories does not import a general endorsement of a merely descriptive and sociological approach towards the relevant practice. To the contrary, the study aims at complementing descriptive analysis with a normative/prescriptive assessment of the consequences of the ICC's current practice, in order to formulate proposals aimed at fostering the effectiveness and legitimacy of its mandate.

[**] *Ibidem*, 81-87 (emphasis added).
[††] *Ibidem*, 98-99.

Before proceeding to a detailed analysis of prosecutorial practice according to the proposed methodology, it has been necessary to clearly define and theoretically defend a few core concepts (such as the dichotomy between *open clash* and *smooth relationship* in the analysis of practice; the *dissociation of formants hypothesis*, etc.), thereby providing solid ground for the case-based enquiry to follow. It must be stressed that the objective of the present study is not to provide a mere collation of prosecutorial and judicial practice. To the contrary, after having developed a reasoned approach to such practice, the study aims at dynamically comparing it with the legal framework considered in its static form, in order to assess the *performance* of the current prosecutorial and judicial practices from the point of view of their legal soundness, predictability and overall fairness.

Comparative analysis has complemented the empirical survey and critical assessment of the relevant prosecutorial practice in two ways. On one hand, comparative reasoning has guided the study of the ICC's prosecutorial regime in the broader context of international criminal justice's mechanisms (i.e. underlining the Court's specificities vis-à-vis other international courts and tribunals). On the other hand, a critical comparison between the static legal framework and its practical implementation with regard to prosecutorial discretion and its judicial oversight has been carried out and represents the true *raison d'être* of the study. The hypothesis is made that a certain degree of *dissociation* between different 'legal formants' within the ICC's legal order may exist and needs to be carefully assessed in order to better understand the current degree of effectiveness of the ICC prosecutorial regime[‡‡].

[‡‡] The concept of 'dissociation of formants' is derived—solely for explicative purposes—from comparative law literature. See, in particular, R. SACCO, *Legal Formants: A Dynamic Approach to Comparative Law (Instalment I of II)*, in *American Journal of Comparative Law*, vol. 39, no. 1, 1991, 1, and of the same author *Legal Formants: A Dynamic Approach to Comparative Law (Instalment II of II),* in *American Journal of Comparative Law*, vol. 39, no. 2, 1991, 343. It must be clarified from the outset that the present study does not in any way suggest that instruments of analysis derived from the methodology of comparative law can be uncritically transposed to the international (criminal) law realm. In the past, especially before the end of the Cold War, literature in the field of Comparative International Law attempted to apply methodologies of comparative legal studies to the analysis of different 'cultural' approaches to international law (such as Soviet, Chinese or Third World approaches), but this discussion is far beyond the scope of the present study. Nevertheless, at a more general and systemic level, the suggestion that a given legal order within the broader context of international law, such as the ICC, can be assessed as to the overall coherence of its *formants* in order to fully understand its concrete functioning seems appropriate and useful for the purposes of the present practice-based study. This is the main reason for scratching beyond the surface of statutory provisions and abstract procedural models in search of the *operative rules* that practically shape the prosecutorial discretion mechanism at the ICC.

While the importance of such analytical methods in the field of international criminal law must not be overstated, it is alleged that the cautious use of certain comparative law tools may help explaining and presenting in a systematic fashion the current trends in the practice of prosecutorial discretion at the ICC.

As to the academic contributions and scholarly literature referred to for bibliographical purposes, the present study relied on a broad, multidisciplinary and inclusive approach. The analysis of the issues related to prosecutorial discretion and its judicial oversight in international criminal justice presupposes the knowledge of some of the most relevant scientific contributions on the subject with regard to national legal systems. Nevertheless, given the internationalist and institutional approach adopted in this study, general literature on international criminal law—both substantive and procedural—and international criminal justice regimes has provided solid ground for the analysis of the relevant legal issues, together with the numerous contributions specifically addressing the Prosecutor's and Court's powers and duties as regards the exercise of and control over discretion. Notwithstanding the preponderance of literature in the English language on the subject, efforts have been made to expand readings and references to works in French, Italian, and Spanish, so to reflect a wider range of scholarly perspectives. In disciplinary terms, the attempt has been made to bring together the sometimes-diverging perspectives of international and criminal lawyers, in the firm belief that only through dialogue and creative integration of these approaches international criminal law could progress as a scientific and applicative enterprise.

Structure of the present study

Based on the abovementioned methodological approach, the research is organised and presented in four parts, reflecting the logical and argumentative steps of the enquiry into the prosecutorial practice at the ICC.

Part One provides an analysis of the theoretical rationale for prosecutorial discretion and its judicial oversight in international criminal justice in general and at the ICC in particular. After introducing certain fundamental definitions and concepts,

Chapter One aims at placing the analysis of prosecutorial discretion in a genuinely international perspective, thereby attempting to underline the most relevant institutional and legal differences vis-à-vis national prosecutorial regimes. In addition, Chapter Two attempts to contextualise the legal and institutional design of the ICC through a comparison between different international (and internationalised) criminal justice mechanisms. It is alleged that while 'vertical' comparative analysis—i.e. between the international and domestic level—in the field of substantive criminal law and procedure may be of great assistance in understanding certain features of prosecutorial discretion—as well as providing a significant body of common problem-solving strategies—the specificity of international criminal prosecutions must not be overlooked. For this reason it is purported that a 'horizontal' comparative analysis—both *synchronic* and *diachronic*—should be carried out as a preliminary step to the analysis of the specific legal and interpretive issues relevant to the practice of the ICC.

Part Two concentrates on a concise analysis of the statutory and regulatory framework governing the ICC's system of prosecutorial discretion and judicial oversight, with a view to shed light on some of its most relevant interpretive issues. In Chapter One, the study recalls the statutory and regulatory provisions that have a bearing on the subject of prosecutorial discretion at the ICC. More than commenting upon their relatively laconic content—which has been the object of extensive academic commentary—efforts have been made to understand how these provisions functionally relate one another, thereby contributing to the overall design of prosecutorial discretion and its judicial oversight. This chapter also analyses the specific acts and decisions that constitute an exercise of discretion, with particular regard to the preliminary examinations and pre-investigation phase; their legal significance and their statutory—formal and substantive—requirements (e.g. request for authorisation in case of *proprio motu*; decisions pursuant to art. 53 of the Rome Statute; etc.).

In Chapter Two the legal nature and relevance of the OTP's internal documents such as policy papers and prosecutorial strategies are analysed with a view to establish their role in the broader context of prosecutorial practice. Issues

such, *inter alia*, the lack of bindingness; the contribution to the crystallisation of prosecutorial practices; the relationship with statutory and regulatory standards are considered in order to assess the function of these documents and how they are implemented in the practice of the OTP. The analysis of said materials also provided an occasion to reflect on the OTP's self-perception as to the exercise of prosecutorial discretion vis-à-vis other organs of the Court and other international actors such as states, the UNSC, NGOs and civil society at large.

Chapter Three concentrates on the fundamental issue of judicial controls over prosecutorial discretionary choices, underlining the role of judges (especially of the PTC) and their powers of judicial oversight/review of the OTP's decisions. These powers can be exercised at various stages of proceedings and their degree and latitude—hence the amount of judicial interference with prosecutorial choices—vary according to the specific acts concerned and the competing interests at stake. The opportunities to challenge discretionary prosecutorial choices at the preliminary stage have been analysed as regards the subjects legally permitted to provoke judicial oversight; the procedures to trigger such controls; the latitude and degree of judicial control over prosecutorial choices; the possible outcomes of such control and the consequences on subsequent OTP's decisions, as well as the potential loopholes in this *checks and balances* mechanism. The analysis of this supervisory mechanism has unveiled a system where a delicate balance between the assertion of prosecutorial independence and control of legality and reasonableness still needs to be reached in practice, through a constructive OTP-Judges dialogue.

Part Three is at the core of the contribution of the present study to the understanding of the empirical dimension of prosecutorial practice at the ICC. It aims at collecting and analysing in a systematic manner the concrete practice of the OTP and Judges as to the exercise of prosecutorial discretion, with a view to conducting—in the following part—a comparative analysis between the static statutory/regulatory framework and its practical dynamic implementation. Consistent with the statement of the research's objectives, the analysis focuses on the procedural junctures where discretion explicates its most evident function of selection, namely preliminary examination and the decision on the opening (or not opening) of an

investigation, or in case of *proprio motu*, to ask or not to ask a judicial authorisation to open one.

In Chapter One a few core conceptual tools are introduced, namely a more precise explication of the concept of 'practice' for the purposes of the present study and of the 'institutional approach' towards the analysis and presentation of said practice. As to the former, it is alleged that a wide understanding of the concept of prosecutorial practice allows for an assessment of the transformative role played by the decisions of the OTP and judges in concrete cases, in a system where statutory provisions provide rather scarce practical directives on the exercise of prosecutorial discretion and its judicial review. As to the latter, it is alleged that the best way to analyse such practice is to adopt an institutional approach that focuses on the respective mandates of the OTP and judges and their dialectical interplay. In the same chapter the working hypothesis of the 'dissociation of formants' (statutory, prosecutorial/judicial, doctrinal) as to the exercise of prosecutorial discretion is introduced. The proposition is made that at the present stage of development of the Court's work, *some degree* of dissociation between the statutory/regulatory framework and its practical implementation by the relevant actors exists. The concepts of *open clash* and *smooth relationship* between OTP and judges shall be introduced as explicative tools for an overall evaluation of the selected practice. These hypotheses will then be tested against the concrete practice, in order to assess—if any—the degree of such dissociation or opposition and their causes.

Chapter Two provides a collection and categorisation of the relevant practice of the OTP and Chambers. It focuses on the phases of preliminary examinations and the opening (or not opening) of investigations by presenting cases—or patterns of cases—showing the current trends in the exercise of selection powers on the part of the OTP and the role played by the judiciary in supervising these choices. The discussion of the relevant decisions and cases proceeds in logical-chronological order, dedicating separate sections to the discrete phases of the preliminary examinations and investigation proceedings. In some instances the relevant practice examined is relatively scarce (sometimes a few or even a single OTP's and/or Chamber's decision), therefore extreme caution has been used in evaluating these few instances of practice, in order not to draw excessive or unreasonable inferences

from such limited empirical evidence. This collection of practice then formed the basis for the elaboration, comparison and assessment presented in Part Four of the work.

In Part Four, the study tries to draw some preliminary conclusions on the current status of the exercise of prosecutorial discretion and its judicial oversight at the ICC. A comparison between the law *in the books* and the law *in action*—as it results form the collected practice—is conducted in order to verify whether the hypotheses formulated in the preceding part have any empirical foundation. In Chapter One a quantitative and qualitative analysis of areas of dissociation between the theoretical legal framework and its practical implementation is carried out, with particular emphasis on patterns of cases showing either clearly conflicting behaviours (*open clash*) or cooperation (*smooth relationship*) on the part of the relevant actors. Attention has been be given to the instances of apparent or real contraposition in the OTP's and Judges' courses of action, in order to assess the degree of coherence of their decisions. The focus has been on the internal coherence of the OTP's action (i.e. the degree of conformity to the self-imposed guidelines and policies) and on the inter-institutional relationship between the OTP and Judges (i.e. the degree of judicial deference to or interference with the Prosecutor's choices). In Chapter Two, the study turns to the analysis of the causes of the dissociation between theory and practice, focusing on the necessity to preserve a balanced relationship between prosecutorial independence and the control of legality over the OTP's actions. It is alleged that a certain degree of flexibility is necessary in order to cope with the Court's institutional goals. A certain degree of discrepancy between theory and practice might be considered physiologic but could reveal certain fundamental issues in the institutional and procedural functioning of the Court that need to be assessed as to their possibly adverse consequences. Additionally, the chapter briefly illustrates the potentially negative consequences of an excessive degree of dissociation of formants as well as of deep interpretive disagreements, especially when they translate into a constant tension between prosecutors and judges. It is alleged that both unfettered discretion and excessive judicial interventionism may endanger the functionality of the Court—thereby transforming the institutional role

of its organs—and its international credibility. The possible downstream adverse consequences of an unreasonably unclear prosecutorial discretion practice are analysed, with particular regard to the position of the accused and victims. Finally, in Chapter Three, drawing on past experiences and building on the existing academic debate, we shall formulate proposals and adjustments that may prove helpful in order to tackle the issues and the potential downsides of the current practical implementation of prosecutorial discretion at the ICC. Focus is first and foremost on the institutional and procedural adjustments that could be enacted *de lege lata* by means of organisational good practices and a more coherent strategic planning. It is further purported that a progressive clarification of the concrete functioning of the prosecutorial discretion system will necessarily take some time and additional judicial practice, which can greatly contribute to the normalisation of the OTP-judges relationship in the future. To conclude, a few proposals for the amendment of regulatory texts (RPE and Regulations of the Court) are formulated with a view to promote practices that may advance the predictability and overall consistency of the exercise of prosecutorial discretion and of its judicial supervision at the ICC.

PART ONE

PROSECUTORIAL DISCRETION AS AN INHERENT FEATURE OF INTERNATIONAL CRIMINAL LAW

CHAPTER ONE

THE THEORETICAL AND PRACTICAL FOUNDATIONS OF PROSECUTORIAL DISCRETION IN INTERNATIONAL CRIMINAL LAW

1. On the concept of prosecutorial discretion in general and its implications

The concept of prosecutorial discretion and its legal implications in the administration of international criminal justice in general—and at the International Criminal Court in particular—have increasingly attracted scholarly attention in recent years[1].

[1] The topic became the object of wide scholarly discussion after the ICC came into operation and the first Prosecutor of the Court Luis Moreno Ocampo was appointed in April 2003, as rightly pointed out by L. CÔTÉ, *Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law*, in *Journal of International Criminal Justice*, vol. 3, issue 1, 2005, 163. While theoretically and empirically understudied, as noted by J. D. OHLIN, *Peace, Security, and Prosecutorial Discretion*, in C. STAHN, G. SLUITER (eds.), *The Emerging Practice of the International Criminal*, Leiden/Boston, 2009, 185-186, the issue of the role and powers of the Prosecutor of the newly established Court had been at the centre of fierce debates at the time of the elaboration of the Rome Statute, especially as regards the introduction of a power to initiate proceedings *proprio motu*. Delegations of various states expressed the fear that endowing the Prosecutor with vast discretionary powers would have encroached in a pervasive manner upon their sovereignty and resulted in the creation of an 'irresponsible' Prosecutor (see, e.g., the Opening General Statement of the Honourable Bill Richardson, United States Ambassador at the United Nations, according to whom the provision of *proprio motu* powers would have been "unrealistic and unwise", resulting in a situation of "overload [of] the limits of the Court's design, leading to greater confusion and controversy"; or the unequivocal stance taken by the Chinese Government in the Opening General Statement of Mr Wang Guangya, Head of the Chinese delegation, according to whom: "granting the Prosecutor the right to initiate prosecutions places State sovereignty on the subjective decisions of an individual. The pre-trial chamber provisions to check those powers fall short"). For a summary of the main issues regarding the role of the Prosecutor that have been discussed during the negotiation phase of the Rome Statute, see S. A. FERNÁNDEZ DE GURMENDI, *The Role of the International Prosecutor*, in R. S. LEE (ed.), *The International Criminal Court: The Making of the Rome Statute*, The Hague, 1999, 175-188 and, especially on the US position on the *proprio motu* powers of the ICC Prosecutor, D. SCHAFFER, *False*

The purpose, extension and limits of prosecutorial prerogatives in criminal proceedings, while widely explored in domestic and comparative literature, have been long neglected in academic contributions specific to the field of international criminal law[2]. The issue only started to gain critical attention with regard to certain prosecutorial selection decisions made by the Prosecutors of the ICTY and ICTR (such as not opening an investigation on the NATO bombing of Serbia or abandoning the perspective of investigating ethnic Tutsis for the crimes in Rwanda)[3] as well as during the implementation of the so-called Completion Strategy of the work of the *ad hoc* tribunals[4].

Since the early days of activity of the International Criminal Court, various authors have contributed to the debate on the theoretical rationale, institutional design and procedural implementation of prosecutorial discretion, with a view to enhance the legitimacy and coherence of action of the Office of the Prosecutor[5], regarded as the true "engine" of the newly established permanent court[6].

Alarm about the Proprio Motu *Prosecutor*, in M. MINOW, C. C. TRUE-FROST, A. WHITING (eds.), *The First Global Prosecutor*, Ann Arbor, 2015, 29-44.

[2] In the field of comparative criminal procedure various works provided an insightful analysis of the different national approaches to the institutional and procedural design of prosecutorial regimes. See, e.g., A. PERRODET, *The Public Prosecutor*, in M. DELMAS-MARTY, J. R. SPENCER (eds.), *European Criminal Procedures*, Cambridge/New York, 2002, 415-458.

[3] As noted by J. D. OHLIN, *Peace, Security, and Prosecutorial Discretion*, cit., 185-186. On the specific issue of the NATO bombing of Serbia in 1999, see, critically, A.-S. MASSA, *NATO's Intervention in Kosovo and the Decision of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia Not to Investigate: An Abusive Exercise of Prosecutorial Discretion*, in *Berkeley Journal of International Law*, vol. 24, issue 2, 2006, 610-649, who draws a comparison between the almost unfettered discretion of the Prosecutors of the *ad hoc* tribunals and the tempered and judicially supervised discretion of the ICC Prosecutor; at 648-649 the Author concludes that opening an investigation on the NATO bombing "would have given the impression, in the eyes of the international community, that justice was equally exercised against the weak and the powerful". As regards the influence of *realpolitik* on the attitude of the ICTR's Prosecutor towards crimes committed by the Rwandan Patriotic Front and the decision not to reappoint Carla Del Ponte partly due to her intention to pursue those investigations, see L. CÔTÉ, *Independence and Impartiality*, in L. REYDAMS, J. WOUTERS, C. RYNGAERT (eds.), *International Prosecutors*, Oxford, 2012, 382-385.

[4] See, A. D. MUNDIS, *The Judicial Effects of the "Completion Strategies" on the Ad Hoc International Criminal Tribunals*, in *American Journal of International Law*, vol. 99, no. 1, 2005, 142-158.

[5] See, among the many works that are referred to in the present study, the contributions of D. D. NTANDA NSEREKO, *Prosecutorial Discretion Before National Courts and International Tribunals*, in *Journal of International Criminal Justice*, vol. 3, issue 1, 2005, 124-144; L. CÔTÉ, *Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law*, cit.; W. A. SCHABAS, *Prosecutorial Discretion v. Judicial Activism at the International Criminal Court*, in *Journal of International Criminal Justice*, vol. 6, issue 4, 2008, 731-761; M. R. BRUBACHER, *Prosecutorial Discretion within the International Criminal Court*, in *Journal of International Criminal Justice*, vol. 2, issue 1, 2004, 71-95; A. M. DANNER, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, in *American Journal of International Law*, vol. 97, no. 3, 2003, 510-552; M. M. DEGUZMAN, *Choosing to Prosecute: Expressive Selection at the International Criminal Court*, in *Michigan Journal of International Law*, vol. 33, issue 2, 2012,

While it goes beyond the scope of the present study to provide an all-encompassing and philosophically satisfactory definition of the concept of prosecutorial discretion in international criminal law, it is nevertheless appropriate to start the present analysis of the empirical dimension of prosecutorial practice at the ICC from a few widely shared definitional coordinates. As a matter of fact, although authors' views differ significantly on the scope and boundaries of the prosecutor's discretionary powers—and on its very desirability in the realm of international criminal law—the core meaning of this notion appears to be relatively uncontroversial.

In general legal terms, according to the much quoted and authoritative *Oxford Companion to Law*, discretion can be defined as "the faculty of deciding or determining in accordance with circumstances and what seems *just*, *right*, *equitable*, and *reasonable* in those circumstances"[7]. In a more context-specific sense, the *Oxford Companion to International Criminal Justice* defines prosecutorial discretion as "the power of a prosecutor to make autonomous (independent and impartial) choices as to whom to incriminate, on which charges, on the basis of which evidence and at which moment in time, within a given legal order"[8].

Therefore, whatever the definition one may adopt, what characterises a criminal system based on prosecutorial discretion—sometimes referred to as 'principle of opportunity' of criminal prosecutions in opposition to the 'principle of legality'—is the prosecutor's ability—or freedom—to choose between different courses of action in the exercise of the powers and prerogatives that the legal order

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J. KNOOPS, *Challenging the Legitimacy of Initiating Contemporary International Criminal Proceedings: Rethinking Prosecutorial Discretionary Powers from a Legal, Ethical and Political Perspective*, in *Criminal Law Forum*, vol. 15, issue 4, 2004, 365-390.

[6] More in general, international prosecutors have been regarded as the fundamental clog in the jurisdictional machinery of international criminal tribunals. In this vein, L. CÔTÉ, *Independence and Impartiality*, cit., 321: "Considered as the driving force of all international criminal tribunals, international prosecutors are the engines that set in motion the whole adjudication process in which they play a central role".

[7] This definition from D. M. WALKER, *The Oxford Companion to Law*, Oxford, 1980, is quoted by D. D. NTANDA NSEREKO, *op. cit.*, 124. In the more recent work of P. CANE, J. CONAGHAN (eds.)*, The New Oxford Companion to Law,* Oxford, 2008*,* 330 the Authors stress that thanks to prosecutorial discretionary powers it is possible to "individualize the implementation of the law, softening the harshness or injustices that sometimes arise from rules dispassionately applied".

[8] See, S. ZAPPALÀ, *Prosecutorial Discretion*, in A. CASSESE (ed.), *Oxford Companion to International Criminal Justice*, Oxford, 2009, 471.

under consideration entrusts him or her[9], including the faculty not to exercise his or her powers to trigger or continue criminal proceedings (*nolle prosequi*)[10].

Coessential to the idea of discretion is that the freedom of choice it entails, in order not to drift into arbitrariness, must somehow be limited by certain general principles and constrained by a combination of substantive and procedural rules[11]. Additionally, its exercise should be guided and restrained by some sort of criteria—not necessarily legal, mandatory and externally imposed on prosecutors—allowing to discern the logic behind those choices and to control and if necessary review their legality and reasonableness[12]. As CÔTÉ convincingly points out, quoting a passage of

[9] See A. M. DANNER, *op. cit.*, 518, quoting a definition of discretion given by H. M. HART JR., A. M. SACKS, in W. N. ESKRIDGE JR., P. P. FRICKEY (eds.), *The Legal Process: Basic Problems in the Making and Application of the Law*, Westbury, 1994, 144.

[10] The following paragraphs address the influence and relevance of national prosecutorial regimes vis-à-vis those of various international criminal justice mechanisms. It is alleged that the traditional dichotomy between (national) criminal systems based on the 'principle of opportunity' and those based on the 'principle of legality' (i.e. compulsory criminal prosecutions upon receipt of a *notitia criminis*), does not always offer a valid key to the understanding of the rationale behind prosecutorial discretion in ICL. In this vein, see C. STAHN, *Judicial Review of Prosecutorial Discretion: Five Years On*, in C. STAHN, G. SLUITER (eds.), *op. cit.*, 248-249. Comparing the institutional development of the checks and balances of prosecutorial action at the national and international level, the Author writes that "international criminal courts are almost of a different species", particularly in the sense that "there is recognizable asymmetry between prosecutorial duties and judicial control".

[11] See, S. ZAPPALÀ, *Prosecutorial Discretion*, cit., 471: "Prosecutorial discretion should never imply arbitrariness", and C. STAHN, *Judicial Review of Prosecutorial Discretion: Five Years On*, cit., 252: "discretionary powers are not arbitrary or unchecked powers". For a judicial recognition of this principle, see ICTY, Judgment, *Prosecutor v. Delalić et al.* (*Čelebići case*), IT-96-21-A, AC, 20 February 2001, par. 602: "It is beyond question that the Prosecutor has a broad discretion in relation to the initiation of investigations and in the preparation of indictments . . . It is also clear that a discretion of this nature is not unlimited".

[12] The determination of principles and selective criteria that should guide the exercise of prosecutorial discretion has been the object of various academic collective endeavours, such as the extensive study of M. BERGSMO (ed.), *Criteria for Prioritizing and Selecting Core International Crimes Cases*, 2nd edition, Oslo, 2010. The prosecutors of international criminal tribunals themselves have developed strategies and prosecutorial policies to guide the action of their offices. In the case of the ICTY and ICTR, unfortunately, those documents were never made public, which led to serious transparency concerns on their selection choices, also considering the extremely limited judicial review of prosecutorial action available in the procedural context of the *ad hoc* tribunals. See, critically, L. CÔTÉ, *Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law*, cit., 171-172 and C. ANGERMEIER, *Case Selection and Prioritization Criteria in the Work of the International Criminal Tribunal for the Former Yugoslavia*, in M. BERGSMO, *op. cit.*, 27, who stresses that in any event those principles have not been consistently followed. On the contrary, in the framework of the ICC, in a significant effort towards transparency, the OTP decided to publish every three years the so-called Prosecutorial Strategy (or Strategic Plan) containing the broad objectives of the Office's activity and a number of policy documents (known as Policy Papers), stating the principles and guidelines to be followed by the Office on specific issues. Particularly relevant for the present discussion are the Policy Paper on Preliminary Examinations of 2013 and the Policy Paper on Case Selection and Prioritisation of 2016. These policy documents will be thoroughly examined in Part Two, Chapter Two of the present work. For a discussion of the general principles guiding the work of the OTP from the point of view of the current Prosecutor, see F. BENSOUDA, *Challenges*

DWORKIN's seminal book, it is only through the study of the limits and constraints that a legal system imposes on the exercise of discretion that one can understand how it really performs in practice[13]. Such limits to discretionary powers can be normative, judicial, political, institutional, financial and disciplinary in character—or more frequently a combination thereof[14]—and are usually enforced by organs whose *dialectical* relation with the prosecutor decisively contributes to shape the *dynamics* of prosecutorial discretion of a criminal justice system[15].

Inextricably connected to the constraints and controls over the exercise of prosecutorial discretion are the concepts of independence, impartiality, accountability and transparency of prosecutorial action as constitutive elements of the rule of law in the administration of international criminal justice[16]. These concepts must be succinctly addressed in turn before examining the rationales generally adduced in favour of prosecutorial discretion in ICL—sometimes resorting to incorrect analogies with national legal systems—and the different schemes of its implementation across various international(ised) criminal tribunals.

Related to Investigation and Prosecution at the International Criminal Court, in R. BELLELLI (ed.), *International Criminal Justice: Law and Practice from the Rome Statute to its Review*, Farnham, 2010, 131-134.

[13] See L. CÔTÉ, *Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law*, cit., 163 quoting R. DWORKIN, *Taking Rights Seriously*, London, 1984, 31. The American philosopher, through one of his incisive metaphors affirms that "discretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction".

[14] With regard to the constraints to prosecutorial discretion at the ICC see, C. STAHN, *Judicial Review of Prosecutorial Discretion: Five Years On*, cit., 250 and 258-265. The Author stresses the fact that, notwithstanding the scarce indications in the Rome Statute as to the concrete exercise of discretion, the system of the ICC provides for a "multi-layered model of accountability. It combines professional responsibility (according to which Prosecutors may be held accountable for discretionary decisions based on professional misconduct) with elements of judicial review", adding that "The Prosecutor and the Deputy Prosecutor are ultimately responsible to the Assembly of States and act under their budgetary scrutiny". He then goes on to examine the various types of constraints that can play a role in the checks and balances mechanism of the ICC (respectively described as "political"; "process-based"; "self-regulation" and "judicial review"). For an overall evaluation of the various mechanisms of oversight of international prosecutors, with particular regard to the ICC framework, see J. I. TURNER, *Accountability of International Prosecutors*, in C. STAHN (ed.), *The Law and Practice of the International Criminal Court*, Oxford, 2015, 382-407.

[15] The preliminary methodological contention of the present enquiry is that any meaningful study of the prosecutorial regime of the ICC must above all acknowledge these fundamental legal and institutional dialectics (freedom to choose v. rules and procedures limiting such freedom; powers of the prosecutorial organ v. powers of the judicial supervisory organs), and subsequently proceed to scrutinise how practice compares with the static legal framework of the system under consideration.

[16] See, S. ZAPPALÀ, *Prosecutorial Discretion*, cit., 471 and L. CÔTÉ, *Independence and Impartiality*, cit., 352: "prosecutorial discretion and prosecutorial independence can be seen as opposite sides of the same coin".

Independence is an attribute that attaches both to the individuals exercising prosecutorial functions ('personal independence') and—collectively—to the organ/institution vested with prosecutorial authority ('institutional independence')[17]. Its concrete configuration is strictly connected to the choices of institutional design made at the time of the creation of a given system of (international) criminal justice, and is heavily influenced by the structure, sources of production of the rules and subjects of the legal order under consideration[18]. While any criminal justice system based on the rule of law must be premised on the individual predisposition of its actors—among which are prosecutors—to act out of their own will without being subject to (personal) undue interferences, legal systems differ as to the guarantee and safeguard of such autonomy vis-à-vis other organs and institutions[19].

On this point, it can be safely concluded that the evolutionary trajectory of international criminal justice has witnessed a growing trend towards the explicit normative recognition of the prosecutors' institutional independence both vis-à-vis the other organs of international tribunals (such as the Judiciary and Registry) and external subjects (such as states, international organisations and their organs, NGOs and individuals)[20]. In the case of the ICC, the Statute also entrusts the OTP with "full

[17] *Ibidem*, 324-325.

[18] *Ibidem*, 320, 324. The Author establishes a clear link between the concrete measure of independence enjoyed by international prosecutors and the specificities of the international legal order: "the existence of international prosecutors is determined by and inextricably associated with the setting-up of new international criminal jurisdictions. If one can affirm that prosecutors working within international criminal jurisdictions can be labelled as 'international prosecutors', their specific functions—prosecuting war crimes, crimes against humanity, and genocide—and the legal nature of the judicial institution itself will often govern the extent of independence afforded to their prosecution attorneys".

[19] *Ibidem*, 323-324. Not all legal systems provide for a formal institutional independence of the prosecutor from other branches of government. In various jurisdictions prosecutors are at least formally subject to the executive power, though various operational mechanisms ensure an appropriate level of impartiality and autonomy of their action. On this point, see the UN Guidelines on the Role of Prosecutors adopted in Cuba in 1990. As CÔTÉ points out this document does not explicitly make reference to the issue of independence, while it establishes that prosecutors shall "carry out their functions impartially" (Guideline 13(a)). In the European context, recent developments at the Council of Europe lean toward a more explicit recognition of independence as an essential requirement of prosecutorial status and action. See, e.g., the so-called Bordeaux Declaration ("Judges and Prosecutors in a Democratic Society") on the relations between judges and prosecutors in a democratic society, adopted jointly by the Consultative Council of European Judges and the Consultative Council of European Prosecutors in 2009 (particularly, paragraphs 6-8 of the declaration and paragraph 10 of the Explanatory Note: "The independence of the public prosecution service constitutes an indispensable corollary to the independence of the judiciary").

[20] L. CÔTÉ, *Independence and Impartiality*, cit., 325: "Most of the international criminal jurisdictions created after Nuremberg and Tokyo have recognised in their statutes the institutional independence of their prosecutors using two main features. Characterizing the OTP as a 'separate organ of the Court'

authority over the management and administration of the office" [21], thereby recognizing that "true substantive independence is only possible if there is administrative or managerial independence as well"[22].

As it will be seen, in parallel with the recognition of institutional and administrative independence, a trend towards the extension of various forms of judicial review of prosecutorial discretionary choices can be observed at the international level[23].

Impartiality of prosecutorial action is strictly connected to both personal and institutional independence, but whereas those are essentially 'relational' concepts (independence *from* something or somebody), impartiality centres on the behaviour and actual conduct of the prosecutor in discharging of his or her duties[24]. The obligation to act impartially can even be the object of a specific normative sanction,

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affirms his independence both as part of and with regards to the judicial institution as such. Stipulating that the prosecutor 'shall act independently' and 'shall not seek or receive instructions from any external source' establishes his independence towards third parties such as states and other non-governmental organizations". For normative references see, article 42(1) of the ICC Statute; article 16(2) of the ICTY Statute; article 15(2) of the ICTR Statute; article 11(2) of the STL Statute; article 15(1) of the SCSL Statute; article 19(1) of the Law on the Establishment of the ECCC. In the case of the ICC, the Code of Conduct for the Office of the Prosecutor, entered into force on 5 September 2013, contains detailed provisions on the issue of independence (see, Section 2 of the Code).

[21] Article 42(2) of the Rome Statute.

[22] See, L. CÔTÉ, *Independence and Impartiality*, cit., 336. The Author recalls how drafters of the Rome Statute learned from the experience of the *ad hoc* tribunals, where the administrative dependency of the OTP on the Registry gave rise to significant conflicts and inefficiencies.

[23] See, S. ZAPPALÀ, *Prosecutorial Discretion*, cit., 471. At the *ad hoc* tribunals, until the advent of the completion strategy, the latitude and degree of judicial review of discretionary choices had been rather limited, consistently with the common law-oriented procedural scheme prevailing in those jurisdictions. Nevertheless, with the UNSC authoritatively setting the broad objectives of the prosecutorial policy to be implemented by the tribunals' respective prosecutors through Resolutions 1503 and 1534, the latitude of judicial interference on prosecutorial choices was significantly increased. In particular, Res. 1503 called the prosecutors to concentrate on "the most senior leaders suspected of being most responsible" (UNSC Resolution 1503 (2003), S/Res/1503, 28 August 2003, seventh recital); while Res. 1534 went on to intensify judicial review and confirmation of any new indictments, calling on each of the *ad hoc* Tribunal "to ensure that any such indictments concentrate on the most senior leaders suspected of being most responsible" (UNSC Resolution 1534 (2004), S/Res/1534, 26 March 2004, section 5). As it will be seen in greater detail, in the case of the ICC both the Statute and the other regulatory documents—as well as the relevant case law—provide for a wider and deeper supervisory role of judges with respect to prosecutorial discretionary choices and certain acts of the OTP. In this sense, M. R. BRUBACHER, *op. cit.*, 86: "This aversion to judicial intervention in prosecutorial decisions was weakened in the ICC Statute" and C. STAHN, *Judicial Review of Prosecutorial Discretion: Five Years On*, cit., 250-251. At the same time, a certain degree of political oversight is maintained through the disciplinary role of the ASP (see articles 46, 47 and 112 of the Statute) and, more importantly, the powers attributed to the UNSC as regards the triggering of the Court's jurisdiction pursuant to article 13(a) and the faculty to temporarily block its activity pursuant to article 16 of the Rome Statute.

[24] See, L. CÔTÉ, *Independence and Impartiality*, cit., 357-359. The Author speaks of "symbiotic" relationship between independence and impartiality.

such as the unprecedented one contained in article 54(1)(a) of the Rome Statute and imposing on the OTP the duty to "investigate incriminating and exonerating circumstances equally" for the establishment of the truth[25]. Nevertheless, in the highly politicised environment in which international prosecutors operate, the duty of impartiality may give rise to the "paradox" that in order to be—and appear—truly impartial and even-handed, prosecutors are sometimes required to make selective choices that might raise concerns of bias on the part of the Accused, states or other external observers[26]. The duty of impartiality, while not depriving the prosecutor of his or her quality of party to the proceedings, is therefore entangled with a general duty to act fairly and to cooperate with other actors at trial in the proper administration of justice[27]. To quote the eloquent words of Judge Shahabuddeen in one of his separate opinions as appellate judge of the *ad hoc* tribunals

[25] On this relevant issue see the critical assessment of the first years of prosecutorial practice and the analysis of the judicial reactions thereof provided by C. BUISMAN, *The Prosecutor's Obligation to Investigate Incriminating and Exonerating Circumstances Equally: Illusion or Reality?*, in *Leiden Journal of International Law*, vol. 27, issue 1, 2014, 205-226. While the same duty is not statutorily established for the prosecutors of the *ad hoc* tribunals, it has been argued that the jurisprudence of the ICTY and ICTR supports the existence of a similar obligation also in those judicial regimes. See S. ZAPPALÀ, *The Prosecutor's Duty to Disclose Exculpatory Materials and the Recent Amendment to Rule 68 ICTY RPE*, in *Journal of International Criminal Justice*, vol. 2, issue 2, 2004, 620-630. The duty of impartially is also linked to the general principle of non-discrimination in the application of the law provided for by article 21(3) of the Rome Statute. References to impartiality are also made by other documents, such as the OTP Policy Paper on Preliminary Examinations, November 2013, par. 28-29 and the Code of Conduct for the Office of the Prosecutor, Chapter 2, Section 6.

[26] See, L. CÔTÉ, *Independence and Impartiality*, cit., 366, 368-370. The Author discusses at length the issue of prosecutorial selection choices in relation to the victor's justice paradigm, which is frequently invoked in criticizing the activity of international criminal tribunals. As he correctly points out, in certain circumstances prosecutors may need to select potential accused persons not only on the basis of the evidence available but also on considerations regarding their affiliation with a certain social group, in order to provide a more "balanced" account of the various forms of criminality occurred in a certain spatial and temporal framework (such as an armed conflict or other serious episodes of violence). Case law of the *ad hoc* tribunals has clarified the limits of this discretionary power, insisting on the fact that while the prosecutorial policy to investigate all the parties to a conflict is not *per se* in violation of the duty of impartiality and equality before the law, such selection choices must not be based on discriminatory or otherwise "impermissible motives". See ICTY, Judgment, *Prosecutor v. Delalić et al*. (*Čelebići case*), IT-96-21-A, AC, 20 February 2001, par. 605, 607, 611, 614-615 and, similarly, ICTR, Judgment, *Prosecutor v. Akayesu*, ICTR-96-4-A, AC, 1 June 2001, par. 94-96; ICTR, Judgment and Sentence, *Prosecutor v. Ntakirutimana*, ICTR-96-10 and ICTR-96-17-T, TC, 21 February 2003, par. 870-871.

[27] See L. CÔTÉ, *Independence and Impartiality*, cit., 357. International documents stress the importance of the duty to act impartially. See, e.g., the already quoted (*supra*, footnote 19) UN Guidelines on the Role of Prosecutors (article 13(a)) and Bordeaux Declaration (paragraph 6 of the Declaration and paragraphs 11, 12, 40, 55 of the Explanatory Note). In particular paragraph 55 of the Explanatory Note provides a very clear explanation on the connection between impartiality, fairness and cooperation in the administration of justice: "The impartiality of the prosecutors during the procedure should be understood in this sense: they should proceed fairly and objectively to ensure that the court is provided with all relevant facts and legal arguments and, in particular, ensure that

> The Prosecutor of the ICTR is not required to be neutral in a case; she is a party. But she is not of course a partisan . . . The implications of that requirement suggest that, while a prosecution must be conducted vigorously, there is room for the injunction that prosecuting counsel 'ought to bear themselves rather in the character of ministers of justice assisting in the administration of justice'[28].

Mechanisms to ensure the accountability for prosecutorial action and the transparency of selection decisions are closely connected to prosecutorial discretion and its latitude. At the national level, notwithstanding the divergent traditions and cultural approaches to the issue, a variety of institutional and procedural solutions—formal and informal, internal and external—is employed to strike a balance between the need for flexibility of prosecutorial action and the demand for accountability[29]. At the international level, the significant 'institutional distance' of the judicial and prosecutorial organs from a clearly discernible constituency—coupled with the highly politicised environment in which such organs are inevitably embedded—makes it particularly difficult to design effective accountability mechanisms[30]. Nevertheless, statutory and regulatory documents—as well as the case law of international tribunals—have contributed to gradually develop a multi-layered system of principles, rules and remedies against major prosecutorial misconducts and/or failures to act fairly and reasonably in the administration of international criminal justice[31]. The effectiveness of such procedures and remedies at the

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evidence favourable to the accused is disclosed; take proper account of the position of the accused person and the victim; verify that all evidences have been obtained through means that are admissible by the judge according to the rules of a fair trial and refuse to use evidence obtained through human rights violations, such as torture".

[28] Separate Opinion of Judge Shahabuddeen, ICTR, Decision (Prosecutor's Request for Review or Reconsideration), *Prosecutor v. Barayagwiza*, ICTR-97-19-AR72, AC, 31 March 2000, par. 68 also cited by H. B., JALLOW, *Prosecutorial Discretion and International Criminal Justice*, in *Journal of International Criminal Justice*, vol. 3, issue 1, 2005, 154.

[29] See, F. MÉGRET, *Accountability and Ethics*, in L. REYDAMS, J. WOUTERS, C. RYNGAERT (eds.), *op. cit.*, 418-419. The Author speaks of a "regulatory dilemma" as regards the quest for a fair balance between independence and accountability, pointing out that the two extremes of "absolute independence" and "absolute accountability" both fail to properly address the values at stake and that "accountability should not be so pervasive as to defeat the purpose of having an independent Prosecutor, it should not be so absent as to condone arbitrariness, which is the opposite of justice". After recalling the different national approaches to the issue of prosecutorial accountability, the Author stresses the fact that while domestic experiences may be a source of inspiration, no single national legal system offers solutions that can be easily transplanted to international criminal justice mechanisms, considering their institutional and normative specificities.

[30] *Ibidem*, 418-420. In the same vein, see J. I. TURNER, *Accountability of International Prosecutors*, cit., 384-386.

[31] See, F. MÉGRET, *Accountability and Ethics*, cit., 420-424, 457-466. The Author addresses in turn the various sources of legal standards for the evaluation and enforcement of prosecutorial

international level—especially those of political and disciplinary character—is the object of debate, with particular regard to the lack of coordination in the action of the supervising authorities and the rather generic standards for the evaluation of prosecutorial (mis)conduct[32]. The role of judicially imposed sanctions in cases of prosecutorial misconduct at trial has gained significant relevance in the early practice of the ICC and various Chambers' decisions provide an interesting point of observation on the dialectical OTP-Judiciary relationship as regards the use of prosecutorial discretionary powers and their judicial supervision[33].

Transparency of prosecutorial choices and decision-making processes is one additional dimension of prosecutorial discretion, especially in the context of international judicial institutions that constantly struggle to strengthen the (perception of) legitimacy of their action[34].

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accountability (international human rights law; international prosecutorial standards; staff regulations; tribunals' Statutes and RPE; internal regulations) and the different bodies responsible for their application and enforcement (the OTPs themselves; the Judiciary; the Registry, the political governing bodies such as the ASP of the ICC; other external bodies).

[32] *Ibidem*, 422-423, stressing the "lack of specificity" of the underlying rules as well as the fact that they usually deal exclusively with "worst case scenarios" (i.e. serious misconduct hypothesis, especially at trial) and not with the many other aspects involving ethical and deontological issues as regards the prosecutor's conduct. On the lack of coordination of the supervising authorities see J. I. TURNER, *Accountability of International Prosecutors*, cit., 406-407.

[33] See, in particular, the decisions of both the TC and AC regarding the OTP's failure to disclose certain exculpatory materials in the *Lubanga* case and the imposition of two stays of proceedings as a remedy to prosecutorial action that had caused prejudice to the Accused's rights: ICC, Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements and the Application to Stay the Prosecution of the Accused with certain other issues raised at the Status Conference on 10 June 2008, *Prosecutor v. Lubanga*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-1401, TC I, 13 June 2008; ICC, Judgment on the Appeal of the Prosecutor against the Decision of Trial Chamber I entitled 'Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008', *Prosecutor v. Lubanga, Situation in the Democratic Republic of the Congo,* ICC-01/04-01/06-1486, AC, 21 October 2008; ICC, Redacted Decision on the Prosecution's Urgent Request for Variation of Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU, *Prosecutor v. Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2517-Red, TC I, 8 July 2010; ICC, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled "Decision on the Prosecution's Urgent Request for Variation of Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU", *Prosecutor v. Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2582, AC, 8 October 2010. As pointed out by J. I. TURNER, *Accountability of International Prosecutors*, cit., 391-394, the TCs and AC, both in later decisions in *Lubanga* and in other cases such as *Kenyatta* and more recently *Ruto and Sang*, have gradually shifted to a less draconian, more "structured" and "diversified" approach to remedies.

[34] Various authors link the quest for legitimacy to the enhancement of transparency of decision-making and in particular to the publicity of the criteria for selection decisions. See, e.g., A. M. DANNER, *op. cit.*, 546-547; P. WEBB, *The ICC Prosecutor's Discretion not to Proceed in the 'Interests*

At a minimum, the principle of transparency requires the prosecutor to make the strategic objectives and selective criteria guiding his or her discretionary action public, which in the case of the ICC has increasingly been done with the issuance of the so-called Strategic Plan and Policy Papers[35]. The publicity of such documents, as well as a regular reporting on the activities of the Office—especially at the preliminary examination stage—may significantly help in keeping track of prosecutorial performances through a comparison between the stated objectives and the results achieved[36]. Moreover, transparency requires the prosecutor to justify and provide adequate reasons at least for certain major discretionary choices (such as the one not to open an investigation or proceed with a prosecution)[37]. It is on the basis of these reasons that it is possible to carry out—when permitted under the relevant provisions—the judicial review of the prosecutor's discretionary choices[38].

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of Justice', in *Criminal Law Quarterly*, vol. 50, no. 3, 2005, 324-325; L. CÔTÉ, *Independence and Impartiality*, cit., 354-357, recognizing that the publication of such documents is necessary but insufficient to ensure legitimacy. Others, such as M. M. DEGUZMAN, *Choosing to Prosecute: Expressive Selection at the International Criminal Court*, cit., 298-299, take issue with such a straightforward approach, articulating that *ex ante* selection criteria do not inherently enhance the legitimacy of prosecutorial choices, and that transparency can only contribute to that end if it "exposes to public discourse the decision makers' understanding of the appropriate goals and priorities for the institution". This particular view, while heavily influenced by an expressivist approach towards international criminal law that may be otherwise seriously questioned, has the merit of demystifying the idea that transparency alone can solve the issues of credibility of international criminal institutions.

[35] See*, supra*, footnote 12*,* and *infra*, Part Two, Chapter Two of this work. For a positive appraisal of the publication of such documents, see also L. CÔTÉ, *Independence and Impartiality*, cit., 357 and C. STAHN, *Judicial Review of Prosecutorial Discretion: Five Years On*, cit., 251.

[36] The OTP publishes every year a report on the activities performed at the preliminary examination stage, presenting the work carried out by the Office in each situation according to a 'phase-based' approach. As regards preliminary examinations and the reporting activity thereof, the OTP in its Policy Paper on Preliminary Examinations points out at par. 94 that one additional function of reporting on these activities is to "enable the Office to carry out its mandate without raising undue expectations that an investigation will necessarily be opened, while at the same time encouraging genuine national proceedings and contributing towards the prevention of crimes". Transparency on the activities performed by the Office is therefore linked to the correct public perception of the Court's legitimacy and to the complementarity regime.

[37] See, article 53(3)(a) and (b) of the Statute and Rule 105(3) and (5) of the RPE. There is nevertheless a serious issue concerning the effectiveness of this duty to provide reasons in relation to the possibility to trigger judicial review, for instance, of the decision to decline the opening of an investigation. In fact, as pointed out by C. STAHN, *Judicial Review of Prosecutorial Discretion: Five Years On*, cit., 271, "Review under Article 53 (3) is based on a vicious cycle", since the possibility to ask for judicial review is dependent on the prosecutor's notification of his or her negative decision to the referring entity and/or the Court (the Statute mandates such a communication to the Court only if the negative decision is based "solely" on considerations regarding the interest of justice). In the absence of such notification it may prove procedurally impossible to trigger such judicial control over the discretionary choice under consideration.

[38] Article 15 of the Statute concerning the authorization to open an investigation pursuant to a request of the Prosecutor acting *proprio motu* and article 53(3)(a) and (b) of the Rome Statute provide the two

While assertions of the need for transparency are present in a number of prosecutorial documents—especially at the ICC [39] —and notwithstanding the commendable efforts made on the point under the tenure of Fatou Bensouda, many argue that its overall implementation in the OTP's practice is still insufficient[40]. As it will be seen in greater detail, recent practice also shows that fulfilling the need for transparency *through* extensive reasoning in the absence of solid and coherent principles guiding prosecutorial action can result in serious blows to the prosecutor's credibility and encourage judges to extend the boundaries of judicial interference with his or her selection choices[41].

2. 'Selectivity' as an ontological feature of international criminal law

It flows from the above general considerations that attributing to the prosecutor the ability to exercise a measure of discretion in discharging his or her duties—albeit under certain conditions and subject to both judicial and non-judicial

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most relevant mechanisms for the judicial supervision of such discretionary decisions. On these provisions and their limits see, *infra*, Part Two, Chapter One and Three.

[39] See, e.g., ICC-OTP Strategic Plan 2012-2015, 11 October 2013, par. 8, 10, 32, 38, 53, 65, 86. Transparency is mentioned as an essential component in the enhancement of the effectiveness of preliminary examinations, as well as listed as one of the six overall goals of the prosecutorial strategy. This approach has been confirmed more recently in the ICC-OTP, Strategic Plan 2016-2018, par. 54, 81. Other prosecutorial documents mention the requirement of transparency as regards specific issues, see e.g., ICC-OTP, Policy Paper on Preliminary Examinations, November 2013, par. 94; ICC-OTP, Policy Paper on Case Selection and Prioritization, 15 September 2016, par. 3, 5.

[40] See, e.g., L. CÔTÉ, *Independence and Impartiality*, cit., 356-357 and C. STAHN, *Judicial Review of Prosecutorial Discretion: Five Years On*, cit., 251: "These guidelines, however, are predominantly geared towards internal application by OTP and not meant to be targeted towards judicial review. This has shifted the focus from formalism and external scrutiny to self-regulation and internal review".

[41] In this sense, see M. M. DEGUZMAN, *Choosing to Prosecute: Expressive Selection at the International Criminal Court*, cit., 298-299: "Transparency enhances legitimacy when it exposes good process, but may undermine legitimacy when it reveals incoherence" and "Transparency without goals may therefore harm the ICC's legitimacy". A very clear example of this unwanted consequences is provided by the way in which the OTP decided, at the end of preliminary examination, not to open an investigation on the facts occurred on the *Mavi Marmara*. The OTP produced a very detailed document discussing at length the reasons behind the *nolle prosequi* decision, thereby stimulating the request for judicial review by the referring entity (the Union of the Comoros) pursuant to article 53(3)(a) of the Statute. The PTC severely criticised the OTP's approach toward the construction of the gravity requirement on the basis of which the Prosecutor declined to open an investigation, and asked her to reconsider her previous decision (see ICC, Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation, *Situation on the Registered Vessels of the Comoros*, *Greece and Cambodia*, ICC-01/13-34, PTC I, 16 July 2015). Irrespective of the fact that the decision at hand does not have the effect of mandating the Prosecutor to open an investigation, it is evident that the analysis of the PTC reveals a profound disagreement between the OTP and judges on the latitude of prosecutorial discretion not to proceed with an investigation on the basis of the purported insufficient gravity of the facts. For a discussion of this decision see, *infra*, Part Three, Chapter Two, par. 3.1.3.

constraints—has very far-reaching legal and institutional consequences on the concrete functioning of a criminal justice mechanism, its performances and legitimacy[42].

Prosecutorial discretion necessarily implies complex selection decisions, such as those on if, when, where, who, and for what crimes to investigate and prosecute[43]. But are these choices necessarily 'selective' (arbitrary) in a negative connotation, and is 'selective enforcement' of international criminal law intrinsically disruptive of the rule of law (however this concept may be construed at the international level)[44]? The answer to such questions is of even greater relevance since international criminal justice—even in its more recent and evolved forms—has historically been confronted with allegations of 'selectivity', both *ratione personae* and *ratione materiae*[45], i.e. of targeting exclusively certain individuals or crimes based on considerations that have more to do with *realpolitik* than with any applicable legal (or moral) standard[46].

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[42] For a discussion of the academic literature on the relations between prosecutorial discretion, selectivity and the legitimacy of international criminal law according to the rule of law discourse, see R. CRYER, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime*, Cambridge, 2005, 194-199.

[43] Authors largely agree on the fact that at the international level such selection choices are particularly complex, considering factors such as the limited jurisdictional reach of international judicial institutions; their dependency on state cooperation; the finite resources at their disposal; etc. See, e.g., F. MÉGRET, *Accountability and Ethics*, cit., 418: "It is in the nature of the Prosecutors' work, especially that of international criminal tribunals, that they make very complex decisions" stressing that it is even more so "in an international realm fraught with conflicts of interest, values, and culture. International criminal justice often operates in environments where it is facing an uphill struggle in terms of its legitimacy"; M. M. DEGUZMAN, *Choosing to Prosecute: Expressive Selection at the International Criminal Court*, cit., 297, who goes on to call into question the feasibility of *ex ante* selection criteria in international criminal law, stating that "Each situation presents such a complex mix of relevant circumstances that application of rigid criteria may be impossible and is probably undesirable".

[44] There has been significant scholarly debate on the appropriateness of applying the 'rule of law discourse' to the realm of international law, provided that such an approach has historically been developed in the context of domestic legal systems. On this debate see the seminal book by T. FRANCK, *Fairness in International Law and Institutions,* Oxford, 1998. See also I. BROWNLIE, *The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations*, The Hague, 1998.

[45] This distinction is used by R. CRYER, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime*, cit., 191-231 (for the aspects concerning selectivity *ratione personae*), 232-326 (for the aspect concerning selectivity *ratione materiae* as regards both the definition of the crimes and the general principles of liability and defences).

[46] See T. L. H. MCCORMACK, *Selective Reaction to Atrocity: War Crimes and the Development of International Criminal Law*, in *Albany Law Review*, vol. 60, no. 3, 1997, 681-731. Allegation of victor's justice, the *tu quoque* argument and accusation of overall selectivity have been the object of in-depth analysis, especially from the perspective of international relations and political science, as recalled by R. CRYER, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime*, cit., 199-202, footnotes 50-53. For a very critical account on the legitimacy of international criminal law from this standpoint see D. ZOLO, *La giustizia dei vincitori. Da Norimberga*

One possible way of conceptualizing the issue would be to distinguish between a 'negative/pathologic' and a 'neutral/physiologic' understanding of the concept of selectivity of international prosecutions, and reflect on whether it is

a Baghdad, Bari, 2006, 39-42, who speaks of a "dualistic system" of international criminal justice, whereby different standards of justice apply to powerful and less powerful states and their leaders. Recently, the debate on selectivity and double standards in international criminal justice has re-emerged with regard to the severe critiques to the work of the ICC coming from the African continent. Allegations of bias and (judicial) neo-colonialism towards Africa in the selection decisions of the OTP have been put forward both at the political level (as part of a wide anti-ICC campaign at the African Union) and in academic writings. The most contentious issues at stake relate not only to the selection of situation and cases by the OTP, but also to the issue of immunity of Heads of State under international customary law and its relationship with the obligation to cooperate with the ICC under Part IX of the Statute. For an example of such political manoeuvres see the AU, Assembly, Decision on Africa's Relationship with the International Criminal Court, Extraordinary Session of the Assembly of the African Union, 12 October 2013, Doc. Ext/Assembly/AU/ Decl. 1–2 (October 2013) Ext/Assembly/AU/Decl.1–4. As a result of controversies regarding requests for cooperation with the Court, late 2016 saw the first three cases of notification of withdrawal from the Rome Statute of Burundi, South Africa and Gambia. At the time of writing, the act of withdrawal deposited by the Government of South Africa with the UN Secretary General according to article 127(1) of the Rome Statute on 19 October 2016 has been invalidated by a decision of the High Court of Pretoria sitting as judge of first instance, which ordered the Government to revoke its notice of withdrawal (High Court of Pretoria, Gauteng Division, *Democratic Alliance v. Minister of International Relations and Cooperation et al.*, case 83145/2016, 22 February 2017). On 7 March 2017 the Government of South Africa, in compliance with the court's ruling, deposited with the Secretary General of the United Nations an act of revocation of the notice of withdrawal (available at https://treaties.un.org/doc/Publication/CN/2017/CN.121.2017-Eng.pdf, last retrieved 6 November 2018). After presidential elections in Gambia, the new Government notified to the UNSG the annulment of the decision to withdraw previously notified on 10 November 2016. With regard to Burundi, the African state became the first State Party to effectively withdraw from the Rome Statute pursuant to article 127(1) of the Statute on 27 October 2017, one-year after the receipt of the notification of withdrawal. Nevertheless, before withdrawal became effective the OTP had already submitted to the PTC—under seal—a request for authorisation to open an investigation pursuant to article 15 of the Statute, which the preliminary judges granted with a decision adopted on 25 October 2017 and made public on 9 November 2017 (See, ICC, 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", ICC-01/17-X-9-US-Exp, 25 October 2017, *Situation in the Republic of Burundi*, ICC-01/17-9-Red, PTC III, 9 November 2017). This swift move of the OTP finds support in article 127(2) of the Statute, establishing that the withdrawal of a state "shall [not] prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective". Notwithstanding this apparent setback of the pan-African withdrawal strategy, relationships with the ICC remain tense and a recent AU draft decision—adopted prior to the most recent legal and political developments in South Africa and Gambia—has reaffirmed the existence of such a withdrawal strategy in the political agenda of the organization (see AU, Assembly, Draft Decision on the International Criminal Court, 28th Ordinary Session of the Assembly of the African Union, 30-31 January 2017, Doc. Assembly/AU/Draft/Dec.1(XXVIII)Rev.2). On the ICC-AU relationship a growing literature is available. See, e.g., K. M. CLARKE, *Fictions of Justice: the International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa,* New York, 2009; K. AMBOS, *Expanding the Focus of the "African Criminal Court"*, in W. A. SCHABAS, Y. MCDERMOTT, N. HAYES (eds.), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives,* Burlington, 2013, 499–529; R. DICKER, *The International Criminal Court (ICC) and Double Standards of International Justice*, in C. STAHN (ed.), *The Law and Practice of the International Criminal Court*, cit., 3-12; J.-B. J. VILMER, *The African Union and the International Criminal Court: Counteracting the Crisis*, in *International Affairs*, vol. 92, issue 6, 2016, 1319-1342.

possible to discern a progressive development of international criminal justice from the former to the latter[47].

The 'negative/pathologic' understanding of selectivity refers to situations where the selection decisions made in the exercise of prosecutorial discretion are: i) To a large extent pre-determined by unchecked political and/or administrative actors[48]; ii) Not constrained by legal criteria susceptible of external control; iii) Adopted by subjects who cannot be held accountable for such choices; iv) Based on irrelevant or arbitrary criteria leading to unpredictability and lack of consistency in the application and enforcement of the law[49].

On the contrary, a 'neutral/physiologic' understanding of selectivity points at situations where—as it happens in most national jurisdictions, including those theoretically subscribing to the principle of mandatory prosecutions[50]—selection choices are made by the prosecutorial authorities: i) Independently from—at least – direct political interference; ii) Based on formal and/or informal criteria that allow a certain measure of external review; iii) Subject to accountability procedures and professional ethics requirements; iv) Based on patterns of conduct revealing a sufficient degree of consistency and coherence in the application and enforcement of the law.

While the first of these understandings of selectivity points towards arbitrariness, the second points towards the recognition of the simple truth that "no criminal justice system has nowadays the capacity to prosecute all offences no matter how serious they are"[51], and therefore that "the question is not whether selective

[47] On the relationship between selectivity and the idea of "progress" of international criminal justice, see A. V. ARMENIAN, *Selectivity in International Criminal Law: An Assessment of the 'Progress Narrative'*, in *International Criminal Law Review*, vol. 16, issue 4, 2016, 642-672.
[48] On this fundamental aspect for the purposes of distinguishing between acceptable and unacceptable selectivity, while recognizing the inevitable political dimension of selection choices at the international level, see L. CÔTÉ, *Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law*, cit., 171 and R. CRYER, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime*, cit. 193.
[49] *Ibidem*, 196, echoing Thomas Franck's conception of legitimacy in international law, centred on the requirements of consistency and coherence.
[50] K. AMBOS, *Comparative Summary of the National Reports*, in L. ARBOUR, A. ESER, K. AMBOS, A. SANDERS (eds.), *The Prosecutor of a Permanent International Criminal Court*, Freiburg, 2000, 525: "even if strict mandatory prosecution is called for there are mechanisms of factual discretion".
[51] *Ibidem*. The passage is also quoted by R. CRYER, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime*, cit., 192.

prosecution should occur . . . but when selective enforcement is unacceptable"[52]. This holds particularly true in the case of international criminal justice, considering the institutional, jurisdictional and—last but not least—practical and logistical limitations of its judicial enforcement, given the generally massive scale of international crimes[53].

Selectivity—sometimes in the first more problematic, sometimes in the second more acceptable form—has been a historically unavoidable reality of international criminal justice [54]. Nevertheless, it must be conceded that—notwithstanding the often well-grounded critiques to certain prosecutorial choices—normative and institutional developments of ICL such as those reflected in the ICC's legal regime contain the seeds of a significant improvement in the pursuit of a more principled selectivity compared to previous experiences[55]. One evident example of this trend is the fact that the jurisdiction of the permanent court, contrary to that of the *ad hoc* and internationalised tribunals, is not subject to statutorily pre-determined temporal or territorial limitations[56]. The extent to which such potential improvements are met in the actual functioning of the selection mechanism at the ICC is one of the key issues that the presents study tries to address.

In sum, notwithstanding the current mainstream claims that in the era of the International Criminal Court *all* international crimes should *always* be punished [57]

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[52] *Ibidem*.

[53] On the rationales and practicalities that contribute to make selectivity a necessity for international criminal justice, see, *infra*, paragraph 3 of the present chapter.

[54] For an overview of the 'metamorphic' expressions of selectivity in the experience of the various generations of international criminal justice institutions, see A. V. ARMENIAN, *op. cit.*, 647-652 (as regards the IMT and IMTFE), 652-655 (as regards the *ad hoc* tribunals, especially the ICTY) and 655-658 (as regards the ICC).

[55] See R. CRYER, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime*, cit., 231, stressing the fact that the Court represents a "quantum leap beyond what went before" and that the new regime may prove to be less susceptible to critiques based on selectivity.

[56] As to jurisdiction *ratione temporis* there is no time limit as it was the case with the ICTY and ICTR, provided that the conduct took place (or was still on-going) after the entry into force of the Statute (with specific regard to the state whose territory or citizens are concerned). As to jurisdiction *ratione loci*, its scope is determined by states' participation to the founding treaty (or acceptance of the Court's jurisdiction pursuant to article 12(3) of the Statute), and can in any event be extended by means of a UNSC resolution adopted pursuant to article 13(b) of the Rome Statute, and at least potentially, in a universal fashion.

[57] See, e.g., the position—shared among globally active NGOs—expressed by C. K. HALL, *The Danger of Selective Justice: All Cases Involving Crimes Under International Law Should Be Investigated and the Suspects, When There is Sufficient Admissible Evidence, Prosecuted*, in M. BERGSMO, *op. cit.*, 174-176, stressing that all international crimes must be punished and that the criteria to guide prosecutorial action must only have a prioritization and not a selection function.

and the prosecutorial mantra that purely legal criteria are applied in reaching selection decision[58], a healthy dose of realism makes it necessary to recognise the inherent selectivity of the enforcement of international criminal law[59]. It is the task of jurists to reasonably tame such selectivity, to provide a persuasive theoretical framework and practical correctives to limit the risk of arbitrariness and, as SCHABAS explains with his usual frankness, "to ensure the greatest legitimacy without at the same time encouraging the myth that what they are doing is devoid of any political dimension"[60].

3. The (incorrect) analogies with national prosecutorial regimes: Differences in perspective and the rationale for prosecutorial discretion in ICL

When analysing prosecutorial regimes across different international(ised) criminal law institutions, it is natural to look at domestic experiences as sources of

[58] See the words of the Court's first prosecutor L. MORENO-OCAMPO, *The International Criminal Court in Motion*, in C. STAHN, G. SLUITER (eds.), *op. cit.*, 18: "As the Prosecutor of the ICC, I was given a clear judicial mandate; my duty is to apply the law without political considerations and I will not adjust to political considerations. Other actors have to adjust to the law". In the same vein, see the Statement of the ICC Prosecutor Fatou Bensouda "The Public Deserves to Know the Truth about ICC's Jurisdiction over Palestine", 2 September 2014, released in reply to media allegations about the failure to open an investigation into alleged crimes committed in Gaza: "It is my firm belief that recourse to justice should never be compromised by political expediency. The failure to uphold this sacrosanct requirement will not only pervert the cause of justice and weaken public confidence in it, but also exacerbate the immense suffering of the victims of mass atrocities. This, we will never allow". See, additionally, F. GUARIGLIA, E. ROGIER, *The Selection of Situations and Cases by the OTP of the ICC*, in C. STAHN (ed.), *The Law and Practice of the International Criminal Court*, cit., 354, 358-359, 363-364. The two Authors, who both hold high-level positions at the OTP, strongly reaffirm the exquisitely legal nature of the assessments carried out by the OTP in the selection of situation and cases. Various authors, while conceding that such bold claims may be justified as part of the communication strategy of the OTP towards the public at large, consider them to be somehow disingenuous. See, e.g., A. K. A. GREENAWALT, *Justice Without Politics? Prosecutorial Discretion and the International Criminal Court*, in *New York University Journal of International Law and Politics*, vol. 39, no. 3, 2007, 586-587; J. A. GOLDSTON, *More Candour about Criteria. The Exercise of Discretion by the Prosecutor of the International Criminal Court*, in *Journal of International Criminal Justice*, vol. 8, issue 2, 386-387: "such formulations are incomplete; they may not sufficiently explain the complexity of the decisions the Office of the Prosecutor (OTP) is asked to make in practice. However powerful the aspiration for neutral principles, experience and common sense suggest that law can never be entirely divorced from its surrounding environment"; W. A. SCHABAS, *Selecting Situations and Cases*, in C. STAHN (ed.), *The Law and Practice of the International Criminal Court*, cit., 380-381.

[59] *Ibidem*, 373-375. The Author points out that the positive developments concerning the independence of the prosecutor and the increased supervisory role of judges have not made selectivity disappear, particularly as regards the prosecutor's decisions not to open an investigation pursuant to a preliminary examination.

[60] W. A. SCHABAS, *Victor's Justice: Selecting "Situations" at the International Criminal Court*, in *John Marshall Law Review*, vol. 43, issue 3, 2010, 552.

possible institutional and procedural solutions that may fit the needs of the particular international criminal law mechanism under consideration. Comparative criminal law and procedure have provided a vast body of knowledge both in theoretical and practical terms for the purposes of drafting the Statutes and Rules of Procedure of international criminal tribunals[61].

Nevertheless, from a methodological point of view, it must always be borne in mind that the specificities of the international legal order in which such institutions are created and called to operate impose a measure of caution in resorting to national legal models and categories to explain such international phenomena and their development. In a classic passage worth quoting, LAUTERPACHT summarised this methodological attitude as follows

> To attribute to one system of a particular time and space the qualities of a universal law and to see in it a vehicle of the development of international law, may well result in checking that development[62].

With specific regard to prosecutorial regimes in ICL, SCHABAS adamantly explains that

> Mechanistic extrapolation based upon the model of the national prosecution to the context of international criminal tribunals is fundamentally flawed because there is no expectation that all perpetrators of serious international crimes will be brought to justice by such institutions[63].

[61] On the lessons that ICL can learn from comparative law scholarship see C. STEER, *Legal Transplants or Legal Patchworking? The Creation of International Criminal Law as a Pluralistic Body of Law*, in E. VAN SLIEDGRET, S. VASILIEV (eds.), *Pluralism in International Criminal Law*, Oxford, 2014, 64-67 and M. DELMAS-MARTY, *The Contribution of Comparative Law to a Pluralist Conception of International Criminal Law*, in *Journal of International Criminal Justice*, vol. 1, issue 1, 2003, 13-25.

[62] H. LAUTERPACHT, *Private Law Sources and Analogies of International Law*, London, 1927, 178. The words of one of the most prominent internationalists of the 20th century are also a wise warning against the temptations of hegemony of any particular—national—legal tradition on the development of international law. In this sense and more specifically as regards international criminal law, see E. VAN SLIEDGRET, S. VASILIEV, *Pluralism. A New Framework for International Criminal Justice*, in E. VAN SLIEDGRET, S. VASILIEV, *op. cit.*, 32: "international criminal justice is no forum for rhetorical dominance of one legal culture over the other(s) … While it can be hoped that the ICL will eventually develop its own coherent culture, it is clear that it will take hold only if it accommodates pluralism and does not settle the cultural differences between constitutive legal traditions by means of comparative 'hegemony'".

[63] W. A. SCHABAS, *Victor's Justice: Selecting "Situations" at the International Criminal Court*, cit., 542. While it is true that virtually all ICL scholars consider it obvious that it is practically impossible that international criminal tribunals deal with *all* the perpetrators of *all* international crimes, this view is apparently not so obvious for external—and particularly political—commentators of the work of international criminal tribunals.

For these reasons the abstract typification derived from comparative law that distinguishes between prosecutorial regimes based on the 'principle of legality' and those based on the 'principle of opportunity', while useful for explicative purposes, falls short of providing a safe guide in analysing the rationales behind the choices made at the international level[64]. The reasons why international criminal justice clearly leans towards prosecutorial regimes relying—to a variable degree—on discretionary powers, must therefore be examined on the basis of a genuinely internationalist and historically informed approach to the issue.

In the following sections such an analysis will be synthetically carried out with a view to explain why at least a certain degree of prosecutorial discretion is both theoretically and practically warranted in the realm of ICL, and to underline the most relevant differences with national criminal jurisdictions.

3.1 The inevitably limited scope of international prosecutions: Jurisdictional limitations and large-scale character of international crimes

A first element that differentiates international criminal justice from national jurisdictions—bearing important consequences on the desirability and necessity of prosecutorial discretion—is the fact that international criminal tribunals possess, with the only partial exception of the ICC, a jurisdiction which is very limited *ratione*

[64] For a succint but accurate presentation of this traditional dichotomy and the respective rationale behind the 'principle of opportunity' (prosecutorial discretion) and 'the principle of legality' (compulsory prosecution) see K. DE MEESTER, *The Investigation Phase in International Criminal Procedure. In search of Common Rules*, Cambridge, 2015, 214-219. The two models, in any event, suffer from excessive abstraction and typification even when compared with the reality of domestic contexts. For instance, scholars who have carefully assessed national prosecutorial practices stress the fact that even in national legal systems formally based on the *Legalitäsprinzip*—such as Germany or in an even stricter fashion Italy—there are various practical ways for public prosecutors to exercise a measure of discretion and selection in investigating and prosecuting. See, e.g., K. AMBOS, *Comparative Summary of the National Reports*, cit., 525 and M. CAIANIELLO, *The Italian Public Prosecutor: An Inquisitorial Figure in Adversarial Proceedings?*, in E. LUNA, M. WADE (eds.), *Transnational Perspectives On Prosecutorial Power*, Oxford, 2011, 255-256: "mandatory prosecution pursuant to the legality principle is far from absolute in practice. On a daily basis, prosecution offices have to deal with too many cases, making it impossible to scrutinise each one. The situation is exacerbated by huge dockets resulting from decades of inefficient administration of justice. Under these circumstances, it is inevitable that prosecution offices will neither process all the information nor investigate all of the crimes . . . For all these reasons, even though the Constitution prohibits prosecutorial discretion, it is clear that such discretion exists; although it is hard to precisely measure its extent, the discretion is undoubtedly quite broad".

loci, *temporis*, *materiae* and *personae*[65]. At a superficial view this obvious normative fact seems to contradict the proposition that international prosecutors should generally enjoy a wider degree of discretion compared to their national counterparts, based on the ingenuous equation: more restricted jurisdiction = less potential cases and perpetrators = more prosecutions and less discretionary selection choices. Unfortunately, the logic of the argument immediately falls in front of the consideration that international crimes are generally committed on a massive scale, involving a high number of potentially punishable conducts and perpetrators (as well as of affected victims)[66]. Sometimes it is the very normative structure of these crimes to postulate such character[67]. This observation alone, coupled with the constraints of resources and enforcement capacities faced by international criminal tribunals, is sufficiently compelling to consider realistically impossible to subscribe—in the realm of international criminal law—to the 'principle of legality', not only in its standard understanding (all crimes must be investigated and prosecuted), but also in

[65] National criminal courts do not suffer from this kind of limitations, at least in the same way that international criminal tribunals do. Their jurisdiction naturally flows from the application of the fundamental rules and principles of national substantive criminal law and procedure, and is not generally limited to a certain temporal or territorial framework, or to a few relevant conducts or categories of persons (such as those 'most responsible' or the 'senior leaders', when such labels serve as a jurisdictional criteria).

[66] On the large-scale character of international crimes see, A. CASSESE, P. GAETA (eds.), *Cassese's International Criminal Law*, 3rd ed., Oxford, 2013, 7; G. WERLE, F. JEßBERGER, *Principles of International Criminal Law*, Oxford, 2014, 33-34, 84; W. A. SCHABAS, *The Cambridge Companion to International Criminal Law*, Cambridge, 2016, 57, underlying the frequently high number of victims and perpetrators; E. AMATI, M. COSTI, E. FRONZA, P. LOBBA, E. MACULAN, A. VALLINI, *Introduzione al diritto penale internazionale*, Torino, 2016, 1-2, who speak of "macro-offensive" and "pluri-subjective" character of these crimes. As correctly pointed out by K. DE MEESTER, *op. cit.*, 285, one notable exception in the panorama of international criminal justice is represented by the Special Tribunal for Lebanon, which has been created to deal with limited episodes of criminality (the assassination of Prime Minister Hariri and other 21 in a terrorist attack and other "connected" attacks) involving a relatively limited number of victims and of alleged perpetrators. Nevertheless the purposes and jurisdiction of the tribunal, including the fact that it deals with terrorism, which is not usually considered one of the core international crimes, make it a rather eccentric experiment of internationalised criminal justice. On the STL see*, infra*, Chapter Two, par. 4.

[67] The generally mass-scale character of genocide, crimes against humanity and of war crimes is rather evident from the very legal formulations of such crimes. For instance, as regards crimes against humanity, the contextual element as formulated pursuant to article 7(1) of the Rome Statute refers to a "widespread or systematic attack directed against any civilian population"; similarly the contextual element for war crimes under article 8(1) of the Rome Statute refers to the commission of the enumerated acts "in particular when committed as part of a plan or policy or as part of a large-scale commission of such crime". On the historical evolution of these contextual elements see AMBOS, K., *Treatise on International Criminal Law*, *Vol. II, The Crimes and Sentencing*, Oxford, 2014, 50-63 (for crimes against humanity) and 118-119 (for war crimes and the formulation of article 8(1) of the Rome Statute).

its reasonably more restricted version (all *serious* crimes must be investigated and prosecuted)[68].

These observations are even more true with regard to the ICC, due consideration given to its potentially universal jurisdictional reach and are fundamentally reflected in the complementarity regime that assigns precedence to the national level in the prosecution of international crimes[69].

3.2 Selecting upwards: Dealing with those who 'bear the greatest responsibility' and the role of gravity

A second fundamental aspect that distinguishes international criminal law from domestic criminal jurisdictions—and with significant consequences on the justifications for prosecutorial discretion—is its historical focus on those individuals 'who bear the greatest responsibilities' for the commission of the 'most serious international crimes'.

These or similar propositions, which can be found in at least some of the founding instruments of international(ised) criminal tribunals[70], introduce two additional elements that deserve to be briefly analysed, namely the influence of an

[68] See, K. DE MEESTER, *op. cit.*, 218-219, agreeing with L. ARBOUR, *Progress and Challenges in International Criminal Justice*, in *Fordham International Law Journal*, vol. 21, issue 2, 1997, 534 on the proposition that in national jurisdiction there is a presumption that all serious crimes should normally be prosecuted, provided that there is sufficient evidence, whereas "the differing nature of international criminal prosecutions does not allow to do so".

[69] See, K. DE MEESTER, *op. cit.*, 285-286.

[70] Going back to the early days of international criminal justice, see the preamble of the London Agreement of 8 August 1945 and article 1 of the Charter of the IMT, referring to "the major war criminals of the European Axes" and article 1 of the Charter of the IMTFE, referring to the "major war criminals in the Far East". In the case of the *ad hoc* tribunals, the founding documents do not explicitly make reference to the category of the "most responsible ones", although with the advent of the Completion Strategy, the UNSC clearly mandated the Prosecutors and Judges concentrate on "the *most senior leaders* suspected of being *most responsible* for the crimes" (see UNSC Resolution 1503 (2003), S/Res/1503, 28 August 2003, seventh recital, emphasis added). Article 1 of the Statute of the Special Court for Sierra Leone (SCSL) explicitly makes reference to the "persons who bear the greatest responsibility". Article 1 and 2 of the UN-Royal Government of Cambodia Agreement on the Extraordinary Chambers in the Courts of Cambodia (ECCC) and article 1 and 2 new of the Law on the Establishment of the ECCC make reference to the two categories of "senior leaders of Democratic Kampuchea" and "those who were most responsible for the crimes" in shaping the Extraordinary Chambers' jurisdiction *ratione personae* (although the Supreme Court Chamber has held that such categories do not function as jurisdictional requirements, see *infra*, footnote 71). Finally, as regards the ICC, the Statute does not make an explicit reference to the concept of "those who bear the greatest responsibility", but contains various indications pointing towards the conclusion that a selection in this sense is consistent with the object and purpose of the Statute. See, e.g., the Preamble and article 5 referring to "the most serious crimes of concern to the international community as a whole", as well as article 17(1)(d) referring to the concept of gravity as a central element of the admissibility test.

explicit or implicit focus on those 'most responsible' as a guiding principle for the decisions to initiate an investigation or prosecution; and the role of 'gravity/seriousness' as a multifunctional concept enabling international prosecutors to exercise a certain measure of discretion.

As regards the issue of the 'most responsible ones', while it is true that the founding documents and case law of the various international (or internationalised) tribunals have framed the concept differently[71] or, as in the case of the ICC do not even openly make reference to it, it is reasonable to conclude that ICL has historically shown a tendency—with notable exceptions in certain phases of its development—to 'select upwards' the potential targets for prosecutions[72]. Nevertheless, this does not warrant the conclusion that ICL exclusively focuses on leadership crimes, concentrating only on the alleged perpetrators in positions of civil,

[71] See, *supra*, footnote 70. In particular, an aspect worth considering is whether in the various international and internationalised regimes at hand the categories of the 'most responsible ones' or 'senior leaders' function as jurisdictional criteria, legally capable of limiting the tribunal's jurisdiction *ratione personae*, or not. As underlined also by K. DE MEESTER, *op. cit.*, 272-278, probably the most instructive discussion of the issue can be found in the ECCC's case law, provided that the founding documents of the ECCC make reference to both categories in defining the Chambers' personal jurisdiction. In *Duch*, the Trial Chamber subscribed to the view that the two categories constitute jurisdictional criteria and that therefore an Accused could challenge the ECCC's jurisdiction alleging that he or she does not belong to either of them (ECCC, Judgement, *Co-Prosecutors v. KAING Guek Eav (Duch)*, 001/18-07-2007/ECCC/TC, TC, 26 July 2011, par. 17). The Supreme Court Chamber disagreed, considering that while the requirement of being a Khmer Rouge official is jurisdictional in character, the fact of being "most responsible" and "senior leader" are not justiciable and only operate as "investigatorial and prosecutorial policy" (ECCC, Appeal Judgement, *Co-Prosecutors v. KAING Guek Eav (Duch)*, 001/18-07-2007/ECCC/SC, SCC, 3 February 2012, par. 62-63, 76-77).

[72] It has been correctly pointed out that especially in the early days of the *ad hoc* tribunals (especially of the ICTY), the Prosecutors frequently concentrated on lower level perpetrators ('small fishes'), essentially for the practical impossibility to reach the most senior military and political leaders. This trend was only corrected with time and more decisively after the adoption by the UNSC of the Completion Strategy. For this discussion see H. TAKEMURA, *Big Fish and Small Fish Debate—An Examination of the Prosecutorial Discretion*, in *International Criminal Law Review*, vol. 7, issue 4, 2007, 678–679, referring to the admission by the ICTY's former prosecutor Justice Goldstone that early selection decisions had been heavily influenced by the prospects of arrest and the necessity to produce a viable indictment. See also R. GOLDSTONE, *Crimes Against Humanity—Forgetting The Victims*, The 2001 Ernest Jones Lecture, The British Psychoanalytical Society & Institute of Psychoanalysis, Tuesday 25 September 2001 (available at http://psychoanalysis.org.uk/articles/crimes-against-humanity-forgetting-the-victims-justice-richard-goldstone, last retrieved 6 November 2018). With regard to the ICC, authors have expressed doubts on the choice to concentrate on relatively minor perpetrators such as in *Lubanga*, the first trial resulting in a final conviction at the ICC. See, e.g., W. A. SCHABAS, *Prosecutorial Discretion v. Judicial Activism at the International Criminal Court*, cit., 741-747, discussing the soundness of the decision to investigate and prosecute Thomas Lubanga both from the point of view of gravity and the relevance of leadership positions for the purposes of discretionary choices. The Author concludes at 744 that such decision "had more to do with the fact that this was an accused who was accessible to a Court starved for trial work rather than any compelling analysis based upon either gravity or complementarity".

military or political seniority. To the contrary, case law at the ICC has clarified that at least in that system the category of the "most responsible ones" and that of "senior leaders" must not be conflated in order to avoid an unjustified restriction of the Court's jurisdiction[73]. In any event, even when the concept at hand does not function as a jurisdictional criterion (defining the scope of *ratione personae* jurisdiction of a court or tribunal), prosecutorial strategies and policy documents frequently refer to the label of "those who bear the greatest responsibility" as one of the policy criteria to guide the exercise of discretion[74]. In this sense, international criminal jurisdictions mark the distance with most national jurisdictions where such 'big fish/small fish' contraposition is not necessarily central to the work of the prosecuting authorities,

[73] The issue has been discussed at length by the PTC and AC of the International Criminal Court in their decisions regarding the *Lubanga* warrant of arrest pursuant to article 58 of the Statute. PTC I expressed the view that only by concentrating on the highest ranking perpetrators the deterrent effect of the Court could be maximised (ICC, Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the incorporation of documents in the record of the case against Mr Thomas Lubanga Dyilo, *Prosecutor v. Lubanga*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-08-US-Corr, PTC I, 24 February 2006, par. 51-55). The Appeal's Chamber disagreed, clarifying that seniority is not a necessary requirement for the purposes of the Statute in the determination of gravity as part of the admissibility test, maintaining that "also individuals who are not at the very top of an organization may still carry considerable influence and commit, or generate the widespread commission, of very serious crimes" and that nowhere in the text of the Statute the drafters "had intended to limit its application to only the most senior leaders suspected of being most responsible" (ICC, Judgment on the Prosecutor's Appeal against the Decision of the Pre-Trial Chamber I Entitled: "Decision on the Prosecutor's Application for a Warrant of Arrest, Article 58", *Prosecutor v. Lubanga*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-169, AC, 13 July 2006, par. 73-75, 78-79). This position has been recently confirmed by the PTC I in its first review decision pursuant to article 53 of the Statute (ICC, Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation, *Situation on the Registered Vessels of the Comoros*, *Greece and Cambodia*, ICC-01/13-34, PTC I, 16 July 2015, par. 23-24).

[74] See the references to this concept in the ICC-OTP, Paper on Some Policy Issues Before the Office of the Prosecutor, September 2003, 7: "*the Office of the Prosecutor should focus its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility, such as the leaders of the State or organisation allegedly responsible for those crimes*" (italicised in the original text) and the ICC-OTP, Draft Policy Paper on Preliminary Examinations, 4 October 2010, par. 22, 51. In the final and more recent version of the same document the OTP still refers to the concept (with a slight linguistic change to the expression "those most responsible for the most serious crimes"), though specifying that the investigation and prosecution of mid-level and low-level perpetrators may be considered when appropriate (ICC-OTP, Policy Paper on Preliminary Examinations, November 2013, par. 42, 49, 66, 103). See also, ICC-OTP, Strategic Plan 2012-2015, par. 22 and ICC-OTP, Strategic Plan 2016-2018, par. 35. These last two documents explain the current position of the OTP and the prosecutorial shift from "focused investigations" to "open-ended, in-depth investigations" and to a "building-upwards strategy" that proceeds "by first investigating and prosecuting a limited number of mid- and high-level perpetrators in order to ultimately have a reasonable prospect of conviction for the most responsible". Regulation 34(1) of the Regulations of the OTP refers to the concept of the most responsible with regard to the formulation of the case hypothesis.

since there is at least a presumption that—irrespective of the subjective position of the alleged perpetrators—all crimes of a certain gravity shall be prosecuted[75].

With regard to the second aspect, namely the relevance of gravity as a criterion for the exercise of prosecutorial discretion, it has been correctly pointed out that the selective function of this concept has long been overlooked in ICL, especially in the context of the ICC[76]. The reason behind this early lack of elaboration of the concept lays in the common understanding that international crimes are *ontologically* characterised by their extreme gravity, and that any further consideration on the seriousness of such conducts would therefore be unnecessary for the purposes of deciding in which cases their investigation and prosecution is warranted at the international level[77]. Nevertheless, gravity has been at the basis of some fundamental choices of institutional and legal design of most international tribunals and certainly of the Rome Statute, although normative texts carefully avoid defining its function(s), in line with the "constructive ambiguity" that characterises many aspects of the Statute's drafting[78].

As it will be seen in greater detail, many scholars agree on the fact that in the context of the ICC there exist at least two conceptually distinct dimensions of gravity (in particular at the situation stage). First, a strictly *legal/objective* dimension connected to gravity as an admissibility criterion laid down by article 17(d) and

[75] See, K. DE MEESTER, *op. cit.*, 218.

[76] See, W. A. SCHABAS, *Prosecutorial Discretion v. Judicial Activism at the International Criminal Court*, cit., 736-737, underlining the fact that the most authoritative commentaries on the Rome Statute, at least in their first editions, devoted a very limited space to the concept. *Ibidem*, at 739-748 the Author discusses the OTP's and Chamber's views on the concept in the light of the first practice of the ICC. In the same vein, see M. M. DEGUZMAN, *Gravity and the Legitimacy of the International Criminal Court*, in *Fordham International Law Journal*, vol. 32, issue 5, 2008, 1401: "despite the acknowledged centrality of gravity to international criminal law, there is virtually no discussion in academic or judicial sources of the theoretical basis and doctrinal contours of this concept".

[77] Various Chambers of the ICC, while certifying the obvious truth that all international crimes are particularly serious, have explained the function of the sufficient gravity criterion in relation to the Prosecutor's discretionary powers. See, e.g., ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *Situation in the Republic of Kenya*, ICC-01/09-19-Corr, PTC II, 31 March 2010, par. 56: "all crimes that fall within the subject-matter jurisdiction of the Court are serious, and thus, the reference to the insufficiency of gravity is actually an additional safeguard, which prevents the Court from investigating, prosecuting and trying peripheral cases".

[78] See, M. M. DEGUZMAN, *Gravity and the Legitimacy of the International Criminal Court*, cit., 1400: "the concept of gravity or seriousness resides at the epicenter of the legal regime of the International Criminal Court". The expression "constructive ambiguity" to describe the drafting technique of certain parts of the Rome Statute has been used by various authors. See, e.g., C. KRESS, *The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise*, in *Journal of International Criminal Justice*, vol. 1, issue 3, 603, 605.

recalled by article 53(1)(b) of the Statute. Second, a *policy/selection* dimension of gravity related to the Prosecutor's discretionary determinations under article 53(1)(c) of the Statute[79]. Things become even more complicated bearing in mind the functional distinction between situations and cases in the context of the ICC, and the fact that gravity may perform a different function—and therefore needs to be construed accordingly—at these two stages of the ICC's proceedings[80]. Prosecutorial documents—both policy papers and specific decisions of the ICC's OTP—make reference to the concept and to the factors to be considered as indicators of gravity, albeit not always in a consistent fashion[81]. Certain decisions of the Prosecutor, formally based on gravity considerations, have been severely criticised for their inconsistency and in at least one occasion have been subject to a negative judicial review of the PTC under the mechanism provided for under article 53(3)(a) of the Statute[82]. In any event, while case law has started to provide some clarifications on the concept of gravity and its relationship with prosecutorial discretionary powers, contrasts between the OTP and Chambers (and between different Chambers), reveal a situation of persistent uncertainty in framing the legal boundaries of the concept[83].

[79] For a discussion of these authors' positions and the points of disagreement among them, see K. DE MEESTER, *op. cit.*, 253-256. In particular, the position taken by I. STEGMILLER, *The Pre- Investigation Stage of the ICC*, Berlin, 2011, 331-334, who maintains that prosecutorial discretion can only be linked to article 53(1)(c) in order not to undermine the review mechanism provided for under article 53(3) seems to have been shared by the PTC in its first review decision under the same article. In this already quoted decision (see, *supra*, footnotes 41 and 73), PTC I affirmed that the evaluation of sufficient gravity—as part of the admissibility assessment that the Prosecutor must conduct in reaching a decision under article 53(1)(b) of the Statute—requires the application of "exacting legal requirements", thereby confining the Prosecutor's discretion to the choices based on the "interests of justice" (see, ICC, Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation, par. 14 and, on the interests of justice, *infra*, next paragraph).

[80] On the concept of situational gravity see, K. J. HELLER, *Situational Gravity Under the Rome Statute*, in C. STAHN, L. VAN DEN HERIK (eds.), *Future Perspectives on International Criminal Justice*, The Hague, 2010, 227-253. K. DE MEESTER, *op. cit.*, 255 where the Author recalls the views of different scholars and the case law of various ICC Chambers on the different standards in the evaluation of gravity at the situation and at the case stage.

[81] *Ibidem*. As to OTP's documents concerning the criteria for the evaluation of gravity see Regulation 29(2) of the Regulations of the OTP, echoed by the ICC-OTP, Policy Paper on Preliminary Examinations, November 2013, par. 59-65, which establish that gravity must be assessed on the basis of a combined quantitative-qualitative analysis taking into consideration the scale, nature, manner of commission and impact of the crimes. The Policy Paper further elaborates on the meaning of each of these factors.

[82] See, *supra*, footnote 72 for the critique expressed by SCHABAS and footnotes 41, 73, 79 concerning the PTC's decision on the Comoros' situation.

[83] See, *supra*, note 73 on the PTC-AC disagreement concerning gravity. K. DE MEESTER, *op. cit.*, 249 concludes that at this point "the gravity-criterion . . . lacks clarity" and that "The Court's case law should further elucidate its meaning" (*ibidem*, 256). The Court's decision in the Comoros' situation provided an additional, albeit highly problematic, element of clarity, in the sense of limiting

In sum, international prosecutors—notwithstanding the uncertainties and fluctuations in the practice—heavily rely on the concepts of the "most responsible ones" and gravity in justifying their selection choices. On some occasions they have tried to downplay the discretionary character of such choices, whereas in other cases they have attempted to defend their discretionary powers under these concepts against judicial interference. In any event, the 'atrocity character' of international crimes and the practical impossibility to prosecute each and every international crime certainly justify the recognition of prosecutorial discretion, of which these concepts are clear manifestations.

3.3 Policy considerations and the "interests of justice"

Given the extremely politicised environment in which international criminal justice operates, many have argued that prosecutorial discretion finds one of its justifications in the necessity to take into account the political implications of certain prosecutorial choices, both in the case of positive intervention and *nolle prosequi* decisions[84]. Prosecutors have clearly and publicly rejected the idea that political considerations play any role in their decision-making process but, as various commentators have shown, it is difficult to deny that similar considerations do play a role in the prosecutors' determinations[85]. The influence of international politics on the legal determinations of the OTP and more in general on the work of the Court have also been widely studied from the point of view of the triggering mechanisms, provided that two of them (namely state and Security Council referrals) are fraught with political implications, as the practice of self-referrals has shown[86]. One specific

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prosecutorial discretion under article 53 of the Statute only to the assessment of the interests of justice.

[84] See, C. STAHN, *Judicial Review of Prosecutorial Discretion: Five Years On*, cit., 256: "The most compelling argument in favour of prosecutorial discretion in the initiation of investigation, the choice of perpetrators and prosecutorial strategy is not the quantity and nature of crimes, but the political ramifications of indictments and selection. Prosecutorial discretion may be defended on the ground that it involves certain political choices which the Office of the Prosecutor is best placed to make in light of its presence on the ground and its close ties to domestic and international authorities"; L. CÔTÉ, *Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law*, cit., 170; G.-J. KNOOPS, *op. cit.*, 365-366. On the Prosecutor's claim that political considerations play no role in her selection decision see*, supra*, footnote 58.

[85] *Ibidem*.

[86] One of the most prominent critics of the practice of self-referrals is W. A. Schabas, who has explained his opposition to their development in various works. See, e.g., W. A. SCHABAS,

area in which political considerations concerning the intervention of ICL mechanisms may play a significant role is that of transitional justice, a theme explored by a vast literature that has problematized the relationship between international criminal justice and national political processes, such as reconciliation and peace processes (including the recourse to restorative justice mechanisms and amnesties)[87].

In the case of the ICC, the Statute contains a 'general clause' that at least in theory—under certain conditions and subject to judicial supervision—may introduce discretionary policy considerations in the equation of prosecutorial choices: the faculty to decline the opening of an investigation or the starting of a prosecution if they would run contrary to the "the interests of justice"[88]. This provision has been at the centre of some debate at the time of the adoption of the Statute, and is generally considered to be one of the most evident statutory recognitions of the Prosecutor's discretionary powers[89]. It is beyond the scope of this section to examine the latitude

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Prosecutorial Discretion v. Judicial Activism at the International Criminal Court, cit., 751, 760-761, underlining the fact that this solution finds no support in the *travaux préparatoires* and is in any event an "interpretive deviation" accepted by the Court and motivated by the necessity to generate activity in its early days. Of the same Author see also "*Complementarity in Practice": Some Uncomplimentary Thoughts*, in *Criminal Law Forum*, vol. 19, issue 1, 2008, 12-18, 33 and *Complementarity in Practice: Creative Solutions or a Trap for the Court?*, in M. POLITI, F. GIOIA (eds.), *The International Criminal Court and National Jurisdictions*, Aldershot, 2008, 25, calling the self-referrals a "trap" for the Court. Doubts have been expressed also by P. GAETA, *Is the Practice of "Self-Referrals" a Sound Start for the ICC?*, in *Journal of International Criminal Justice*, vol. 2, issue 4, 2004, 951-952, who stresses the risk that self-referrals may be used opportunistically by state authorities to fight against opposition forces in the context of civil wars. D. ROBINSON, *The Controversy over Territorial State Referrals and Reflections on ICL Discourse*, in *Journal of International Criminal Justice*, vol. 9, issue 2, 2011, 355-384, takes issue with these critical positions. While conceding that self-referrals may prove problematic for political reasons, the Author explains how in his view the text, drafting history and purpose of the relevant provisions of the Statute fully support the Court's conclusions on their admissibility at the ICC.

[87] The legal and political debate on transitional justice has been one of the most flourishing areas of scholarly debate in recent years. On the role of ICL in the context of transitional justice (including the issue of amnesties) see K. AMBOS, *The Legal Framework of Transitional Justice: A Systematic Study with a Special Focus on the Role of the ICC*, in K. AMBOS, J. LARGE, M. WIERDA (eds.), *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development*, Berlin/Heidelberg, 2009, 19-103 and J. N. CLARK, *Peace, Justice and the International Criminal Court: Limitations and Possibilities*, in *Journal of International Criminal Justice*, vol. 9, issue 3, 2011, 521-545. The issue is briefly touched upon also by the ICC-OTP, Policy Paper on the Interests of Justice, September 2007, 7-8, par. 6(a) and (b). See, *infra*, footnote 92.

[88] Article 53(1)(c) and (2)(c) of the Rome Statute.

[89] Various authors have argued that this clause gives the prosecutor ample discretionary powers to decline an investigation or prosecution. See, G. TURONE, *Powers and Duties of the Prosecutor*, in A. CASSESE, P. GAETA, J. R. W. D. JONES (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford, 2002, 1153 who stresses that such discretion not to proceed is akin to that enjoyed by public prosecutors of common law countries; H. OLÁSOLO, *The Prosecutor of the ICC before the initiation of investigations: A quasi-judicial or a political body?*, in *International Criminal*

and limits of this rather vague concept, but a few preliminary observations on its relationship with the exercise of prosecutorial discretion seem necessary.

First of all, the Prosecutor's own understanding of the interests of justice, as reflected in a dedicated policy paper, is extremely limited and circumscribed. The OTP maintains that recourse to the interests of justice as a justification for *nolle prosequi* decisions should only be made in exceptional cases and that there is a presumption in favour of the investigation and prosecution of the crimes falling under the Court's jurisdiction[90]. In other words, the Prosecutor does not bear the burden to show that an investigation or prosecution is in the interest of justice and "shall proceed with investigation unless there are specific circumstances which provide substantial reasons to believe it is not in the interests of justice to do so at that time"[91]. The Policy Paper also makes reference to other justice mechanisms and peace processes at the national level as "other potential considerations" for decisions under article 53, but cautiously avoids entering into an abstract discussion on their concrete influence on the determination concerning the interests of justice, in particular excluding that the interests of justice embrace "all issues related to peace and security"[92].

Law Review, vol. 3, issue 2, 2003, 135 who labels such discretion as "unlimited"; and P. WEBB, *op. cit.*, 318 who speaks of "enormous discretion". As recalled by K. DE MEESTER, *op. cit.*, 257, footnote 791, some authors such as F. Razesberger do not share this view, arguing—not very convincingly—that because the assessment of the interests of justice must be based on objective criteria, this criterion leaves little room for discretion to the OTP. In any event, the contention that considerations under the interests of justice entail an absolute and unlimited discretion is excessive, given that article 53(3)(b) of the Statute provides for a mechanism of judicial review by the PTC—even acting *ex officio*—with respect to *nolle prosequi* decisions based "solely" on the contrariety of an investigation or prosecution with the interests of justice. On the interests of justice and the prosecutorial policy of the OTP see also C. CÁRDENAS ARAVENA, *Revisión crítica del criterio "Interés de la justicia" como razón para no abrir una investigación o iniciar un enjuiciamiento ante la Corte Penal Internacional*, in *Revista de Derecho Universidad Católica del Norte Sección: Estudios*, vol. 18, no. 1, 2011, 21-47.

[90] ICC-OTP, Policy Paper on the Interests of Justice, September 2007, 3, par. 4(a) and (b).

[91] *Ibidem*, 2-3, par. 3.

[92] *Ibidem*, 8-9, par. 6(b). The Policy Paper recognises the primacy of the UNSC in matters relating to the maintenance of international peace and security ("the broader matter of international peace and security is not the responsibility of the Prosecutor; it falls within the mandate of other institutions"), thereby distinguishing the "interests of justice" from the broader concept of the "interests of peace". This approach has been criticised by J. DONDÉ MATUTE, *La política criminal de la Fiscalía de la Corte Penal Internacional para el inicio de investigaciones*, in *Anuario Mexicano de Derecho Internacional*, vol. 14, 2014, 62-63 who underlines the connection between international criminal justice and the maintenance of peace, as recalled by the Preamble of the Statute. In the same vein, K. A. RODMAN, *Is Peace in the Interests of Justice? The Case for Broad Prosecutorial Discretion at the International Criminal Court*, in *Leiden Journal of International Law*, vol. 22, issue 1, 2009, 99-126, arguing in favour of broad prosecutorial discretion, contends that a consequentialist approach to the matter justifies the fact that peace processes—and the consequences of the ICC intervention in

Secondly, article 53(1)(c) and (2)(c) of the Statute indicate—albeit in a non-exhaustive way—the explicit factors to be taken into consideration when carrying out the assessment of the interests of justice, respectively the gravity of the crime and interests of victims (for the decision not to open an investigation), and the additional circumstances relating to the age or infirmity of the alleged perpetrator and his or her role in the alleged crime (for the decision not to proceed with a prosecution).

Thirdly, the same article of the Statute provides for a mechanism of judicial supervision over such discretionary choices, centred on the oversight functions of the PTC. Decisions of no-action based *solely* on the purported conflict with the interests of justice must be communicated to the referring entities and the competent PTC—which can exercise its review also *ex officio*—and are only effective if confirmed by the PTC[93].

At least one scholar has suggested a parallelism between the Rome Statute and certain national jurisdictions—especially of the common law area—with respect to the interests of justice (or similar general discretionary clauses), indicating that ICL may learn from such national experience[94]. While there is certainly some merit in comparing these situations, it must be maintained that the reasons for attributing to the ICC Prosecutor the discretionary power to decline action based on the interests of justice are in many ways different from those envisaged in national legal systems,

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situations of pending conflict—should be factored in by the OTP while reaching its conclusions on the opening of an investigation or starting of a prosecution.

[93] Article 53(3)(b) of the Rome Statute. The judicial review of the OTP's decision not to open an investigation or start a prosecution can also take place if the decision is not based "solely" on grounds of alleged contrariety with the interests of justice, according to par. (3)(a) of the same article. Nevertheless, in this case the review procedure can only be triggered by an *ex parte* request of the referring entity (state or UNSC). Another relevant difference between these two cases of judicial review is that the review under par. (3)(b) entrusts the PTC with the power to determine the outcome of the preliminary examination phase (if the Chamber confirms the decision of the OTP, the procedure comes to an end, whereas if judges do not confirm the *nolle prosequi* decision, they can mandate the opening of an investigation or of a prosecution). On the contrary, the review under par. (3)(a) only allows the PTC to request the Prosecutor to reconsider his or her previous decision not to open an investigation or start a prosecution, therefore leaving to the OTP the final decision on the outcome of the preliminary examination. On this issue, see, *infra*, Part. Two, Chapter Three, par. 2.3 and Part Three, Chapter Two, par. 3.1.

[94] See L. M. KELLER, *Comparing the "Interests of Justice": What the International Criminal Court Can Learn from New York Law*, in *Washington University Global Studies Law Review*, vol. 12, issue 1, 2013, 1-39. The Author suggests that some lessons could be learned from the law and courts' practice of the state of New York, where a similar criterion to decline investigations or prosecutions is provided for under Section 210.40 of the New York Criminal Procedure Law. On the same topic see J. F. WIRENIUS*, A Model of Discretion: New York's "Interests of Justice" Dismissal Statute*, in *Albany Law Review*, vol. 58, issue 1, 1994, 175-222.

and that solutions adopted by the courts of one jurisdiction in the US—informative as they may be—cannot light-heartedly be transplanted at the international level[95].

It must nevertheless be emphasised that up to date the OTP has never relied on the interests of justice in order decline an investigation or prosecution, and that consequently any judicial clarification on the scope and correct construction of the concept is still lacking.

3.4 Limited resources and other practical constraints

Among the proposed justifications for prosecutorial discretion in ICL, one of the most controversial—given its utilitarian character—relates to the issue of the limited financial resources at the disposal of international criminal institutions, and to prosecutorial authorities in particular, to carry out their mandate[96]. Critics of international criminal justice have long maintained that the costs of these institutions far outweigh their achievements, although these views largely overlook the available data and some insightful comparisons with the costs of the very few national criminal trials of analogous complexity[97].

Prosecutors in every jurisdiction have to deal with limited resources in carrying out their mandate, and legal systems significantly differ on the solutions to

[95] *Ibidem*, 17-20 for a comparison of the two normative systems. The Author seems conscious of the fundamental differences between the two legal orders (both substantive and procedural), but concludes that recourse to the interest of justice in order to decline investigations or prosecutions is even more warranted at the international level. Additionally, the article argues that—in line with the prosecutorial and judicial experience of NY law—the duty to provide detailed reasons for the choice not to proceed and the existence of formal criteria to exercise discretion under the "interests of justice" clause may prove counterproductive in terms of legitimacy and efficacy of such discretionary mechanism (*ibidem*, 23-32).

[96] For a detailed and relatively up-to-date analysis of the cost and performances of international criminal tribunals, especially of the *ad hoc* ones, see S. FORD, *Complexity and Efficiency at International Criminal Courts*, in *Emory International Law Review*, vol. 29, issue 1, 2014, 1-69. The Author focuses on the concept of complexity of international criminal trials, which he tries to measure and compare with that of national criminal trials, showing that the claim of inefficiency of international criminal trials is very often empirically unfounded. See also, D. WHIPPMAN, *The Cost of International Justice*, in *The American Journal of International Law*, vol. 100, no. 4, 2006, 880 who stresses the complexity of international criminal trials, stating that "the perception that international criminal trials are costly and slow is accurate but misleading". See also, with regard to the length of international criminal trials, A. WHITING, *In International Criminal Prosecutions, Justice Delayed Can Be Justice Delivered*, in *Harvard International Law Journal*, vol. 50, no. 1, 2009, 323-364.

[97] S. FORD, *Complexity and Efficiency at International Criminal Courts*, *op. cit.*, 50-62 (see, particularly the tables comparing the different efficiency index of various large-scale domestic trials and how they relate to facts and figures of international criminal trials).

adopt in order to maximise the efficiency of their criminal justice institutions[98]. Nevertheless, empirical studies show that the complexity of international trials is rarely matched by their national counterparts, making certain comparisons and the reference to crude data of little explicative significance[99]. What really matters from the point of view of the sustainability—and efficiency assessment—of a criminal justice mechanism is the correct proportion between the available financial and human resources, and the number and complexity of the proceedings to be conducted.

International prosecutors face a number of challenging practical and logistical difficulties connected to the specific configuration of international jurisdictions and the context where crimes occur. To provide just a few examples: the high number of criminal incidents, conducts and potential perpetrators that may be the object of investigation and prosecution (given the large-scale character of international crimes); the conduct of investigations in difficult conditions and with the necessity to rely on cooperation with national authorities for most of the investigative tasks; the cultural and linguistic barriers that make it necessary to contract qualified personnel (anthropologists, psychologists, interpreters and translators, etc.); and the inherent complexity of pre-trial and trial procedures, provided that in ICL the settlement of cases through procedures alternative to full trial (such as plea bargaining) is still the exception[100].

Against this background—and with particular regard to the ICC's broad territorial and personal jurisdiction—any ambition of investigating and prosecuting the vast majority of international crimes must be abandoned in favour of pragmatic

[98] *Ibidem*, 62. The Author recalls that in the US most of the criminal prosecutions are resolved through a plea deal, whereas at the ICTY more than 80% of the Accused have received a full trial.
[99] *Ibidem*, 29-30.
[100] On this issue see the recent article by J. I. TURNER, *Plea Bargaining and International Criminal Justice*, in *University of the Pacific Law Review*, vol. 48, issue 2, 2017, 219-246. For a comparative perspective on the issue of plea bargaining that may shed light on the solutions adopted under the Rome Statute and the respective influence of domestic models see Y. MA, *Prosecutorial Discretion and Plea Bargaining in the United States, France, Germany and Italy: A Comparative Perspective*, in *International Criminal Justice Review*, vol. 12, issue 1, 2012, 22-52. It should be noted that up to date only one trial at the ICC has been defined through a guilty plea under article 65 of the Statute, namely in the case against Ahmad al-Faqi Al-Mahdi, in the context of the Malian situation. TC VIII of the Court accepted the guilty plea and sentenced the Accused to nine years of imprisonment for the war crime of attacking protected objects as defined under article 8(2)(e)(iv) of the Statute. See, ICC, Judgment and Sentence, *Prosecutor v. Al-Mahdi*, *Situation in the Republic of Mali*, ICC-01/12-01/15, TC VIII, 27 September 2016.

selection decisions that take into consideration, in the allocation of the available resources, also the concrete prospects of success in opening specific situations and cases[101].

In addition, prosecutorial discretion and its judicial review may even reinforce each other in the quest for a reasonable balance between the need to fight impunity and the necessity of making an efficient use of the financial and human resources available to the OTP. As a matter of fact, as argued by STAHN, the fact that prosecutorial choices may be subject to judicial review can contribute to prevent the waste of resources and avoid procedural challenges at later stages in the proceedings[102]. Nevertheless, the recent—albeit very limited—practice of the ICC on the point seems to prove that the opposite can also be true. Discretionary decisions based—although not primarily—on practical considerations such as the efficient use of resources in relation to the prospects of success of an investigation or prosecution have been called into question by the judges in the exercise of their functions of judicial supervision over the Prosecutor's decision not to open an investigation[103].

In other words, this pragmatic rationale for prosecutorial discretion—frequently invoked also at the national level—seems to be even more warranted at the international level, also in response to criticism as regards the negative perception concerning the performances of international criminal tribunals.

[101] See, K. DE MEESTER, *op. cit.*, 286, footnote 992. OTP's documents often make reference to the efficient use of resources as one of the elements to consider in exercising prosecutorial discretion. See, e.g., ICC-OTP, Policy Paper on Preliminary Examinations, November 2013, par. 57. Additionally, references to the issue of limited resources are omnipresent in the Strategic Plan for 2016-2018.

[102] See K. DE MEESTER, *op. cit.*, 286, footnote 992 quoting the position of C. STAHN, *Judicial Review of Prosecutorial Discretion: Five Years On*, cit., 256-258.

[103] Again, this is the case of the decision not to open an investigation in the Situation on the Registered Vessels of the Comoros, Greece and Cambodia, and of the PTC's request for reconsideration, whereby judges have invited the Prosecutor to reconsider her previous decision. While concerns regarding the use of resources haven't been explicitly mentioned in the OTP's decision, the rather limited perspectives of successful prosecutions in the potential cases arising out of the situation under preliminary examination may have been among the decisive factors in declining the opening of an investigation. See, *supra*, footnotes 41, 73, 79.

CHAPTER TWO

COMPARATIVE ANALYSIS OF THE DIFFERENT PROSECUTORIAL MODELS ACROSS INTERNATIONAL(ISED) CRIMINAL JUSTICE MECHANISMS

1. Introduction

The purpose of this chapter is to succinctly present a comparative survey of the different prosecutorial models across international criminal jurisdictions. Consistently with the methodological approach adopted in the present work and the theoretical framework set out in the previous chapter, horizontal comparison is carried out—synchronically and diachronically—within the realm of international criminal justice mechanisms, in order to better reflect the specificities of the institutional and procedural regimes at the international level[104].

Comparative analysis of the normative design of the relevant jurisdictions shows that prosecutorial discretion has always played a significant role in the concrete functioning of international criminal justice. Nevertheless, important structural differences exist among these experiences as to the practical implementation of prosecutorial discretion, with particular regard to the institutional position of the Prosecutor, the purpose and latitude of his or her discretionary powers, as well as the degree of judicial oversight of prosecutorial choices. As it will be seen, the historical trajectory of ICL—both at the legislative and applicative level—shows a gradual trend towards a more legally constrained prosecutorial discretion and a more incisive judicial oversight, in parallel with increased institutional safeguards of the prosecutor's independence.

An in-depth analysis of all the normative and procedural aspects of the various systems of international criminal procedure with regard to the functioning of the prosecutor's office is clearly beyond the scope of this chapter, and has been thoroughly carried out elsewhere in ICL literature[105].

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[104] For the reasons of this methodological approach see, *supra*, the Introduction.

[105] See, e.g., the monumental work of L. REYDAMS, J. WOUTERS, C. RYNGAERT (eds.), *op. cit*. Another extremely informative comparative contribution on the subject is that of M. BERGSMO, C. CISSÉ, C.

The focus of the chapter is therefore limited to elucidating the broad lines of development and transformation of the concept of prosecutorial discretion and its judicial oversight, in order to gradually approach the study of the prosecutorial regime of the ICC, making it possible to fully appreciate its specificities vis-à-vis its predecessors (especially the *ad hoc* tribunals) and its contemporary internationalised peers.

This preliminary work will prepare the ground for the detailed analysis of the theory and practice of the ICC prosecutorial regime to be carried out in the subsequent parts of the work.

2. The IMT and IMTFE: The lack of independence and the Prosecutor as *longa manus* of states

The creation of the international military tribunals of Nuremberg and Tokyo at the end of World War II is unanimously considered the moment of birth of (modern) international criminal justice. For this reason the analysis of the prosecutorial regimes of the IMT and IMTFE is the necessary starting point for any comparative survey.

Despite the significant differences in the political and institutional genesis of the two tribunals—reflected in various legal and procedural aspects—these unprecedented jurisdictional mechanisms share many features with regard to the fundamental design of their prosecutorial regimes[106].

STAKER, *Les Procureurs des Tribunaux internationaux: Étude comparative des Tribunaux de Nuremberg et de Tokyo, du TPIY et du TPIR et du projet de Statut de la CPI*, in L. ARBOUR, A. ESER, K. AMBOS, A. SANDERS (eds.), *op. cit.*, 155-189.

[106] On the major political events and discussions leading to the creation of the two tribunals see L. REYDAMS, J. WOUTERS, C. RYNGAERT, *The Politics of Establishing International Criminal Tribunals*, in REYDAMS, J. WOUTERS, C. RYNGAERT (eds.), *op. cit.*, 16-19. Literature on the institution, functioning, achievements and legacy of the two tribunals is immense and even a partial selection of the available materials would not faithfully depict the breadth of scholarly debate that their activity has elicited. Nevertheless, for an accurate historical report of the events leading to the creation of the two tribunals see, on the IMT, B. F. BRADLEY, *The Road to Nuremberg*, New York, 1981; T. TAYLOR, *The Anatomy of the Nuremberg Trials: A Personal Memoir*, New York, 1992 and, on the IMTFE, A. C. BRACKMAN, *The Other Nuremberg: The Untold Story of the Tokyo War Crimes Trials*, New York, 1987. For two relatively recent books dealing with the main legal and institutional issues related to the work of the tribunals and their importance for the development of ICL see G. METTRAUX (ed.) *Perspectives on the Nuremberg Trial*, Oxford, 2008 and N. BOISTER, R. CRYER, *The Tokyo International Military Tribunal: A Reappraisal*, Oxford, 2008.

The first element that the contemporary international criminal lawyer would find in stark contrast with the more recent generation of international criminal tribunals concerns the fact that the prosecutorial authorities of both the IMT and IMTFE did not enjoy any formal—and to an extent even substantive—independence from the governments of the victorious Powers that had established the tribunals[107]. To the contrary, they substantially served as agents of their governments, implementing the criminal policy priorities of the Allied Powers[108]. It is well known that the Chief of Counsel for the prosecution at Nuremberg Robert H. Jackson—who at the time of his appointment was serving as Associate Justice of the Supreme Court of the United States—not only played a pivotal role in the negotiations leading to the creation of the tribunal and the preparation of the trial, but was also directly and formally answerable to the US President Truman for his activities as prosecutor in Nuremberg[109]. Similarly, other key members of the four prosecuting teams in Nuremberg held high-level posts in the—civil or military—judicial system of their countries[110]. In addition to that, the lack of attention for the requisite of independence was evidenced by the fact that most of the personnel attached to the prosecution both at the IMT and IMTFE was of military extraction, and the rigid and hierarchically organised structure of the prosecuting authorities further reinforced the prevalence of

[107] In the Charters of the two tribunals no provisions can be found to the effect of guaranteeing the independence of the prosecutors vis-à-vis their Governments, such as those found in the statutes of the *ad hoc* tribunals, internationalised courts and the ICC (for the punctual normative references see, *supra*, footnote 20). On this crucial issue see M. BERGSMO, C. CISSÉ, C. STAKER, *op. cit.*, 159 and L. CÔTÉ, *Independence and Impartiality*, cit., 372-373.

[108] L. REYDAMS, J. WOUTERS, C. RYNGAERT, *op. cit.*, at 14: "The four Chief Prosecutors leading four separate prosecuting teams were accountable directly to their respective governments. There was no delegation of authority to an international bureaucracy and hence no danger that the tribunal might turn against its creators".

[109] G. TOWNSEND, *Structure and Management*, in L. REYDAMS, J. WOUTERS, C. RYNGAERT, *op. cit.*, 174-178. See also, T. TAYLOR, *op. cit.*, 215-216 where it is argued that—because of his exclusive and direct link with the US President—Jackson was in practice largely independent and able to make his own decisions without any undue influence from Washington officials. On the role of Jackson in the preparation of the trial and the establishment of the prosecution structures at Nuremberg see M. BERGSMO, C. CISSÉ, C. STAKER, *op. cit.*, 159 and G. TOWNSEND, *op. cit.*, 179-192.

[110] *Ibidem*, 174. As recalled by the Author, most of the national officials appointed as state representatives at the London Conference later came to hold some of the most relevant posts—such as that of Chief Prosecutor—in the four investigation and prosecution teams (or those of Judges or Alternate judges of the IMT). Virtually all those nominated to these posts held some of the highest judicial offices in their own country, such as Sir Hartley Shawcross and Sir David Maxwell-Fyfe (respectively Chief and Deputy Prosecutors of the British team) who had been Attorney General in the United Kingdom.

the 'military' over the 'international' character of these judicial institutions[111]. In the case of the IMTFE, such military imprinting of the Tribunal was further evidenced by the legal source of its creation, namely a unilateral act of the Supreme Commander of the Allied Powers (SCAP), General Douglas MacArthur[112].

With regard to the prosecutorial structures at the two tribunals, different models were chosen[113]. At Nuremberg the choice was made to create four national prosecution teams, one for each of the victorious Powers (US, UK, Soviet Union and France), each headed by a Chief-Prosecutor[114]. The preparation for trial and presentation of the case followed this division of labour along national lines, pursuant to a suggestion of the Soviet delegate at the London Conference and later Judge of the IMT General Nikitchenko, although the working capacity of the American and British teams significantly surpassed that of the other two teams[115]. To the contrary, in Tokyo, the choice was made to create a single International Prosecution Section, comprising prosecutors from all participating states, led by a Chief Prosecutor—also acting as Chief of Counsel—a post for which Joseph B. Keenan was nominated by President Truman[116].

One relevant consequence of the lack of formal and substantive independence of the IMT and IMTFE prosecutors is the fact that the instituting Powers imposed—

[111] L. REYDAMS, J. WOUTERS, C. RYNGAERT, *op. cit.*, 14 and L. CÔTÉ, *Independence and Impartiality*, cit., 372 quoting D. SPRECHER, *Inside the Nuremberg Trial: A Prosecutor's Comprehensive Account*, Vol. II, Lanham, 1999, 1532-1534.

[112] MacArthur's Special Proclamation for the creation of the tribunal was adopted on 19 January 1946 and was based on the US State War Navy Co-ordinating Committee (SWNCC) Directive on the Identification, Apprehension and Trial of Persons Suspected of War Crimes adopted on 2 October 1945 (see in particular paragraphs 5 and 7 of Appendix "D" to document SWNCC 57/3, United States Department of State, *Foreign Relations of the United States: Diplomatic Papers, 1945. The British Commonwealth, the Far East*, vol. VI, Washington DC, 1945, 932-936). See also, L. REYDAMS, J. WOUTERS, C. RYNGAERT, *op. cit.*, 17-18. As the Authors point out, although the creation of the IMTFE had been marked by an extremely unilateralist approach, the composition of the tribunal was markedly more international than that of its European counterpart and included Judges from countries who had experienced the crimes under Japanese military occupation.

[113] On this differences see S. ZAPPALÀ, *Human Rights in International Criminal Proceedings*, Oxford, 2003, 30-33.

[114] G. TOWNSEND, *op. cit*., 174-175.

[115] *Ibidem*, 200 (on the Soviet suggestion to divide the case for the presentation at trial), 192-200 (for a very detailed presentation of the structure of the American prosecuting office, which had been frequently changed over time), and 202-207 (respectively on the British, French and Soviet organizational charts). At 203 the figure is given on the size of the British delegation, which was composed of nearly 170 people, bigger than the French and Soviet ones, but significantly smaller—roughly one-tenth—than the American one led by Jackson.

[116] *Ibidem*, 209-212, 219 for the organisational chart of the IPS. See also article 8 of the IMTFE Charter.

formally and informally—to the prosecuting authorities a *de jure* and *de facto* preliminary selection of the alleged crimes and suspects that were eligible for trial. In other words there was no real autonomous prosecutorial policy, and prosecutors' choices closely followed the political priorities of the states that had set up the tribunals[117]. Not only the Statutes limited the prosecution at the two tribunals to the "major criminals" of the Nazi and Japanese regimes, but in addition the process leading to the formation of the two list of respectively 24 and 28 Accused people was heavily influenced by the states' desire to balance *realpolitik* and legal considerations[118]. Among the most notable examples of these political influences are the instruction of the Soviet leadership to Prosecutor Rudenko in order to have the Katyn massacre attributed to the Nazis or the explicit directive to General MacArthur not to pursue the prosecution of Emperor Hirohito and other members of the Japanese Imperial Family[119]. Additionally, an important role in preparing the initial list of indictees was played by the United Nations War Crimes Commission and, in the case of the IMTFE, by the Far Eastern Commission, although the refinement of

[117] The list of the 24 Accused for the Nuremberg trial was drawn up after negotiation between the four delegations and the indictment was first made public in October 1945, roughly one month prior to the opening of the trial. The list of the 28 defendants at the Tokyo trial (known as "List A") was made public on 29 April 1946.

[118] In this sense see, N. BOISTER, R. CRYER, *op. cit.*, 62: "The non-selection of some prominent leaders was at least partly the result of the political exigencies of the day"; and F. DE VLAMING, *Selection of Defendants*, in L. REYDAMS, J. WOUTERS, C. RYNGAERT, *op. cit.*, 547: "In short, both in Nuremberg and Tokyo circumstances and politics influenced the selection of defendants. Though the suspects' responsibility did play a role, several factors undermined a consistent selection process".

[119] L. CÔTÉ, *Independence and Impartiality*, cit., 373. *Ibidem*, other relevant cases of opportunistic exclusions from the prosecutions are reported, such as "instructions given by Chiang Kai-shek to the prosecutor of the Republic of China not to investigate crimes committed by Japan in communist-based areas … and US prosecutors granting immunity to those involved with Unit 731 of the Japanese army in charge of biological and chemical warfare and to high-ranking Nazis who had collaborated with the United States in the final months of the war". As regards the exclusion from prosecution of the Japanese Emperor, see in particular paragraph 17 of Appendix "D" to document SWNCC 57/3, SWNCC, Directive on the Identification, Apprehension and Trial of Persons Suspected of War Crimes adopted on 2 October 1945 (United States Department of State, *Foreign Relations of the United States: Diplomatic Papers, 1945. The British Commonwealth, the Far East*, vol. VI, Washington DC, 1945, 936), where the SWNCC directs General MacArthur to "take no action against the Emperor as a war criminal pending receipt of a special directive concerning his treatment". On the notable omissions from the indictment at the IMTFE see also N. BOISTER, R. CRYER, *op. cit.*, 61-69. The Authors recall how the exclusion of Hirohito was formally decided by a majority of the acting prosecutors, but reflected the official policy of the SCAP, clearly backed by the US Government, with the only significant opposition of the Australian delegation (*ibidem*, at 65). It must also be recalled that at the IMTFE the focus of the indictment had been on aggression and war crimes, whereas crimes against humanity were not targeted, leading to the exclusion of massive episodes of criminality such as the phenomenon of the so-called 'comfort women' (*ibidem*, at 64).

the lists was carried out by the restricted executive bodies of the prosecuting authorities of the two tribunals[120].

Lastly, as explained by AMBOS, the criminal procedure applicable at the two international military tribunals did not provide for any form of judicial supervision of prosecutorial selection choices prior to trial: "Prosecutors were vested with the exclusive control over the investigation"[121]. In the absence of any pre-trial procedure—for instance in the form of a confirmation of the indictments—judicial oversight of prosecutorial selection choices could only be exercised indirectly and *ex post* when considering the guilt or innocence of the Accused at trial.

In sum, the experience of the international military tribunals shows that the unique events and geopolitical conditions leading to their creation were reflected in procedural regimes where, on the one hand, prosecutors did not enjoy independence from political authorities (to the contrary, they contributed to the enactment of their governments' policies), and on the other hand, no judicial oversight of the politically-influenced prosecutorial choices was available.

3. The *ad hoc* Tribunals: From broad discretion to increased judicial interventionism

The revival of international criminal justice in the 1990s with the creation of the two *ad hoc* tribunals for the former Yugoslavia and Rwanda—after decades of dormancy in its judicial implementation at the international level—brought back to the attention the issue of prosecutorial discretionary powers and their decisive role in the jurisdictional machinery of international criminal tribunals.

It should come as no surprise that almost half a century after the experience of the IMT and IMTFE the choices of institutional design for the newly established tribunals took different paths, both as to the legal parameters delimiting their jurisdiction and as to the unprecedented formal recognition of the prosecutors'

[120] The UNWCC prepared a first list of Axis war criminals in December 1944, when the Great Powers had not yet reached an agreement on how to deal with the "major" Nazi criminals (see, L. REYDAMS, J. WOUTERS, C. RYNGAERT, *op. cit.*, 12-13). The role played by the FEC—and its relationship with the SWNCC—as regards the selection of defendants in Tokyo, as well as the definitive selection made by the prosecution's Executive Committee of the IMTFE, are analysed by BOISTER, R. CRYER, *op. cit.*, 50-54.

[121] K. AMBOS, S. BOCK, *Procedural Regimes*, in L. REYDAMS, J. WOUTERS, C. RYNGAERT, *op. cit.*, 492-493.

independence[122]. Among the reasons behind these choices are the radically different international situation leading to the establishment of the two tribunals as well as the increased influence of international human rights law (and particularly fair trial rights) on the development of international criminal justice[123].

For the purposes of the present comparative analysis of international prosecutorial regimes, four main points shall be briefly touched upon as regards the experience of the *ad hoc* tribunals, respectively: a) The influence of the jurisdictional criteria defined by the UNSC on the exercise of prosecutorial discretion; b) The importance of the novel provisions on the prosecutor's independence contained in the Statutes; c) The concrete latitude of prosecutorial discretion and its substantive and procedural limitations; d) The (increasingly incisive) role played by the Judiciary in carrying out the judicial review of prosecutorial choices (with particular regard to the implementation of the Completion Strategy).

In the first place, it must be recalled that the founding documents of the two *ad hoc* tribunals provide a clear delimitation of the jurisdictional reach of these judicial institutions, thereby preliminarily establishing the perimeter for the exercise of prosecutorial discretionary powers[124]. The UNSC, in particular, framed the temporal and territorial jurisdiction of the two tribunals differently, providing for an open-ended jurisdiction that could extend to on-going conflicts in the case of the ICTY, while imposing a clear-cut timeframe for prosecutions at the ICTR[125]. As a

[122] See article 16(2) of the ICTY Statute and 15(2) of the ICTR Statute.

[123] On the increasingly important role of international human rights law on the development of procedural safeguards for the Accused in both international and domestic criminal proceedings see the in-depth empirical study by M. C. BASSIOUNI, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, in *Duke Journal of Comparative & International Law*, vol. 3, no. 2, 1993, 267-291. On the relevance of human rights law on the work of the *ad hoc* tribunals, see the general introductory remarks in S. ZAPPALÀ, *Human Rights in International Criminal Proceedings*, cit., 2-7.

[124] See article 1 of the ICTY Statute: "The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute"; Article 1 of the ICTR Statute: "The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994" and article 2 of the same Statute concerning the crime of genocide (in the light of this double reference to genocide and other serious violations of IHL, the ICTR has been described as a 'dual mandate' tribunal, although the focus has been clearly put on genocide crimes).

[125] In addition to the wider temporal scope, the territorial jurisdiction of the ICTY extended to the entire territory of the former Yugoslavia. As pointed out by L. REYDAMS, J. ODERMATT, *Mandates*, in L. REYDAMS, J. WOUTERS, C. RYNGAERT, *op. cit.*, 92, this fact "produced an unanticipated effect: the

consequence, the area for the exercise of prosecutorial discretion in the case of the ICTY has been, at least potentially and from a 'quantitative' point of view, wider than that the one enjoyed under the ICTR founding document.

In the second place, the formal recognition of prosecutorial independence in the Statute of both tribunals marked a significant step forward compared to the international military tribunals of the post-World War II era[126]. The relevant shift from the Nuremberg and Tokyo paradigm of the Great Powers 'prosecuting in their own name' to the UNSC delegating the task to investigate and prosecute international crimes to subsidiary but autonomous judicial organs, resulted in the necessity to guarantee the institutional independence of the prosecutor, for the first time conceived as "a separate organ of the International Tribunal"[127]. It must also be borne in mind that from the establishment of the ICTR in 1994 to September 2003, the tribunals had a common Office of the Prosecution, which was subsequently split up into two separate organs in order to tackle certain organisational and administrative issues[128]. As recalled by CÔTÉ, one major limitation to the operative independence of the prosecutors at the *ad hoc* tribunals was linked to the lack of full administrative autonomy vis-à-vis the Registry[129].

In the third place, it must be observed that *within* the outer jurisdictional boundaries traced by the UNSC, the prosecutors of the *ad hoc* tribunals—especially in the first years of their activity—enjoyed an extremely wide degree of discretion in

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Kosovo war, altogether an entirely different conflict four years after Dayton, fell within ICTY jurisdiction, as did the insurgency in the Former Yugoslav Republic of Macedonia". See, *supra*, footnote 124 for a comparison of the exact jurisdictional parameters set by the UNSC for the two tribunals. It must also be noted that the more restricted timeframe envisaged for prosecutions at the ICTR has been the object of significant political controversy at the time of the establishment of the tribunal, see L. REYDAMS, J. ODERMATT, *op. cit.*, 94-97.

[126] See, *supra*, footnote 20.

[127] *Ibidem*. See also, L. REYDAMS, J. WOUTERS, C. RYNGAERT, *op. cit.*, 27-28.

[128] See UNSC Resolution 1503 (2003), S/Res/1503, 28 August 2003 through which the UNSC amended Article 15 of the ICTR Statute, creating a distinct position of Prosecutor for the ICTR. The difficulties of running an office in charge of investigating and prosecuting crimes in separate and far-apart contexts had been evident form the beginning, although there has also been speculation on additional—and more political—reasons behind the splitting of prosecutorial mandates. See, e.g., the criticism of the UNSC's decision expressed in the Press Release of the ICTY Prosecutor Carla Del Ponte of 12 September 2003 and interviews released around the same time recalled by L. CÔTÉ, *Independence and Impartiality*, cit., 347-348. The Author quotes an interview of December 2003 found in V. PESKIN, *International Justice in Rwanda and the Balkans*, Cambridge, 2008, 221 where Del Ponte says that the decision to split the mandate is a "political" one. See also the words of Del Ponte to The Guardian, 13 September 2003: "I was sacked as Rwanda genocide prosecutor for challenging President [Kagame]".

[129] See, *supra*, footnote 22.

the selection of the specific crimes and alleged perpetrators to investigate and prosecute[130]. The two Statutes placed on the Prosecutor the task to determine whether there existed a "sufficient basis to proceed" with an investigation, thereby recognizing his or her margin of discretion[131]. In other words, no duty to investigate could reasonably be derived from the two Statutes[132]. Part of the doctrine has argued—on the basis of a reasonable reading of articles 18(4) of the ICTY Statute and 17(4) of the ICTR Statute—that once the Prosecutor had established the existence of a sufficient basis to proceed, he or she was under an obligation to prosecute [133] . Nevertheless, as correctly pointed out by DE MEESTER, the jurisprudence of the ICTY denied the existence of such an unconditional duty[134]. As already clarified, the existence of broad discretionary powers does not mean that prosecutors can arbitrarily exercise (or deny to exercise) their functions[135], and various procedural and substantive restraints have been imposed on their discretionary choices, in particular through the prism of the principle of non-discrimination and equality before the law, as constitutive elements of the duty of impartiality, and through the *gravity* criterion embedded in the provisions defining the subject-matter jurisdiction of the tribunals[136].

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[130] K. AMBOS, S. BOCK, *op. cit.*, 502. Case law of both tribunals certified the existence of such broad discretion, introducing certain restraints. See, ICTY, Judgment, *Prosecutor v. Delalić et al*. (*Čelebići case*), IT-96-21-A, AC, 20 February 2001, par. 602; and, in an even more forceful way ICTR, Decision on Ntabakuze Petition for a Writ of Mandamus and Related Defence Requests, *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, TC I, 18 April 2007, par. 6 where discretion is described as "unfettered". Resorting, for explicative purposes only, to the ICC 'nomenclature', it could be said that for the *ad hoc* tribunals the *situation* (i.e. the complex of temporal-spatial boundaries in which conducts constituting international crimes have allegedly been committed) had been pre-determined in its scope by the UNSC, whereas prosecutors enjoyed broad discretion on the selection of *cases* (i.e. the individual instances in which an investigation and/or prosecution at the international level was warranted).

[131] See article 18(1) of the ICTY Statute and 17(1) of the ICTR Statute.

[132] In this sense see K. DE MEESTER, *op. cit.*, 219-220.

[133] K. DE MEESTER, *op. cit.*, 220 quoting the position expressed by I. STEGMILLER, *The Pre-Investigation Stage of the ICTY and the ICC Compared*, in T. KRUESSMANN (ed*.), ICTY: Towards a Fair Trial?*, Wien/Graz, 2008, 329; D. D. NTANDA NSEREKO, *op. cit.*, 135-136.

[134] *Ibidem*, footnote 550 for the case law confirming the inexistence of such obligation to prosecute all cases where *prima facie* evidence existed.

[135] See, *supra*, Chapter One, par. 1 (particularly footnotes 11, 26, 29). See also, K. AMBOS, S. BOCK, *op. cit.*, 502-503.

[136] See K. DE MEESTER, *op. cit.*, 221-223 and *supra*, Chapter One, par. 1. With regard to gravity, it must be noted that the Statutes refer to "serious violations of international humanitarian law", although no explicit reference to the 'most responsible ones' or the 'major criminals' had originally been made. Only with the Completion Strategy there has been a substantial refocus on senior leadership crimes. See, *supra*, Chapter One, par. 3.2, footnote 70 and, *infra*, this paragraph.

Lastly, the fundamental issue of judicial review of prosecutorial discretionary choices and its progressive development at the *ad hoc* tribunals must be addressed. As a starting point, it should be stressed that the system of criminal procedure applicable at the ICTY and ICTR had been—at least originally—predominantly akin to the common law adversarial model, with elements of continental law only more recently acquiring a significant influence on the tribunals' procedural regimes[137]. Along these lines, and differently from the ICC procedural regime, at the *ad hoc* tribunals if the Prosecutor at the end of the investigation had collected sufficient evidence to establish a *prima facie* case, he or she could go on to prepare the indictment, which was then subject to the review of a Single Judge of the competent Trial Chamber[138]. Such review consisted in a completely written procedure that could take place in the absence of the suspect, and where the reviewing judge "is merely examining whether a prima facie case exists, without filtering cases or safeguarding the rights of the suspect"[139]. No procedural remedy existed against the prosecutor's decision not to start a prosecution through the filing of an indictment (*nolle prosequi*)[140].

As various authors have correctly pointed out, at the beginning of the work of the *ad hoc* tribunals the judicial review of prosecutorial choices had been rather "abstensionist" to become increasingly "interventionist" with the implementation of

[137] For an accurate discussion of international criminal procedure from the perspective of adversarial and inquisitorial models—including a critique of the excessive reliance on an abstract conception of such models—see K. AMBOS, *International criminal procedure: "adversarial", "inquisitorial" or mixed?*, in *International Criminal Law Review*, vol. 3, issue 1, 2003, 1-37. *Ibidem*, at 5-6 the Author, writing in 2003, close to the procedural reforms imposed by the UNSC Completion Strategy, underlines that "only recent developments … have strengthened the civil law elements in international criminal procedure. Originally, the law of the *Ad Hoc* Tribunals was drafted by common lawyers [and] adopted a largely adversarial approach".

[138] See articles 18(4) and 19(1) of the ICTY Statute and Rule 47(B),(E) and (F) of the ICTY RPE; Articles 17(4) and 18(1) of the ICTR Statute and Rule 47(B),(E) and (F) of the ICTR RPE. In the case of the ICC, the judicial review of the choices made by the Prosecutor during the investigation stage and resulting in the "Document Containing the Charges" (DCC) is carried out in a significantly more formalised way through a dedicated hearing for the confirmation of charges in front of the competent PTC (see, article 61 of the Rome Statute).

[139] K. AMBOS, S. BOCK, *op. cit.*, 505. In the case of the ICC, the hearing for the confirmation of charges must, as a rule, take place in the presence of the person charged, except in the two cases listed under article 61(2) of the Statute.

[140] *Ibidem*. See also, K. DE MEESTER, *op. cit.*, 220. On the contrary, as already pointed out *supra* (Chapter One, par. 3.3) the procedural regime of the ICC allows a certain degree of judicial supervision with regard to decisions not to open an investigation or start a prosecution under article 53 of the Rome Statute.

the Completion Strategy[141]. Following the adoption of the relevant UNSC's Resolutions, important changes to the procedural rules were introduced to the effect of reducing the margin of prosecutorial discretion and increasing the latitude of judicial interference, in the perspective of concentrating on the "the most senior leaders suspected of being the most responsible for the crimes within the jurisdiction of the Tribunal"[142]. The reforms that impacted the most on the exercise of prosecutorial discretion were the introduction of Rule 28(A) of the ICTY RPE (not replicated at the ICTR) and Rule 11*bis* of the RPE of both tribunals. The first of these provisions, highly criticised by the OTP as an infringement of the Prosecutor's independence[143], provided for a novel pre-indictment review procedure whereby the indictment—prior to being sent to the Single Judge for review—must be forwarded to the Bureau (consisting of the President, Vice-President and Presiding Judge of the Trial Chambers)[144], which must determine "whether the indictment, *prima facie*, concentrates on one or more of the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the Tribunal"[145]. The provision of Rule 11*bis*, in addition, provided a procedural mechanism of burden-sharing between the international and national jurisdictions on grounds—*inter alia*—of "the gravity of the crimes charged and the level of responsibility of accused", allowing a Referral Bench to refer back cases for prosecution at the national level under certain conditions, while retaining at the international level only the most serious cases[146]. Other amendments to the rules further reduced the discretionary powers of the OTP

[141] *Ibidem*, 224. See also, K. AMBOS, S. BOCK, *op. cit.*, 505.
[142] UNSC Resolution 1503 (2003), S/Res/1503, 28 August 2003, seventh recital and UNSC Resolution 1534 (2004), S/Res/1534, 26 March 2004, section 5.
[143] As reported by K. DE MEESTER, *op. cit.*, 226, footnote 584 (quoting A. D. MUNDIS, *op. cit.*, 148) the introduction of this procedure did not make its way in the ICTR RPE because judges considered it to infringe the ICTR Statute and the Prosecutor's independence. See also the ICTY, Tribunal's Prosecutor Addresses Security Council on Completion Strategy progress, Press Release, AN/MOW/1085e, 7 June 2006, where Prosecutor Carla Del Ponte expressed the view that "such [Rule 28(A)] directions by the Chambers can only be interpreted as advisory in nature. Only the Security Council has the power to modify the Tribunal Statute, which guarantees the independence of the Prosecutor and assigns to her the responsibility of determining which charges to bring in a prosecution".
[144] Rule 23(A) of the ICTY RPE.
[145] Rule 28(A) of the RPE.
[146] Rule 11*bis*(A) and (C) of the ICTY and ICTR RPE.

once the indictment had been confirmed, in favour of a more directive role of judges in the management of the scope and latitude of the charges[147].

In sum, the over twenty-year experience of the *ad hoc* tribunals saw the definitive acquisition of the prosecutor's formal and institutional independence and of a gradually increased judicial supervision of his or her discretionary choices, as part of a new and original merging of adversarial and inquisitorial procedural schemes considered functional to the attainment of the Completion Strategy's objectives. Such developments, while not dispelling all doubts on the appropriateness of certain prosecutorial selection choices[148], had a significant influence on the drafting of the Rome Statute[149].

4. The hybrid (or internationalised) Tribunals: Heterogeneity and the influence of national models

The expression 'hybrid (or internationalised) courts/tribunals'—with a number of equivalent terminological variants [150] —indicates an extremely heterogeneous category of judicial institutions created starting from the early 2000s, generally as a response to serious episodes of criminality of concern for the international community and under the auspices of the United Nations, frequently as part of post-conflict transitions[151]. While authors disagree on the specific definitional

[147] See Rule 73bis(D) and (E). See, C. STAHN, *Judicial Review of Prosecutorial Discretion: on Experiments and Imperfections*, in G. SLUITER, S. VASILIEV, *International Criminal Procedure: Towards a Coherent Body of Law*, London, 2009, 240 who speaks of the judges' "managerial" approach in the implementation of the completion strategy.

[148] For an analysis of some of the most controversial selection decisions of the OTP see L. CÔTÉ, *Independence and Impartiality*, cit., 375-379 (particularly on the *Milošević* case and the failure to open an investigation concerning the NATO bombing of 1999), 379-385 (on the *Barayagwiza* case and the political pressures to avoid an investigation on the RPF's crimes). On the selection policies of the various prosecutors of the *ad hoc* tribunals see F. DE VLAMING, *op. cit.*, 547-562.

[149] See K. AMBOS, *International criminal procedure: "adversarial", "inquisitorial" or mixed?*, cit., 5-7.

[150] Many other similar expressions have been used in literature, including "mixed courts", "hybrid-domestic courts", "internationalized domestic courts".

[151] Literature on these tribunals, some of which are still operational to the present day, has increasingly developed in recent years. See, e.g., C. P. R. ROMANO, A. NOLLKAEMPER, J. K. KLEFFNER (eds.), *Internationalized Criminal Courts and Tribunals: Sierra Leone, East Timor, Kosovo, and Cambodia*, Oxford, 2004; A. C. MARTINEAU, *Les juridictions pénales internationalisées: un nouveau modèle de justice hybride*?, Paris, 2007; E. CIMIOTTA, *I tribunali penali misti*, Padova, 2009; S. DE BERTODANO, *Current Developments in Internationalized Courts. East Timor—Justice Denied*, in *Journal of International Criminal Justice*, vol. 2, issue 3, 2004, 910-926; S. LINTON, *Cambodia, East Timor and Sierra Leone: Experiments in International Justice*, in *Criminal Law Forum*, vol. 12, issue

elements of the category, with some even questioning the feasibility of grouping such diverse experiences in one single category[152], there is wide agreement on the fact that these institutions are characterised by a mix—in variable proportions—of national and international elements as regards the legal sources, composition, applicable law and procedural models adopted[153]. The following judicial institutions have been generally included in the category: the Special Panels for Serious Crimes in East Timor (SPSC); Regulation 64 Panels in the Courts of Kosovo; The Special Court for Sierra Leone (SCSL); The Extraordinary Chambers in the Courts of Cambodia (ECCC) and, although not unanimously, the Special Tribunal for Lebanon (STL)[154]. It is obviously beyond the scope of the present work to offer an overarching analysis of the procedural regimes of all these institutions. A few summary remarks must be made with regard to the most distinctive features of the prosecutorial regimes of the SCSL, the ECCC and the STL.

The Special Court for Sierra Leone, established pursuant to an international agreement between the UN and the Government of Sierra Leone concluded in 2002, is arguably among the hybrid courts the one in which the international component is more accentuated[155]. In this sense, the provisions of the Statute regarding the powers and duties of the Prosecutor largely mimic those of the ICTY and ICTR Statutes[156]. The SCSL Statute therefore establishes that the Prosecutor is an independent and separate organ of the Court, bearing the ultimate responsibility for the decision to investigate and prosecute[157]. Nevertheless, contrary to the Statute of the two *ad hoc* tribunals, the founding documents of the SCSL established that the jurisdiction of the

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2, 2001, 185-246; S. M. H. NOUWEN, *'Hybrid courts'. The hybrid category of a new type of international crimes courts*, in *Utrecht Law Review*, vol. 2, issue 2, 2006, 190-214.

[152] S. M. H. NOUWEN, *op. cit.*, 192-193.

[153] *Ibidem*.

[154] *Ibidem*, 192. The STL is not referred to in the article since it has been established only in 2007. For a monographic work on the STL see A. ALAMUDDIN, N. N. JURDI, D. TOLBERT, *The Special Tribunal for Lebanon: Law and Practice*, Oxford, 2014.

[155] On the events leading to the establishment of the SCSL and the decisive American and British influence on the political-diplomatic process see L. REYDAMS, J. WOUTERS, C. RYNGAERT, *op. cit*., 65-71. According to article 12 of the Statute the majority of the Judges is international (nominated by the UN Secretary General), whereas a minority is nominated by the Government of Sierra Leone. The post of Prosecutor and Acting Prosecutor have been mostly occupied by American citizens (namely David Crane, Stephen Rapp, Brenda Hollis).

[156] K. DE MEESTER, *op. cit*., 230.

[157] Article 15(1) of the SCSL Statute.

court was limited to the persons "bearing the greatest responsibilities"[158]. Although such provision clearly seems to introduce a jurisdictional criterion limiting the Court's jurisdiction *ratione personae* (and the prosecutor's discretionary powers thereof) the AC, in the face of contradictory case law of the Chambers, established—similarly to the SCC of the ECCC[159]—that this only worked as a guide for the exercise of prosecutorial discretion[160]. For this reason DE MEESTER, while strongly criticising the AC's interpretation of the Statute, describes the prosecutorial regime of the SCSL as a system characterised by "guided discretion"[161]. As regards the prosecutorial policy informing the work of the OTP of the SCSL, it must be observed that especially under the tenure of David Crane efforts have been made to investigate and prosecute members of all the three main actors of the Sierra Leonean conflict, namely the Armed Forces Revolutionary Council (AFRC), the Revolutionary United Front (RUF) and the Civil Defence Forces (CDF)[162].

The Extraordinary Chambers in the Courts of Cambodia have been created – pursuant to a ten-year strenuous political-diplomatic process[163]—in order to "bring to trial *senior leaders* of Democratic Kampuchea and *those who were most responsible* for the crimes" committed under the Khmer Rouge rule, spanning from 17 April 1975 to 6 January 1979[164]. Among the mixed tribunals, the ECCC are undoubtedly

[158] Article 1(1) of the SCSL Statute establishes that "The Special Court shall, except as provided in subparagraph (2), have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone".
[159] See, *supra*, footnote 71.
[160] See, SCSL, Judgment, *Prosecutor v. Brima et al. (AFRC)*, Case No. SCSL-2004-16-A, AC, 22 February 2008, par. 280. See also K. DE MEESTER, *op. cit*., 232-235 for a discussion and a critique of the reasoning of the Appeals Chamber in the light of both textual arguments and preparatory works.
[161] K. DE MEESTER, *op. cit.*, 230.
[162] Faithful to this policy of alleged even-handedness the prosecution indicted four members of the AFRC, six of the RUF and three of the CDF respectively, to which the case against Charles Taylor must be added. As reported by F. DE VLAMING, *op. cit.*, 568-570, a closer analysis of the charges and of the conclusions reached by the Truth and Reconciliation Commission, reveals that the CDF may have been overrepresented in the selection decisions, both in qualitative and quantitative terms, and that "Crane may have considered the gravity criterion subordinate to membership of and position in a certain group".
[163] For a summary of the political events and the long negotiations leading to the establishment of the ECCC, see L. REYDAMS, J. WOUTERS, C. RYNGAERT, *op. cit.,* 47-54 and P. LOBBA, *Ai confini della giustizia penale internazionale: i Khmer Rossi a processo davanti alle "Extraordinary Chambers" di Cambogia*, in *L'Indice Penale*, anno XV, n. 2, 2012, 612-615.
[164] See article 1 and 2 new of the Law on the Establishment of the ECCC (as amended on 27 October 2004, emphasis added). As recalled by P. LOBBA, *op. cit.*, 614 the establishing law had been unilaterally passed by the Cambodian Parliament in 2001 amid a stalemate in the negotiations with the

the one in which the national component is the strongest, particularly as regards the legal sources of its establishment[165], its institutional position within the Cambodian Judiciary[166] and the composition of its organs[167]. In terms of criminal procedure models the ECCC stands as an exception in the wider panorama of hybrid courts. In fact, it is the only tribunal where—in line with the French tradition influencing the organisation of the Judiciary and Cambodian criminal procedure[168]—there are Co-Investigating Judges (COJ) entrusted with the task of carrying out a formal judicial investigation based on the Co-Prosecutors' introductory submissions[169]. The judicial investigation carried out independently by the OCIJ serves the purpose of establishing the factual and legal elements necessary to decide whether or not to commit the suspects to trial, through the so-called Closing Order[170]. Limiting the present analysis to the prosecutorial regime, the margin of prosecutorial discretion and the latitude of judicial supervision of discretionary choices, a few considerations seem necessary.

Firstly, it must be recalled that the ECCC Law carefully frames the jurisdiction of the ECCC with particular regard to its temporal scope and, at least

UN. After the negotiations were resumed and an international agreement between the Cambodian Government and the UN was concluded in 2003, the ECCC Law has been amended to reflect the content of the Agreement.

[165] While it is true that the legal source of the establishment of the ECCC may be regarded as composite with particular regard to the involvement of both UN acts, an international agreement and domestic legislation, it must be stressed that the formal act of creation of the Chambers is a piece of Cambodian legislation (only followed two years later by a 'cover' international agreement).

[166] The ECCC are extraordinary judicial organs *within* the framework of the Cambodian judicial system (as the name suggests "*in* the Courts of Cambodia"). Nevertheless, they maintain a close relationship with the UN, especially from the administrative and financial point of view, as well as with regard to the appointment of the international component of the judicial and prosecutorial posts.

[167] According to the ECCC Law and the UN-RGC Agreement, certain organs of the ECCC are formed according to the criterion of equal representation of the national and international component, while others are formed by a majority of Cambodian nationals. Therefore according respectively to article 16 and 23 new of the ECCC Law, there are two Co-Prosecutors and two Co-Investigating Judges (one Cambodian, one international). To the contrary, according to article 9 new of the ECCC Law, the judicial posts in the Pre-Trial, Trial and Supreme Court Chamber, are occupied by a majority of national judges (3 out of 5 judges for the PTC and TC, and 4 out of 7 judges in the Supreme Court Chamber). Nominations to the office of ECCC judge are made in accordance with article 11 new of the ECCC Law, which provides for a role of the Supreme Council of the Magistracy also in the formal appointment of the international judges, who are chosen among those included in a list formed by the UN Secretary-General and submitted to the Cambodian Government.

[168] See K. AMBOS, S. BOCK, *op. cit.*, 520-525. *Ibidem* at 523 the Author stresses the fact that "the ECCC follows the French inquisitorial model which is the historical origin of Cambodia's legal system". See also G. ACQUAVIVA, *New Paths in International Criminal Justice? The Internal Rules of Cambodian Extraordinary Chambers*, in *Journal of International Criminal Justice*, vol. 6, issue 1, 2008, 133, 135.

[169] Rule 53 of the Internal Rules.

[170] Rule 67 of the Internal Rules.

apparently, as to the personal scope. Nevertheless, as already pointed out[171], the SCC in *Duch* has interpreted the reference to "senior leaders of Democratic Kampuchea" and "those most responsible" not as imposing jurisdictional hurdles, but as terms that "operate exclusively as investigatorial and prosecutorial policy to guide the independent discretion of the Co-Investigating Judges and Co-Prosecutors as to how best to target their finite resources in order to achieve the purpose behind the establishment of the ECCC"[172]. A residual review of such discretionary choices is only allowed if discretion is not exercised according to "good faith, based on sound professional judgement"[173].

Secondly, it must be added that according to the pertinent substantive and procedural provisions, it is the sole responsibility of the Co-Prosecutors to decide whether to initiate a preliminary investigation (either *ex officio* or on the basis of a complaint)[174]. Complaints lodged with the Co-Prosecutors do not trigger *per se* a criminal investigation[175]. As correctly pointed out by DE MEESTER, a textual reading of Rule 53(1) of the IR seems to support the idea that, once the preliminary investigation is completed and there are reasons to believe that crimes within the ECCC jurisdiction have been committed, the Co-Prosecutors have an obligation to send an introductory submission to the OCIJ for a judicial investigation[176]. The OCIJ, in addition, can only dismiss a case on specific grounds laid out in Rule 67(3) of the IR[177]. While such provisions seem to significantly curtail prosecutorial discretion, it should be stressed that the triggering of any proceeding depends exclusively on the

[171] See, *supra*, Chapter One, Par. 3.2, footnote 71.
[172] *Ibidem*. The SCC held, on the contrary, that the circumstance of being a Khmer Rouge official is a jurisdictional requirement, hence justiciable before the TC. It must be recalled that the issue of the jurisdictional or non-jurisdictional nature of the two categories at hand has been at the centre of disputes non only in the *Duch* case, but also in cases 003 ad 004, leading to a prolonged controversy among the national and international component of the Office of the Co-Prosecutors, Office of the Co-Investigating Judge and Pre-Trial Chamber on whether the suspect belonged or not to one of the two categories for the purposes of establishing the ECCC's jurisdiction.
[173] ECCC, Appeal Judgement, *Co-Prosecutors v. KAING Guek Eav (Duch)*, 001/18-07-2007/ECCC/SC, SCC, 3 February 2012, par. 80, quoting SCSL, Appeal Judgment, *Prosecutor v. Brima*, SCSL-2004-16-A, AC, 22 February 2008, par. 282.
[174] Article 5(3) and 6(3) of the ECCC Agreement and Rule 49(1) IR. See also G. ACQUAVIVA, *op. cit.*, 134-135.
[175] Rule 49(4) IR.
[176] K. DE MEESTER, *op. cit*., 279, based in particular on the use of the expression "*shall* open a judicial investigation".
[177] Namely when: "a) The acts in question do not amount to crimes within the jurisdiction of the ECCC; b) The perpetrators of the acts have not been identified; or c) There is not sufficient evidence against the Charged Person or persons of the charges".

initiative of the Co-Prosecutors and no judicial remedy is available in case of no-action, therefore leaving significant space for the exercise of discretion in selection decisions[178].

Lastly, it should be added that certain decisions of the ECCC concerning the scope of Case 002, inspired by the necessity to enact drastic trial management measures to help bringing about the conclusion of the trial—also considering the advanced age and precarious health conditions of most of the defendants[179]—somehow had the effect of introducing an additional dimension of judicially enforced discretionary selection[180]. The extremely complex procedural history leading to the severance(s) of Case 002 reveals that in the presence of a Closing Order encompassing an enormous amount of incidents and crime locations—all of which should be in principle discussed at trial—an *ex post* selection of the charges for actual prosecution at trial may be imposed by the TC on grounds, *inter alia,* of judicial economy[181]. As a matter of fact, in a system where no formal mechanisms for

[178] In the case of the ECCC an implicit decision of *nolle prosequi* may also be the result of the lack of agreement among the Co-Prosecutors and/or Co-Investigating Judges on the procedural steps necessary to proceed with an investigation and prosecution. Such disagreements can be brought to the attention of the Pre-Trial Chamber for settlement pursuant to articles 20 new and 23 new of the ECCC Law and Rules 71 and 72 of the IR respectively, but may significantly hinder the practical viability of an investigation or prosecution, also considering the requirement of a 'supermajority' for the adoption of all the Chambers' decisions (see article 14 new, 20 new and 23 new of the ECCC Law). The provision that in case of failure to reach such majority the default outcome is that the investigation shall proceed or the intended action shall stand or be executed does not solve all practical issues, nor makes it easier to proceed if the disagreement is radical and protracted.

[179] Originally there were four Accused in Case 002: Khieu Samphan, Nuon Chea, Ieng Sary and Ieng Thirith. Pending the proceedings Ieng Sary and Ieng Thirith died (the latter after having been declared unfit to stand trial). The two surviving Accused are also in their advanced years and in rather precarious health conditions.

[180] For a very detailed analysis of the procedural events concerning Case 002, see S. WILLIAMS, *The Severance of Case 002 at the ECCC. A Radical Trial Management Technique or a Step Too Far?*, in *Journal of International Criminal Justice*, vol. 13, issue 4, 2015, 815-843.

[181] Manageability of the trial(s) and judicial economy have been accepted by both the TC and SCC as reasonable factors to take into account in deciding whether a severance is in "the interest of justice" pursuant to Rule 89*ter*. See ECCC, Decision on Co-Prosecutors' Request for Reconsideration of the Terms of the Trial Chamber's Severance Order (E124/2) and Related Motions and Annexes, 002/19-09-2007-ECCC-TC, TC, 18 October 2011, par. 10; ECCC, Decision on the Co-Prosecutors' Immediate Appeal of the Trial Chamber's Decision Concerning the Scope of Case 002/01, 002/19-09-2007-ECCC-TC/SC(18), SCC, 8 February 2013, par. 36, 50. *Contra*, ECCC, Decision on Immediate Appeals Against Trial Chamber's Second Decision on Severance of Case 002, 002/19-09-2007-ECCC-TC/SC(28), SCC, 25 November 2013, par. 75, where appellate judges rejected the idea that considerations on the financial situation at the ECCC are appropriate in deciding on severance. It should be noted that, notwithstanding the disagreements between the OCP and TC on the concrete way in which severance had originally been ordered (i.e. without prior consultation with all interested parties), the Co-Prosecutors were clearly in favour of a substantial reduction of the charges to be heard at trial.

the reduction of the scope of the trial or the withdrawal of charges originally existed, the power of severance under Rule 89*ter* of the IR has been used in order to give priority to the prosecution of specific incidents and crime sites, provided that those ultimately selected for trial were "reasonably representative of the totality of charges"[182]. More recently, and drawing from this experience, the IR have been amended in order to provide the OCIJ and TC with more incisive powers to reduce the scope of a trial, through measures alternative to severance[183].

In sum, even in the unique procedural context of the ECCC—which compared to other internationalised tribunals leans more towards procedural models built around the principle of legality of prosecutions—a good margin of discretion is concretely exercised by the Co-Prosecutors. Such discretion may be further judicially reinforced through the trial management measures adopted by the OCIJ and TC (at least when there is a convergence between the prosecutorial objectives and the pursuit of such judicial measures).

One of the most recent examples of internationalised criminal tribunals is the Special Tribunal for Lebanon[184]. As many commentators have rightly pointed out, the

[182] There have been profound disagreements between the TC and SCC on the purpose and nature of the severance power under Rule 89*ter* and on the way in which the reasonable representativity requirement—judicially introduced by the SCC—had to be concretely applied. See, S. WILLIAMS, *The Severance of Case 002 at the ECCC. A Radical Trial Management Technique or a Step Too Far?*, cit., 827-834. Leaving aside such legal disagreements, and in particular the issue whether the severance should give rise to multiple smaller trials (as advocated by the TC) or to a single trial with reduced charges (as advocated by the OCP and SCC), the practical effect of the severance decisions has been that of prioritizing the prosecution at trial of certain charges over others contained in the original Closing Order.

[183] See the Rules 66*bis* and 89*quater* of the IR(rev.9) as amended at the Plenary Session of the ECCC Judges on 16 January 2015. It should be noted that such new rules could in principle be seen as sources of potential judicial interference with prosecutorial choices. Nevertheless, as trials at the ECCC concretely unfolded, the Co-Prosecutors had been the first to realise the practical necessity of a reduction of the scope of the trial and of the introduction of more incisive rules to that effect.

[184] The actual legal nature of the STL has been the object of debate among scholars (see, *infra*, footnote 185). The establishment of the STL followed a very convoluted legal and political path. An Agreement for its establishment had originally been concluded between the UN and the Lebanese Government in early 2007, but could not be approved and ratified according to Lebanese constitutional law due to internal political obstacles. Subsequently the UNSC, acting under Chapter VII of the UN Charter, sought to 'put into effect' the Agreement, with the adoption of Resolution 1757 (UNSC Resolution 1757 (2007), S/Res/1757, 30 May 2007). On the legality of the establishment of the STL see B. FASSBENDER, *Reflections on the International Legality of the Special Tribunal for Lebanon*, in *Journal of International Criminal Justice*, vol. 5, issue 5, 2007, 1091-1105 arguing that the UNSC established the Tribunal by incorporating the provisions of the negotiated Agreement—which did not entered into force—into a Chapter VII Resolution and not, as others have argued, by substituting "a decision made under Chapter VII of the UN Charter for the missing ratification of the Agreement by Lebanon". The most recent institution of this kind are arguably the Kosovo Specialist Chambers and the Specialist Prosecutor's Office, established in 2015 pursuant to Kosovo Law

uniqueness of the political events leading to its institution, the legal sources of its establishment, as well as the extremely limited jurisdiction and the circumstance that—at least in theory—only Lebanese criminal law is applicable at the Tribunal, make it difficult to compare the STL with other international(ised) criminal institutions[185]. Having regard to the criminal procedure model chosen for the STL, it should be preliminarily noted that notwithstanding the significant French influence on the Lebanese legal tradition and judicial structures, the inquisitorial model based on the role of the *juge d'instruction* has not been replicated in the institutional design of the STL[186]. With regard to the prosecutorial model and the latitude of discretionary powers, the following observations suffice for the purposes of the present comparative analysis.

First, it should be noted that the UNSC has very narrowly delimited the jurisdiction of the tribunal *ratione loci*, *temporis*, *materiae* and *personae* in Resolution 1757 (to which the STL Statute is attached)[187]. The focus is therefore placed on the terrorist attack leading to the death of Prime Minister Hariri (as well as to the death and injury of other people) occurred on 14 February 2005. "Other attacks" connected with this one and occurred in a specified timeframe—which can be extended with the agreement of the UNSC and Lebanese Government—are eligible for investigation and prosecution under certain conditions[188]. Therefore, the

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no.05/L-053 (after the amendment of the Kosovar Constitution with the introduction of article 162 envisaging the new institution), in the context of EULEX mission in Kosovo, in order to bring to trial the persons allegedly responsible for crimes against humanity, war crimes and other crimes under Kosovo law which allegedly occurred between 1 January 1998 and 31 December 2000, on the basis of the Report on Inhuman treatment of people and illicit trafficking in human organs in Kosovo, Council of Europe, Committee on Legal Affairs and Human Rights, Doc. 12462, 7 January 2011.

[185] See C. APTEL, *Some Innovations in the Statute of the Special Tribunal for Lebanon*, in *Journal of International Criminal Justice*, vol. 5, issue 5, 2007, 1107-1108; K. DE MEESTER, *op. cit.*, 282; W. A. SCHABAS, *The Special Tribunal for Lebanon: Is a "Tribunal of an International Character" Equivalent to an "International Criminal Court"?*, in *Leiden Journal of International Law*, vol. 21, issue 2, 2008, 513-528.

[186] C. APTEL, *op. cit.*, 1108, footnote 3: "Lebanon was under French mandate 1918-1943, and, during that period, the French legal system substantially influenced the development of Lebanese laws and judiciary in criminal matters"; M. GILLET, M. SCHUSTER, *The Special Tribunal for Lebanon Swiftly Adopts Its Rules of Procedure and Evidence*, in *Journal of International Criminal Justice*, vol. 7, issue 5, 2009, 895 (especially footnote 80, focusing on the differences between the STL and the ECCC on this point).

[187] See article 1 of the STL Statute on the personal, territorial and temporal jurisdiction.

[188] *Ibidem*: "If the Tribunal finds that other attacks that occurred in Lebanon between 1 October 2004 and 12 December 2005, or any later date decided by the Parties and with the consent of the Security Council, are connected in accordance with the principles of criminal justice and are of a nature and gravity similar to the attack of 14 February 2005, it shall also have jurisdiction over persons responsible for such attacks".

jurisdictional parameters of the Tribunal place significant limitations on the Prosecutor's ability to exercise discretion, pre-determining to a large extent the scope of investigations and cases at the STL[189]. In addition, as regards the identification of the "other attacks", the Prosecutor has up to date heavily relied on the work of the pre-existent UN International Independent Investigative Commission (UNIIIC), whose relevance for the activities of the Tribunal is formally recognised under article 19 of the Statute[190].

Second, it should be underlined that—as it happens in all the other post-Nuremberg international or internationalised jurisdictions—the Statute establishes that the Prosecutor is required to act independently as a separate organ of the Tribunal and not to seek or accept instructions[191]. The Prosecutor is in charge of the decisions on the investigation and prosecution of the crimes within the jurisdiction of the Tribunal and his or her powers, with particular regard to investigation phase, are specifically laid out in the Statute and RPE[192]. Nevertheless, recognizing that the STL is somehow incardinated in the Lebanese judicial system, the Statute allows the international prosecutor, in discharging his or her investigative duties, to seek the assistance of the "Lebanese authorities concerned"[193]. Additionally, in line with the influences of the inquisitorial model, the RPE provide that the Prosecutor "shall assist the Tribunal in establishing the truth"[194].

Lastly, it should be noted that the procedural system of the STL envisages a significant role of judges in the direction of proceedings and a certain degree of oversight on prosecutorial choices, in particular through the functions of the single Pre-Trial Judge at the preliminary stage[195]. In particular, the Prosecutor's selection decisions are subject to judicial supervision in the form of a confirmation of the

[189] In this sense C. APTEL, *op. cit.*, 1111: "The limited mandate and number of cases which the STL could potentially try will certainly constrain the STL 'prosecutorial strategy'".
[190] See article 19 of the STL Statute and UNSC Resolution 1595 (2005), S/Res/1595, 7 April 2005 establishing the Commission. On the relationship between the Prosecutor and the Commission see C. APTEL, *op. cit.*, 1112-1116 and K. AMBOS, S. BOCK, *op. cit.*, 527-528.
[191] Article 11(2) of the Statute.
[192] Article 11(1) of the Statute and Rules 61, 62 of the RPE.
[193] Article 11(5) of the Statute.
[194] Rule 55(C) of the RPE. On this civil law and inquisitorial influence on the RPE see critically, D. JACOBS, *The Unique Rules of Procedure of the STL*, in A. ALAMUDDIN, N. N. JURDI, D. TOLBERT, *op. cit.*, 112 underlying the "strong and exaggerated normative belief on the part of the judges that only the inquisitorial system can satisfy the requirements of justice and truth in international trials".
[195] On the role of the single Pre-Trial Judge at the STL see M. GILLET, M. SCHUSTER, *op. cit.*, 889-890. See Rules 88-97 of the RPE for the detailed discipline of the functions of the Pre-Trial Judge.

indictment[196], and as far as "connected" attacks are concerned, through the necessary preliminary ruling of the Pre-Trial Judge under Rule 11 of the RPE. Nevertheless, no judicial remedy is available against the prosecutor's decision not to proceed in a "connected" case[197]. As far as "other attacks" falling beyond the ordinary temporary jurisdiction of the Tribunal are concerned, the Prosecutor can only forward a reasoned request to the effect of extending the jurisdiction of the Tribunal to encompass them, but any such decision is a matter for the Lebanese Government and UNSC to decide[198]. Finally, as regards the selection of defendants, it should be noted that the STL stands as an exception among international(ised) criminal institutions in that it allows, under certain conditions, for trials *in absentia*[199].

In sum, the very limited jurisdiction of the STL, the institutional position of the Prosecutor vis-à-vis the Lebanese authorities and the UNIIIC, as well as the original mix of inquisitorial and adversarial procedural elements, create a prosecutorial organ with limited and judicially supervised discretionary powers, although the area of discretion is not negligible especially as regards *nolle prosequi* decisions.

5. The ICC: Tempered discretion or tempered legality?

After having provided a comparative overview of the prosecutorial regimes across various international(ised) criminal jurisdictions other than the ICC, it is possible to extend the analysis to the permanent international criminal court, which constitutes the principal focus of the present research. Since an in-depth analysis of some the most relevant institutional and legal issues regarding the prosecutorial regime of the ICC—in the light of the current *practice* of both the OTP and Chambers—will be thoroughly carried out in the following parts, the purpose of the present paragraph is exclusively to sketch out some of the most distinctive features

[196] Rule 68 of the RPE.
[197] See Rules of Procedure and Evidence: Explanatory Memorandum by the Tribunal's President, 25 November 2010, par. 9 (commenting on Rule 11, the Memorandum asserts that in such a decision the Prosecutor enjoys "broad prosecutorial power").
[198] Rule 12(A) and (B) of the RPE.
[199] Articles 16(4)(d) and 22 STL Statute. See also, P. GAETA, *To Be (Present) or Not to Be (Present): Trials in Absentia before the Special Tribunal for Lebanon*, in *Journal of International Criminal Justice*, vol. 5, issue 5, 2007, 1165-1174.

of the prosecutorial model of the ICC, thereby distinguishing it from the jurisdictions studied in the previous paragraphs.

The most evident element of commonality between the ICC's prosecutorial regime and those of other contemporary institutions—as already pointed out *supra*—is the recognition of the institutional independence of the Prosecutor[200]. The ICC legal texts further reinforce the position of the Prosecutor by formally recognising his or her administrative autonomy[201]. Additionally, the role of the Prosecutor as a 'minister of justice' is underscored by the recognition of his or her role in the establishment of the truth (and the corresponding obligation to investigate equally the incriminating and exonerating circumstances)[202].

Nevertheless the specific features of the ICC as a treaty-based institution—*independent from* but *connected to* the UN system—contribute to shape its original physiognomy in terms of prosecutorial institutional and procedural schemes.

First of all, the jurisdiction of the Court, established by the Statute according to the usual *ratione loci*, *temporis*, *personae* and *materiae* parameters, is significantly wider than that of its predecessors. In particular, territorial jurisdiction is potentially universal and is exclusively constrained by the subjective participation of states to the Statute—or acceptance of the Court's jurisdiction through a declaration made under article 12(3) of the Rome Statute[203]—and can be further expanded through the conferral of jurisdiction over non-Parties by means of a UNSC's resolution adopted under Chapter VII of the UN Charter[204]. In other terms, contrary to the experience of the IMTs, *ad hoc* and internationalised courts, in the case of the ICC there is no legal (and political) pre-determination of a specific *situation* (or set of situations) that can

[200] Article 42(1) of the ICC Statute.
[201] Article 42(2) of the ICC Statute.
[202] Article 54(1)(a) of the ICC Statute.
[203] This provision is a sort of opt-in clause allowing a state that is not a party to the Rome Statute to accept the Court's jurisdiction on *ad hoc* basis through a specific declaration to that effect lodged with the Registrar. On this mechanism and with particular regard to the declarations lodged by the Palestinian Authority before the formal ratification of the Rome Statute by Palestine, see M. M. EL ZEIDY, *Ad Hoc Declarations of Acceptance of Jurisdiction: The Palestinian Situation Under Scrutiny*, in C. STAHN (ed.), *The Law and Practice of the International Criminal Court*, cit., 179-209.
[204] Article 13(b) of the ICC Statute. On the UNSC's power to extend the territorial jurisdiction of the Court while complying with the other jurisdictional parameters set out in the Statute, see L. CONDORELLI, S. VILLALPANDO, *Can the Security Council Extend the ICC's Jurisdiction?*, in A. CASSESE, P. GAETA, J. R. W. D. JONES (eds.), *op. cit.*, 571-582.

form the object of the Prosecutor's investigating and prosecuting efforts[205]. Since this "dormant"—complementary—jurisdiction must somehow be triggered, drafters have envisaged three possible ways to put the jurisdictional machinery of the Court in motion, namely state referrals, UNSC referrals and *proprio motu* initiatives of the Prosecutor[206].

It is particularly this power of the ICC Prosecutor to proceed *proprio motu* that sets the Court apart from its predecessors, in that the OTP has the power to select, within the boundaries set out in the Statute, both the *situation* (i.e. the spatial and temporal framework for the exercise of the Court's jurisdiction) and the *cases* (i.e. the individual instances of exercise of criminal action through the formulation of specific charges)[207]. In any event, even when the jurisdiction of the court is triggered through a state or UNSC referral the true *dominus* of preliminary examinations, investigation and prosecution remains the OTP[208].

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[205] For a clear description of this novel feature of the ICC compared to previous generations of international criminal justice mechanisms, see H. OLÁSOLO, *The Triggering Procedure of the International Criminal Court*, Leiden, 2005, 39-40. The Author—who uses the expression "dormant jurisdiction" to indicate the areas of potential exercise of the Court's jurisdiction *before* the "activation prerequisites" of the Statute have been established leading to a "triggered jurisdiction"—stresses the fact that because of this particular institutional architecture "it is impossible to determine *a priori* in which situations the ICC will get involved" and that "only after defining the situation at hand and verifying that the activation prerequisites provided for in arts. 15(3) and (4), 16, 18(2) and 53(1) RS, and rule 48 RPE are met in connection with it, will the Court's competent organs activate its dormant jurisdiction".

[206] Article 13 of the Rome Statute lists the three possible triggering mechanisms of the Courts' jurisdiction, respectively letter (a) (state referrals), letter (b) (UNSC referrals), and letter (c) (Prosecutor's *proprio motu*, pursuant to article 15 of the Statute). Article 14 and 15 respectively deal in greater detail with state referrals and the OTP's *proprio motu* powers (with particular regard to the procedure of authorization to open an investigation).

[207] See K. AMBOS, S. BOCK, *op. cit.*, 552: "Thus, the ICC Statute grants the Prosecution for the first time in history the power to select not only individual defendants but entire situations for investigation". The conceptual distinction between situations and cases is fundamental in the understanding of the Court's jurisdictional architecture (on this issue see, *supra*, the Introduction of the present work). As early as 2006, PTC I of the ICC recognised the importance of the distinction, in that case in relation to the procedural status of victims at the situation stage. See ICC, Decision on the Applications for Participation in the Proceedings of VPRS-1, VPRS-2, VPRS-3, VPRS-4, VPRS-5 and VPRS-6, *Prosecutor v. Lubanga*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-101-tEN-Corr PTC I, 17 January 2006, par. 65: "The Chamber considers that the Statute, the rules of Procedure and Evidence and the Regulations of the Court draw a distinction between situations and cases . . . *Situations*, which are generally defined in terms of temporal, territorial and in some cases personal parameters . . . entail the proceedings envisaged in the Statute to determine whether a particular situation should give rise to a criminal investigation as well as the investigation as such. *Cases*, which comprise specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects, entail proceedings that take place after the issuance of a warrant of arrest or a summons to appear" (emphasis added).

[208] As correctly pointed out in doctrine, the Prosecutor is not under an unconditional statutory duty to launch an investigation of a situation or eventually start individual prosecutions based on the mere

The Prosecutor's unprecedented ability to select both situations *and* cases for the exercise of the Court's jurisdiction is nevertheless counterbalanced by a number of legal constraints that contribute to shape the concrete latitude of the OTP's discretionary powers. In particular, apart from the jurisdictional requirements under the Statute, the exercise of discretion at the ICC must comply with a filtering system that governs the admissibility of situations and cases, and with various procedural avenues for judicial review of the OTP's most relevant selection decisions.

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fact that the Court's jurisdiction has been triggered pursuant to a state or UNSC referral. He or she will conduct a preliminary examination of the situation with a view to establish—*inter alia*—whether or not the conditions set out in article 53 of the Statute are met for the purposes of deciding to open an investigation or start a prosecution. See, e.g., H. OLÁSOLO, *The Triggering Procedure of the International Criminal Court*, cit., 42-43; W. A. SCHABAS, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd edition, Oxford, 2016, 829: "even when there is a referral or 'triggering' by the Security Council or by a State Party, the Prosecutor also conducts a preliminary examination. This is implied by article 53 because it is necessarily the basis for the decision of the Prosecutor about whether or not to proceed with an investigation. The consequence of this scheme is that an investigation under article 53 cannot begin until the Prosecutor has carried out a preliminary examination … Ultimately, then, the Prosecutor must decide in all cases whether or not to conduct an investigation"; J. TRAHAN, *The Relationship Between the International Criminal Court and the U.N. Security Council: Parameters and Best Practices*, in *Criminal Law Forum*, vol. 24, issue 4, 2013, 423-424: "Under the Rome Statute, regardless of how a situation is referred—that is, including if there is a Security Council referral—the Prosecutor undertakes a preliminary examination . . . The Security Council cannot *make* the Prosecutor act in the event of a referral. He or she must independently conclude that there is a reasonable basis to proceed". This position has always been shared by the OTP (see ICC-OTP, Policy Paper on Preliminary Examinations, November 2013, par. 76 "Upon receipt of a referral or a declaration pursuant to article 12(3), the Office will open a preliminary examination of the situation at hand. However, it should not be assumed that a referral or an article 12(3) declaration will automatically lead to the opening of an investigation"). *Contra*, see J. D. OHLIN, *International Law and Prosecutorial Discretion*, in *Whitehead Journal of Diplomacy and International Relations*, vol. 8, issue 2, 2007, 146-150 and, of the same author, *On the Very Idea of Transitional Justice*, in *Whitehead Journal of Diplomacy and International Relations*, vol. 8, issue 1, 2007, 61. The Author argues—on the basis of the normative relationship between obligations flowing from the UN Charter and the ICC Statute—that in case of referral of the UNSC, the ICC Prosecutor does not enjoy discretion on the opening of an investigation, because resolutions adopted under Chapter VII of the UN Charter can have the effect of removing such discretion, limitedly to the decision on the opening of an investigation (while discretion in deciding whether or not to prosecute specific individuals would be retained). This reasoning is not convincing for various reasons. First, because UNSC resolutions, including those referring a situation to the ICC, are binding upon UN Member States and not *per se* on the organs of a separate international organization independent from the UN. Second, because it is highly questionable that the UNSC, via a Chapter VII resolution, could in substance alter the jurisdictional machinery of an international treaty-based institution, and require its organs to act in terms that might be contrary to its founding instrument. As a matter of fact, once the Court's jurisdiction is triggered by the UNSC resolution, the jurisdictional machinery of the ICC—of which the OTP is a fundamental actor—must proceed *according* to the rules of the Rome Statute, which does not provide any differentiated treatment for UNSC referrals as regards the OTP's sole responsibility in determining whether or not to open an investigation pursuant to article 53(1) of the Statute. In this sense see L. CONDORELLI, S. VILLALPANDO, *op. cit.*, 577-580.

For instance, the OTP's decisions revolving around the admissibility test—which comprises the assessment of complementarity[209], gravity[210] and *ne bis in idem*[211]—can lead to a judicial review of prosecutorial choices on the initiation of investigations and prosecutions, and to rulings on the admissibility of a situation or case pursuant to the prosecution's selection decisions[212]. In the same vein, the OTP's power to proceed *proprio motu* is subject to judicial supervision and it does not entail the faculty to directly launch an investigation or prosecution, since the Prosecutor must preventively seek the PTC's authorization to do so[213]. The Prosecutor's decisions not to open and investigation or start a prosecution—at the conclusion of the preliminary examination—pursuant to article 53 of the Statute can be subject to judicial review, pursuant to a dual supervision scheme that can lead—depending on

[209] Article 17(1)(a) and (b), as well as par. 2 and 3 of the same article concentrate on the concepts of unwillingness and inability and the criteria to be taken into consideration in their assessment, thereby giving substance to the principle of complementarity, one of the normative cornerstones of the Rome Statute, as evidenced by paragraph 10 of the Preamble and article 1 of the Rome Statute. As recalled by W. A. SCHABAS, *The International Criminal Court: A Commentary on the Rome Statute*, cit., 453, the PTC has considered that complementarity is "the first part of the admissibility test" (see ICC, Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the incorporation of documents in the record of the case against Mr Thomas Lubanga Dyilo, *Prosecutor v. Lubanga*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-08-US-Corr, PTC I, 24 February 2006, par. 30, 41). It should be observed that in its practice the OTP—particularly in the reports on preliminary examinations and decisions pursuant to article 53 of the Statute—has given logical priority to the assessment of gravity over the complementarity profiles (only dealing with the latter if the former had been satisfied). See, e.g., ICC-OTP, Article 53(1) Report, *Situation on Registered Vessels of Comoros, Greece and Cambodia*, ICC-01/13-6-AnxA, 4 February 2015 (dated 6 November 2014), par. 1, 133-134, 148. On complementarity in general, see C. STAHN, M. EL ZEIDY (eds.), *The International Criminal Court and Complementarity: From Theory to Practice*, Cambridge, 2011.

[210] Article 17(1)(d) of the Rome Statute.

[211] Article 17(1)(c) and 20 of the Rome Statute define the parameters for the assessment of *ne bis in idem* (or double jeopardy) at the ICC.

[212] Articles 18 ("Preliminary rulings regarding admissibility") and 19 ("Challenges to the jurisdiction of the Court or the admissibility of a case") of the Rome Statute set the procedures to obtain a ruling on admissibility. In the case of article 18, it should be noted that such provision—which only applies to situations arising from state referrals and proceedings initiated *proprio motu* pursuant to article 13(c) and 15 of the Statute—allows states to obtain a ruling on admissibility as early as at the situation stage, i.e. well before the initiation of a 'case' for the purposes of prosecution (see W. A. SCHABAS, *The International Criminal Court: A Commentary on the Rome Statute*, cit., 475). To the contrary, article 19 deals, *inter alia*, with challenges to the admissibility of cases that have already been identified within a given situation. Both provisions introduce procedural incentives to deal with admissibility challenges as soon as possible, through the introduction of time limits (e.g. the one-month time limit provided for under article 18(2) of the Statute) or the reduction of the opportunities to submit an admissibility challenge (e.g., the 'one-shot' opportunity to challenge the admissibility of a case under article 19(4) of the Statute). On the practice of the ICC regarding admissibility challenges—exclusively under article 19, given the absence of relevant practice under article 18(2) of the Statute—see C. STAHN, *Admissibility Challenges before the ICC From Quasi-Primacy to Qualified Deference?*, in C. STAHN (ed.), *The Law and Practice of the International Criminal Court*, cit., 228-259.

[213] Article 15(3) and (4) of the Rome Statute.

the grounds on which the *nolle prosequi* decision is based—either to an *ex parte* request of review and a PTC's request to the Prosecutor to reconsider the no-action decision; or to a more pervasive form of 'judicial approval' on such decision, entailing the faculty for the PTC to mandate an investigation or prosecution if judges disagree with the Prosecutor's decision[214]. Nevertheless, no procedural mechanism is provided in order to challenge the Prosecutor's affirmative decision under article 53[215] or decisions not to put a potentially relevant situation on the list of preliminary examinations or to maintain a situation on the list for an indefinite period of time without any further determination on the opening of an investigation[216]. An additional

[214] See article 53(3)(a) and (b) and, *supra*, Chapter One, par. 3.3, footnote 93. The precise nature of this dual oversight mechanism has been clarified by the AC of the ICC in the appeal proceedings with regard to the Comoros' request for judicial review of the Prosecutor's decision not to open an investigation as regards the *Mavi Marmara*. See ICC, 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', *Situation on Registered Vessels of Comoros, Greece and Cambodia*, ICC-01/13-51, AC, 6 November 2015, par. 53-60 and ICC, Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation, *Situation on the Registered Vessels of the Comoros*, *Greece and Cambodia*, ICC-01/13-34, PTC I, 16 July 2015, par. 8-15.

[215] See ICC, Decision on Application under Rule 103, *Situation in Darfur, Sudan*, ICC-02/05, PTC I, 4 February 2009, par. 21-22: "the Chamber emphasises that article 53(3)(b) of the Statute only confers upon the Chamber the power to review the Prosecution's exercise of its discretion when it results in a decision not to proceed" adding that it "does not entrust the Chamber with the power to review the Prosecution's assessment that the initiation of a case against a given individual through the issuance of an arrest warrant or a summons to appear would not be detrimental to the interests of justice".

[216] This is an especially delicate issue in those situations where information disclosing the possible commission of crimes within the jurisdiction of the Court is provided by private entities such NGOs or groups of victims and aims at instigating a *proprio motu* of the Prosecutor. As a matter of fact such providers of information—contrary to states and the UNSC—do not have access to any remedy against the Prosecutor's decision not to put a situation on the list of preliminary examinations or, after completing such analysis, not to open an investigation. According to article 15(1) the Prosecutor is only under the duty to assess the seriousness and reliability of the information provided to his or her office, and pursuant to paragraph 6 of the same article he or she must inform the providers of his or her decision not to seek the PTC's authorization for the opening of an investigation (without prejudice to further evaluations based on new facts). A confirmation of the substantial lack of remedies against no-action decisions in such circumstances came from a 2014 decision of the PTC II. The PTC's decision stemmed from a rather peculiar situation in which former Egyptian President Morsi and his political party—through a law firm based in London—purported to submit a declaration of acceptance of the Court's jurisdiction under article 12(3) of the Statute. The Prosecutor issued a decision on the request on 23 April 2014 and a subsequent press release on 8 May 2014 alleging, *inter alia*, that the senders of the declaration did not possess "full powers" and as a consequence they could not act on behalf of the Egyptian state. For this reason the Office decided that the submission (together with the accompanying documents) had to be treated as a 'private' communication pursuant to article 15 of the Statute, and went on to conclude that no further action could be taken because the allegations fell outside the territorial and personal jurisdiction of the Court (see Prosecutor's Decision on the 'Declaration under Article 12(3) and Complaint regarding International Crimes Committed in Egypt', OTP-CR-460/13, 23 April 2014 and OTP, Press release, The determination of the Office of the Prosecutor on the communication received in relation to Egypt, ICC-OTP-20140508-PR1003, 8 May 2014). The lawyers of the senders then sought to challenge such decision first resorting to Regulation 46(2) of the Regulations of the Court and later to Regulation 46(3). The case was assigned to PTC II

layer of judicial review of the OTP's selection choices is then carried out with the issuance of a warrant of arrest or summons to appear[217] and, even more importantly, at the crucial procedural juncture of the confirmation of charges[218].

From the foregoing—cursory and partial—presentation of some of the most distinctive features of the ICC's prosecutorial discretion mechanism and judicial review thereof, it can be observed that the Court's system is characterised by what could be described as a 'paradox of discretion'. The ICC Prosecutor is endowed with a margin of discretion at the same time *wider* and *narrower* than the one of his or her

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and the judges dismissed *in limine* the application confirming that only a referring entity—state or UNSC—can challenge the Prosecutor's decision not to proceed with an investigation under article 53(1)(a) and (b). Similarly, in the case of *proprio motu*, the failure to include a situation in the list of preliminary examinations and/or to seek an authorization under article 15 of the Statute cannot be challenged by those who had provided the information to the OTP, given the fact that Rule 48 of the RPE directs the OTP to consider for that purpose the same elements set out in article 53(1)(a)-(c). See, ICC, Decision on the 'Request for review of the Prosecutor's decision of 23 April 2014 not to open a Preliminary Examination concerning alleged crimes committed in the Arab Republic of Egypt, and the Registrar's Decision of 25 April 2014', *Request under Regulation 46(3) of the Regulation of the Court*, ICC-RoC46(3)-01/14, PTC II, 12 September 2014, par. 6-7, 9. The same PTC II did not grant a request for reconsideration or leave to appeal against this decision (see ICC, Decision on a Request for Reconsideration or Leave to Appeal the "Decision on the 'Request for review of the Prosecutor's decision of 23 April 2014 not to open a Preliminary Examination concerning alleged crimes committed in the Arab Republic of Egypt, and the Registrar's Decision of 25 April 2014'", *Request under Regulation 46(3) of the Regulation of the Court*, ICC-RoC46(3)-01/14-5, PTC II, 22 September 2014, par. 5-8).

[217] Article 58 of the Rome Statute sets out the procedure for the issuance of a warrant of arrest or summons to appear, as well as the formal requirements and content of both the Prosecutor's application and warrant of arrest (or summons to appear) itself. For a critical view on the current trends in the case law of the Court as regards the issuance of warrants of arrest see M. RAMSDEN, C. CHUNG, *'Reasonable Grounds to Believe', An Unreasonably Unclear Evidentiary Threshold in the ICC Statute*, in *Journal of International Criminal Justice*, vol. 13, issue 3, 555-577. The Authors argue that the current jurisprudence of the various PTCs on article 58 has not provided sufficient clarity on the relevant standard of evaluation ("reasonable grounds to believe") and has somehow lowered such standard to the point that the judicial review of discretionary choices at this juncture—especially as regards the kind and amount of evidence needed to sustain a request for a warrant of arrest—may have become significantly less effective.

[218] Article 61 of the Rome Statute. On the confirmation of charges procedure and its crucial importance in the architecture of the ICC criminal procedure see, K. AMBOS, D. MILLER, *Structure and Functions of the Confirmation Procedure at the ICC from a Comparative Perspective*, in *International Criminal Law Review*, vol. 7, issue 2, 2007, 335-360. At 347-348 the Authors underline the two main functions of the confirmation procedure: "On the one hand, it operates as *a filter* and thus ensures that only the really important cases go to trial, and therefore protects the suspect against improper or unsubstantiated charges. On the other hand, it serves to avoid time-consuming discussions about disclosure of evidence in the trial phase". The importance of this filtering function, which necessarily entails a form of judicial review of the discretionary choices made by the Prosecutor and an assessment of the evidence presented for the purposes of confirmation is also underlined, with ample references to the Court's pertinent case law, by V. NERLICH, *The Confirmation of Charges Procedure at the International Criminal Court: Advance or Failure?*, in *Journal of International Criminal Justice*, vol. 10, issue 5, 2012, 1347: "The confirmation process cannot be a mere rubber-stamping of the Prosecutor's charges, lest the confirmation of charges should become void of any meaning".

international(ised) counterparts. On the one hand, he or she can choose not only the *cases* for prosecution, but also the *situations* warranting the intervention of the Court (which in the case of other international jurisdictions were in general externally and politically pre-determined). On the other hand, his or her selection decisions are subject to a more sophisticated multi-tiered system of judicial supervision designed to prevent—with a degree of effectiveness that is dependent on the attitude of judges in the exercise of their powers[219]—arbitrariness and excesses of prosecutorial discretion. At the same time, while the position of the independent Prosecutor has been significantly reinforced, his or her reliance on the cooperation with states and the UNSC—whose decisions are frequently a function of *realpolitik* considerations[220]—could not have been completely eliminated, in line with the consensual treaty-based nature of the institution and the necessity to strike a balance between the need for accountability and the recognition of state sovereignty[221].

These innovative normative and institutional features of the ICC prosecutorial system, as well as the concrete decisions of the involved actors (OTP and judges *in primis*) and their adherence to the statutory and regulatory framework of the ICC, will be carefully examined both in their *static* and *dynamic* aspects in the following parts, with a particular focus on the creative/transformative role of prosecutorial and

[219] The conceptual categories of 'activism' and 'deference' can be used to describe two possible differing approaches on the parts of judges in the exercise of judicial review of prosecutorial discretion. As it will be seen in greater detail, the trends in case law towards one or the other approach are highly dependent on the specific procedural stage in which judicial review takes place (and the corresponding different standards of review), as well as on the specific facts of a case and the litigation strategies of the involved actors. On the point see W. A. SCHABAS, *Prosecutorial Discretion v. Judicial Activism at the International Criminal Court*, cit., 731-761.

[220] In particular, the practice of self-referrals has sparked significant controversy, given the risks of instrumentalisation of this mechanism on the part of the (self-)referring state. See, *supra*, Chapter One, par. 3.3, footnote 86. The inevitable relevance of political considerations in the UNSC's decisions to refer situations to the ICC seems evident looking at the different approaches taken by the Council with regard to international crisis, such as the situations of Sudan or Libya (object of referral) and, for instance, Syria.

[221] The whole institutional and procedural construct of complementarity serves this fundamental purpose. Another example can be found, for instance, in article 16 of the Rome Statute entrusting the UNSC with the power to defer the beginning or continuation of an investigation or prosecution for a period of 12 months by means of a resolution under Chapter VII of the UN Charter (resolution that can be annually renewed). The significant reliance of the Court (and above all of the Prosecutor) on state cooperation is also textually evident from the Statute (see, e.g., the references to state cooperation as regards the powers and duties of the Prosecutor under article 54(3) letter (c) and (d); or the entire Part IX and X of the Statute dedicated to matters of cooperation between the Court and the State Parties).

judicial practice in shaping the Court's system of checks and balances concerning the exercise of discretionary powers.

PART TWO

THE *STATIC* DIMENSION OF PROSECUTORIAL DISCRETION AT THE ICC AND THE INSTITUTIONAL INTERPLAY BETWEEN THE OTP AND CHAMBERS

CHAPTER ONE

THE LEGAL BASIS FOR PROSECUTORIAL DISCRETION AT THE ICC

1. Introduction

The purpose of this chapter is to provide a more detailed analysis of the legal basis for prosecutorial discretion in the substantive and procedural legal architecture of the ICC. Although some of the most distinctive features of the ICC's prosecutorial mechanism have already been outlined in the previous chapters, a closer look at their statutory and regulatory foundations is necessary in order to get a better grasp of the overall normative design provided by the relevant texts.

As it will clearly emerge from the following paragraphs, the Statute, RPE and the other regulatory texts only provide scarce indications as regards the concrete latitude and mode of exercise of prosecutorial discretionary powers, thereby leaving to the *practice* of the OTP and Chambers—in their institutional interplay—the onus to strike a reasonable balance between the potentially competing needs of flexibility and consistency. The reasons for the existence of areas of broad constructive ambiguity in the texts are here considered, in the broader context of the negotiating history leading to the adoption of the Statute and the other relevant texts.

As regards the methodology of this *static* analysis, it should be preliminarily underlined that it has not proceeded by means of a mechanical exegesis of the relevant provisions—which have already been the object of extensive commentary—but has instead attempted to provide a more systematic understanding of the

principles and rules governing the exercise of prosecutorial powers. In this regard, the focus has been on the *normative interaction* between the different sources constituting the stratified—substantive and procedural—system of norms applicable to prosecutorial discretionary choices and their judicial review. Issues such as—*inter alia*—the hierarchy between these different sources, the solution of discrepancies between them, the different levels at which they operate, and the ways in which they influence the concrete exercise of prosecutorial choices have been considered.

In addition, it should be stressed that in the present chapter the analysis of the legal basis for prosecutorial discretion has been carried out from the *subjective* institutional perspective of the OTP. In other words, the focus has been on *enabling and constraining principles and rules*, i.e. the statutory and regulatory provisions that either explicitly/implicitly allow (or presuppose) a margin of discretion on the part of the prosecuting authorities, or explicitly/implicitly exclude (or limit) said discretion.

The conceptual distinction between norms expressing *principles* and norms expressing *rules* has guided the examination of the relevant provisions, thereby elucidating the different degrees in their bindingness and the room left for integrative and transformative practices of the judicial actors[222].

The analysis carried out in the present chapter will be complemented in Chapter Two through the study of prosecutorial policy documents and in Chapter Three with the consideration of the role of judges, with regard to their supervisory powers as a necessary component of the *dialectical* functioning of the checks and balances mechanism on prosecutorial discretionary choices at the ICC.

2. The independent Prosecutor in the negotiating history of the Statute

Much has been written about the negotiating history of the Rome Statute and the pragmatic compromises leading to the adoption of the founding document of the ICC[223]. As already pointed out elsewhere in the present work, the prosecutorial model

[222] The distinction, which can be traced back—at least in its contemporary formulation—to the writings of authors such as R. DWORKIN and R. ALEXY, can prove useful in order to distinguish the norms which apply "in an all-or-nothing fashion" (*rules*) from those expressing "a consideration inclining in one direction or another" (*principles*). See R. DWORKIN, *op. cit.*, 24, 26 and R. ALEXY, *A Theory of Constitutional Rights*, Oxford, 2002, 57.

[223] For a recollection of the main issues regarding the role and powers of the Prosecutor discussed during the negotiating phase see S. A. FERNÁNDEZ DE GURMENDI, *op. cit.*, 175-188 and, with

to be adopted for the new court—with particular regard to the institutional role, powers and attributions of the Prosecutor—proved to be one of the most contentious legal and political issues during the preparatory stage and up to the last-minute decisive negotiations at the Rome Conference[224]. Doubts on the feasibility of a prosecutor endowed with the power to trigger the Court were expressed as early as of 1996 in the Report of the Preparatory Committee on the Establishment of an International Criminal Court, and were echoed throughout the preparatory phase by a significant group of states[225]. While the idea of an effectively independent

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particular regard to the American opposition to the *proprio motu* powers, D. SCHAFFER, *False Alarm about the* Proprio Motu *Prosecutor*, cit., 29-44. Some of the most authoritative commentaries to the Rome Statute devote significant attention to the negotiating history, the genesis of the Court's procedural regime in general and to the role of the Prosecutor in particular. See, e.g., W. A. SCHABAS, *The International Criminal Court: A Commentary on the Rome Statute*, cit., 394-397; A. CASSESE, P. GAETA, J. R. W. D. JONES (eds.), *The Rome Statute of the International Criminal Court—A Commentary*, *op. cit.*, 34, 57-58, 82-83, 132.

[224] *Ibidem*.

[225] See Report of the Preparatory Committee on the Establishment of an International Criminal Court (Proceedings of the Preparatory Committee during March-April 1996), A/51/22, Vol. I, Supp. No. 22, 1996, par. 149-151. For direct references to the doubts expressed by the delegates of various states later in the political negotiations as regards the independent Prosecutor and his or her ability to trigger the Court's jurisdiction—especially before the German-Argentinean proposal on the supervisory role of the Pre-Trial Chamber gained sufficient consensus—see the Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, A/CONR183/13 (Vol. II), 1998. See, particularly, the position of Japan (67, par. 46, considering "inappropriate to give the Prosecutor the right to initiate an investigation *proprio motu*"); India (86, par. 50, in the same vein); Malaysia (109, par. 50: "he should not be empowered to initiate an investigation *proprio motu* in view of the principle of complementarity and the danger of adverse effects on the integrity and credibility of the office and possible accusations of bias"); Qatar (110, par. 66, in the same vein); Nigeria (111, par. 88 and 198, par. 77); China (124, par. 39: "The Prosecutor's right to conduct investigations or to prosecute *proprio motu,* without sufficient checks and balances against frivolous prosecution, [is] tantamount to the right to judge and rule on State conduct. The provision that the Pre-Trial Chamber must consent to the investigation by the Prosecutor [is] not an adequate restraining mechanism"); Turkey (124, par. 44: "Conferring a *proprio motu* role on the Prosecutor [risks] submerging him with information concerning charges of a political, rather than a juridical nature"); Sudan (126, par. 77: "The Statute gave the Prosecutor, acting *proprio motu,* a role beyond the control of the Pre-Trial Chamber. The Prosecutor should be under reasonable and logical control, and should not act ex officio"); Pakistan (128, par. 95: "Only a State party, and not the Prosecutor *proprio motu,* should be competent to activate the trigger mechanism"); Indonesia (200, par. 103: "The Prosecutor should not be able to initiate investigations *proprio motu*"); Israel (201, par. 11, whose delegation was "unable to support the proposal for ex officio, *proprio motu* investigations by the Prosecutor" and stated that "If the Prosecutor [takes] over the proposed functions, a situation might result in which no complaints by States [are] put forward. Furthermore, there would be a risk of the Prosecutor being overburdened by a multitude of complaints from bodies of all kinds, including frivolous or political complaints which would adversely affect the Prosecutor's independence and standing"); United States of America (202-203, par. 125-130, on accounts that "It would be naive to ignore the considerable political pressure that organizations and States would bring to bear on the Prosecutor in advocating that he or she should take on the causes which they championed" and that "Under the *proprio motu* model, it would become too easy for States parties to abdicate their responsibilities and leave it to individuals, organizations and the Prosecutor to initiate cases without the foundation of political will and commitment that only States could provide. The Prosecutor might

international Prosecutor had been entirely rejected from the start by some states—and forcefully supported by many others—the final compromise was only reached in the last rounds of negotiation in Rome, when significant consensus was gathered around the balanced proposal jointly put forward by Germany and Argentina[226] to the effect of including the Prosecutor's capacity to trigger *proprio motu* the Court's jurisdiction, but only subject to the safeguard of a PTC's authorization for the purposes of opening a full investigation[227].

The frequent references in the preparatory works to adequate "safeguards" or "constraints" on prosecutorial discretion—also expressed by the states supportive of the *proprio motu* powers—reveal the extreme political sensitiveness of the issue, as

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then become isolated in a difficult international arena without the clear, continuing support of States parties". As to the specific issue of prosecutorial discretion the American delegate stated that "in the *proprio motu* setting, the exercise of prosecutorial discretion, which was not universally accepted, would become a frequent and essential step in preserving the proper functioning and focus of the Court. Considerably expanding the number of instances in which the Prosecutor might intervene was unlikely to result in good prosecutions, would undermine the perception of the Prosecutor's impartiality and would subject the Prosecutor to incessant criticism by groups and individuals who disagreed with his or her choices"); Azerbaijan (299, par. 71); Russian Federation (301, par. 114: "Before a case [is] referred to the Court, a State would have to make a complaint. That would make it possible to remove any political pressure from the Prosecutor"); Jamaica (306, par. 15, which "doubted very much whether the *proprio motu* power of the Prosecutor would yield the anticipated benefits", but declared to be "prepared to join in any consensus on the issue"); Yemen (310, par. 82); Oman (312, par. 129); Bangladesh (314, par. 9: "To endow the Prosecutor with the power to initiate proceedings *proprio motu* would be to invest a single individual with some of the attributes of a State"); Kenya (317, par. 33); Islamic Republic of Iran (317, par. 42); Cuba (331, par. 69); Egypt (335, par. 6); Algeria (337, par. 32); Sri Lanka (339, par. 46: "there [is] no justification in international law for the powers envisaged under [the proposed version of] article 12, which seriously threaten[s] the principle of complementarity"); Ethiopia (341, par. 63: "conferral of *proprio motu* powers on the Prosecutor would be detrimental to the independence, universality and effectiveness of the Court"); Iraq (341, par. 64).

[226] See the Proposal submitted by Argentina and Germany, A/AC.249/1998/WG.4/DP.35, 25 March 1998.

[227] The results of this compromise are reflected in the current formulation of article 15 of the Statute. The supervisory role of the Pre-Trial Chamber in case of *proprio motu* envisaged under par. 3-5 of the same article proved to be an acceptable compromise in order to reconcile the progressive idea of an autonomous Prosecutor and the necessity to exercise reasonable control over his or her choice to engage the Court's jurisdiction. Some delegations, while accepting the formulation later transfused in article 15, expressed fears that this authorisation mechanism would introduce unjustified limitations on the Prosecutor's independence. See A/CONR183/13 (Vol. II), 1998 for the moderately critical position of Ecuador (315, par. 14, accepting the safeguards only for the purposes of advancing consensus); the position of Finland (338, par. 39) and Lithuania (340, par. 60); and the more forceful stance taken by Congo (315, par. 17 and 345, par. 16, stating that the Prosecutor should have the power to directly open an investigation and the Pre-Trial Chamber "should only intervene once proceedings had commenced, to check abuses") and New Zealand (202, par. 120, stating that "it would prefer there to be no judicial review of the Prosecutor's independent powers").

well as an interesting polarisation among states, whose position in Rome did not always conform to the respective national legal tradition of criminal procedure[228].

It should nevertheless be noted that the *travaux préparatoires* reveal how the discussion concerning the practicalities of the Prosecutor's discretionary powers has been rather limited, mainly focusing on the core issue of the power to trigger the Court's jurisdiction independently from a state or UNSC referral[229]. In particular, as regards the concrete exercise of discretionary powers at different junctures of the proceedings, significant leeway was left to subsequent interpretation and practice of both the OTP and Chambers[230].

3. The legal basis for discretion in the Statute

The Rome Statute, the founding document of the ICC's legal regime, is undeniably the primary source of the principles and rules governing the functioning of the Court, in accordance with the system of sources delineated by article 21 of the

[228] One could have expected the states' diverging approaches to reflect the different national legal traditions in the field of criminal procedure (or at least those of the main legal families across the spectrum). Quite to the contrary, the legal systems of many of the states strongly supportive of the *proprio motu* powers and of a wide margin of prosecutorial discretion are premised on various procedural and institutional limitations of the prosecutor's discretion (see, e.g., Germany, Italy), whereas the criminal procedure of states opposing such discretionary powers at the international level provide for broad prosecutorial discretion in domestic proceedings, allowing for judicial supervision/intervention only in extreme cases (see, e.g., most of the criminal procedures in the US, as well as China, Israel, Nigeria). This is a clear indication that the issue had been predominantly considered in its political implications, more than from the point of view of the technicalities of the criminal justice mechanism.

[229] The issue was debated more from the perspective of the jurisdictional reach of the newly established court through the role of the Prosecutor, than from the perspective of the procedural *dynamics* of prosecutorial discretion once the Court's jurisdiction is triggered. This is confirmed by the absence of unambiguous indications in the Statute as to the concrete latitude of these prosecutorial selection powers as well as to the exact criteria for their exercise both in the selection of situations and cases. It should be noted that at the Rome Conference, even states opposing the *proprio moutu* powers of the Prosecutor favoured the recognition to the Prosecutor of a wide degree of discretion in the selection of cases. See, albeit with some degree of incoherence, the American position on the issue in Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, A/CONR183/13 (Vol. II), 95, par. 60: "he or she should have maximum independence and discretion in prosecuting cases referred by States parties or the Security Council" and 202, par. 129: "Some prosecutorial discretion would be necessary and appropriate even in the context of a State referral regime".

[230] As it will be seen in greater detail, the Statute does contain some indications and criteria to orient the selection choices to be made by the Prosecutor, thereby 'channelling' his or her discretion. Nevertheless, one must recognise that the normative standards regarding, for instance, the decision to open a preliminary examination and/or an investigation—such as the "reasonable basis to believe" test, the exact content of the admissibility and gravity assessment or of the "interests of justice"—have been loosely defined by the drafters, thereby promoting a significant degree of flexibility.

Statute[231]. Leaving aside the complex issue of its legal relation with other international rules—both conventional and customary[232]—*external* to the Rome system, the primacy of the Statute among the legal texts *internal* to the 'Rome regime' is clearly stipulated or implied by various provisions[233].

It is therefore a sensible approach to assume the Statute as a starting point for a detailed analysis of the legal foundations of discretion from the point of view of the Prosecutor's attributions and the most relevant legal issues thereof. Nevertheless, the undisputed primacy of the Statute does not exclude that significant contributions in shaping the concrete latitude and mode of exercise of prosecutorial discretion can be

[231] On the system of applicable law under article 21 see G. BITTI, *Article 21 and the Hierarchy of Sources of Law before the ICC*, in C. STAHN (ed.), *The Law and Practice of the International Criminal Court*, cit., 411-443 and in the same volume the contribution of J. POWDERLY, *The Rome Statute and the Attempted Corseting of the Interpretative Judicial Function: Reflections on Sources of Law and Interpretive Technique*, 444-498. See, also E. FRONZA, *Le fonti*, in E. AMATI, M. COSTI, E. FRONZA, P. LOBBA, E. MACULAN, A. VALLINI, *op. cit.*, 57-80.

[232] On this fundamental issue see R. CRYER, *Royalism and the King: Article 21 of the Rome Statute and the Politics of Sources*, in *New Criminal Law Review: An International and Interdisciplinary Journal*, vol. 12, no. 3, 2009, 390-405, particularly at 393 and 396-398. The Author criticises the approach to the sources of ICL taken by the drafters in designing article 21 of the Statute on accounts that "The interrelationship of sources is more complex than Article 21's apparently rigid hierarchy implies", as well as the early treatment of the interrelation of sources provided by the Court in the first Al-Bashir arrest warrant decision. For an analysis of the allegedly diminished role of customary international law in the ICC regime see L. VAN DEN HERIK, *The Decline of Customary International Law as a Source of International Criminal Law*, in C. A. BRADLEY (ed.), *Custom's Future: International Law in a Changing World*, Cambridge/New York, 2016, 230-252. See also the insightful analysis carried out by J. D'ASPREMONT, *The Two Cultures of International Criminal Law*, in *Amsterdam Center for International Law Research Paper 2017-01*, 2017, 1-29. The Author argues that what he refers to as the "Roman Culture" of international law inspiring the Statute (as opposed to the "Bavarian Culture" expressed by the paradigms of Nuremberg and the *ad hoc* tribunals), does not exclude expansionist judicial interpretations of the Statute itself, including through resort to international customary international law. In other words, the sibylline formulation of article 21—read in conjunction with article 22 of the Statute ("*Nullum Crimen Sine Lege*")—"opens a remarkable interpretive space for expansion and empowers any expansionist interpreter" resulting in the "elevation of interpretation as the central mode of expansion of international criminal law" (*ibidem*, 25-26).

[233] A first indication in this sense may be derived from article 21(1)(a), listing the Statute first among the other primary legal texts of the Rome legal regime. An unequivocal confirmation of this primacy can be found in article 9(3) concerning the Elements of Crimes, which stipulates that "The Elements of Crimes and amendment thereto *shall* be consistent with this Statute" (emphasis added). In the same vein, article 51(4) of the Statute establishes that "The Rules of Procedure and Evidence, amendments thereto and any provisional Rule *shall* be consistent with this Statute" (emphasis added), while the following par. 5 of the same article provides that "In the event of conflict between the Statute and the Rules of Procedure and Evidence, the Statute shall prevail". Other relevant regulatory—hence sub-statutory—legal texts explicitly confirm this stance. See, e.g., Regulation 1(2) of the Regulations of the Office of the Prosecutor, ICC-BD/05-01-09: "These Regulations shall be read *subject* to the Statute, the Rules, and the Regulations of the Court and *in conjunction* with the Regulations of the Registry and the Staff Rules and Regulations" (emphasis added). On the infra-normative relationship between the legal sources *internal* to the Rome regime and their hierarchically organised layers see, G. BITTI, *op. cit.*, 414-422.

provided by sub-statutory sources, such as the RPE and the various Regulations, which are analysed in turn. As correctly pointed out—in a critical fashion—by G. BITTI, various areas of procedural law at the ICC have witnessed a relevant contribution of both the RPE and their judicial interpretation—especially at the trial level—thereby showing a potential for significant flexibility and "judicial creativity"[234].

3.1 Indications of principle in the Preamble

The interpretive value of preambles in international treaties has been the object of attention both in scholarly writings and international case law[235]. It is widely accepted that preambular provisions contribute to the ascertainment of the object and purpose of a treaty and may assist the interpreter in determining the content of specific provisions contained therein[236]. This is confirmed by article 31(2) of the VCLT, which explicitly refers to the preamble when dealing with the *contextual* (or *systematic*) criterion of treaty interpretation[237]. In general, preambles mainly contain enunciations of principle—frequently to the effect of expressing the policy considerations behind the conclusion of the treaty—and of a rather generic formulation. The capacity of preambular provisions to give rise *per se* to legal obligations is debated in international law[238].

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[234] G. BITTI, *op. cit.*, 443.

[235] See N. QUOC DINH, P. DAILLIER, A. PELLET, *Droit International Public*, 8th edition, Paris, 2009, 146; A. AUST, *Modern Treaty Law and Practice*, New York, 2007, 425-426; M. E. VILLIGER, *The Rules on Interpretation: Misgivings, Misunderstandings, Miscarriage? The 'Crucible' Intended by the International Law Commission*, in E. CANNIZZARO (ed.), *The Law of Treaties Beyond the Vienna Convention*, Oxford, 2011, 110. Among the numerous instances of judicial recognition of the interpretive value of preambles see—in the pre-VCLT era—ICJ, *Case concerning the Application of the Convention of 1902 governing the Guardianship of Infants (Netherlands v. Sweden),* Judgment, 28 November 1958, I.C.J. Reports 1958, 67 and, after the adoption of the VCLT, *Case concerning a dispute between Argentina and Chile concerning the Beagle Channel*, Arbitral Award, 18 February 1977, Reports of International Arbitral Awards**,** vol. XXI, 89, par. 19.

[236] *Ibidem*: "Although Preambles to treaties do not usually—nor are they intended to—contain provisions or dispositions of substance—(in short they are not operative clauses)—it is nevertheless generally accepted that they may be relevant and important as guides to the manner in which the Treaty should be interpreted, and in order, as it were, to "situate" it in respect of its object and purpose".

[237] Article 31(2) of the VCLT: "The *context* for the purpose of the interpretation of a treaty shall comprise, in addition to the text, *including its preamble* and annexes" (emphasis added). See also M. E. VILLIGER, *op. cit.*, 110 stressing that "the contextual or systematic means of interpretation … aim to avoid inconsistencies between the individual term and its textual surroundings".

[238] Some authors maintain almost categorically that preambles never give rise to legal obligations. See

The Rome Statute makes no exceptions to this well-established practice and contains a Preamble eloquently expressing the reasons for the establishment of the Court and the institutional objectives that should inspire its activity, elaborating *inter alia* on its relations with national jurisdictions and other relevant international organisations (namely the UN)[239]. While the degree of bindingness of the provisions of the Preamble is the object of debate among ICL scholars[240], the Court—similarly to other international adjudicating bodies—has recognised in various circumstances the relevance of the Preamble for the interpretation of the Statute[241].

N. QUOC DINH, P. DAILLIER, A. PELLET, *op. cit.*, 146: "Dans l'ordre international, le préambule d'un traité ne possède pas de force obligatoire, il constitue toutefois un élément d'interprétation du traité". Other scholars, on the contrary, maintain that the provisions of a preamble are to be considered on equal footing with those contained in the operative part of the treaty and can, at certain conditions, give rise to legal obligations. See, e.g., E. SUY, *Le Préambule*, in E. YAKPO, T. BOUMEDRA (eds.), *Liber Amicorum Judge Mohammed Bedjaoui*, The Hague, 1999, 260-261. International tribunals have at times recognised that the way in which a particular preambular provision is drafted could point to the conclusion that the parties intended to confer it binding force. See, e.g., ICJ, *Case concerning rights of nationals of the United States of America in Morocco (France v. USA)*, Judgment, 27 August 1952, I.C.J. Reports 1952, 184: "Considered in the light of these circumstances, it seems clear that the principle [of equality of treatment] was intended to be of a binding character and not merely an empty phrase".

[239] On the negotiating history of the Preamble see T. N. SLADE, R. CLARK, *Preamble and Final Clauses*, in R. S. LEE (ed.), *The International Criminal Court: The Making of the Rome Statute*, cit., 421-450.

[240] For instance, J. K. KLEFFNER, *Auto-referrals and the Complementary Nature of the ICC*, in C. STAHN, G. SLUITER, *op. cit.*, 45, footnote 18, maintains that "Nothing in the law of treaties indicates that provisions have an inferior legal force or no legal force at all, by virtue of the fact alone that they are set forth in the Preamble rather than the *dispositif*". On the contrary, M. BERGSMO, O. TRIFFTERER, K. AMBOS, *Preamble*, in O. TRIFFTERER, K. AMBOS (eds.), *Commentary on the Rome Statute of the International Criminal Court*, 3rd edition, München/Oxford/Baden-Baden, 2016, 4 contend that while the Preamble "is an integral part of the Statute . . . the operative articles have higher rank than the Preamble". This latter view has been criticised by W. A. SCHABAS, *The International Criminal Court: A Commentary on the Rome Statute*, cit., 32-33, as an "overly technical and conservative understanding of the Preamble and one that does not appear to find any confirmation in the case law of the Court". *Ibidem* at 40, the same Author recalls, with reference to case law, that the Court has recognised how the legal significance of the Preamble extends well beyond the mere "hortatory prose" (see, ICC, Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation, *Prosecutor v. Ruto et al.*, *Situation in the Republic of Kenya*, ICC-01/09-01/11-1274-Corr2, TC V(A), 17 April 2014, par. 64).

[241] See, e.g., ICC, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, *Situation in the Democratic Republic of the Congo*, ICC-01/04-168, AC, 13 July 2006, par. 33-34: "the purposes [of the Statute] may be gathered from its preamble and general tenor of the treaty". Various Chambers have also derived interpretive assistance from the Preamble in order to enlighten the Statute's provisions on punishment and sentencing, in particular in establishing the objectives of punishment at the ICC. See ICC, Decision on Sentence pursuant to article 76 of the Statute, *Prosecutor v. Katanga*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-3484-tENG-Corr, TC II, 23 May 2014, par. 37-38; ICC, Judgment and Sentence, *Prosecutor v. Al Mahdi*, *Situation in the Republic of Mali*, ICC-01/12-01/15-171, TC VII, 27 September 2016, par. 66; ICC, Decision on Sentence pursuant to Article 76 of the Statute, *Prosecutor v. Bemba et al.*, *Situation in the Central African Republic*, ICC-01/05-01/13-2123-Corr, TC VII, 22 March 2017, par. 19.

Some of the Preamble's enunciations bear direct or indirect relevance on the issue of prosecutorial discretion, thereby providing some programmatic indications that may contribute to shape its exercise. Paragraph 4 of the Preamble is the first of such provisions and reads as follows

> **Affirming** that *the most serious crimes of concern to the international community as a whole* must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation[242]

At a first glance, the reference to "the most serious crimes of concern to the international community as a whole" seems to be the mere recognition—although conveyed with a degree of "literary touch"[243]—that the Court was set up to deal with some of the most heinous forms of criminality known to mankind. A more attentive and systematic reading of the Statute—i.e. one that links the Preamble to the other relevant provisions dealing with the seriousness/gravity of the crimes within the jurisdiction of the Court —reveals a more programmatic function of this preambular provision. This paragraph sets the broad lines of the criminal policy priorities of the Court, preliminarily restricting its mandate to a selected group of particularly serious crimes and preparing the ground for their exhaustive enumeration in article 5 of the Statute. At the same time, it stresses the necessity to put an end to impunity for the perpetrators of such crimes, through the combination of national and international efforts to ensure effective prosecution and accountability[244]. The same formula is repeated in paragraph 9 of the Preamble, with the added references to the jurisdiction of the Court and its relationship with the UN system[245]. These references to the concept of seriousness/gravity of the crimes—permeating the normative fabric of the Statute—are replicated in article 1 and 5 of the Statute, and further developed into fully operational legal parameters for the exercise of prosecutorial discretion under

[242] Rome Statute, Preamble, par. 4 (bold in the original text, emphasis added).
[243] T. N. SLADE, R. CLARK, *op. cit.*, 425.
[244] Paragraph 4 limits itself to stressing the need for international cooperation and does not deal with the principles governing the allocation of labour between the national and international jurisdictions.
[245] See Rome Statute, Preamble, paragraph 9: "**Determined** to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court *in relationship with* the United Nations system, *with jurisdiction over* the most serious crimes of concern to the international community as a whole" (bold in the original text, emphasis added).

article 17 and 53 of the Statute[246]. The inextricable nexus amongst them has already been recognised by the Prosecutor and the Court's Chambers, although not always in a consistent way[247].

Paragraph 5, besides reaffirming the states' commitment to put an end to impunity, refers to the preventive function of the enforcement of ICL[248]. Such reference to *prevention through accountability* presents clear connections to the Prosecutor's discretionary powers, both with respect to his or her selection decisions (if, when, who and for which crimes to investigate and prosecute) and to the issue of the purpose, kind and quantity of the penalties applicable at the ICC[249].

Lastly, Paragraph 6 and 10 of the Preamble lay the foundations of the principle of complementarity of the ICC regime[250]. The entire institutional and procedural architecture of the ICC system is premised on a "division of labour"[251] between the national and international jurisdictions, along the lines more specifically

[246] See article 17 ("Issues of admissibility") and in particular its paragraph (1)(d) referring to "sufficient gravity to justify further action of the Court" and article 53 on the parameters for the Prosecutor's decision to open or not to open an investigation or to start a prosecution.

[247] The OTP has recognised—making reference to paragraph 4 of the Preamble—that gravity considerations play a central role in determining whether or not to open an investigation (see, ICC-OTP, Policy Paper on Preliminary Examinations, November 2013, par. 22 and 59-66, more specifically footnote 42). See, W. A. SCHABAS, *The International Criminal Court: A Commentary on the Rome Statute*, cit., 40-41 on the allegedly irreconcilable indications derived from this preambular phrase by different Chambers as regards the latitude of the definition of crimes against humanity. On the correct understanding of the "most serious crimes" clause for the purposes of the selection decision of the OTP see ICC, Judgment on the Prosecutor's Appeal against the Decision of the Pre-Trial Chamber I Entitled: "Decision on the Prosecutor's Application for a Warrant of Arrest, Article 58", *Prosecutor v. Lubanga*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-169-US-Exp, AC, 13 July 2006, par. 73-75, 78-79.

[248] Rome Statute, Preamble, Paragraph 5: "**Determined** to put an end to impunity for the perpetrators of these crimes and thus to *contribute to the prevention of such crimes*" (bold in the original text, emphasis added).

[249] As already pointed out (see, *supra*, footnote 241) the Court has made reference to the Preamble in order to clarify the purposes of the penalty system of the ICC regime, given the absence of any other clear indications in the Statute to that end, and in particular in articles 76 and 77 dealing with sentencing and the applicable penalties. The Prosecutor not only plays a crucial role in the selection of situation and cases, but also contributes—with his or her reasoning and requests on sentencing—to give substance to the function of penalties and to the criminal policy reference to prevention in the Preamble.

[250] Rome Statute, Preamble, Paragraph 6: "**Recalling** that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes" and Paragraph 10: "**Emphasizing** that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions" (bold in the original text). The complementary nature of the ICC is further affirmed by article 1 of the Statute. Article 17(1) of the Statute makes a direct *internal* reference to paragraph 10 of the Preamble. As correctly pointed out by W. A. SCHABAS, *The International Criminal Court: A Commentary on the Rome Statute*, cit., 53, it is the only case in which an operative provision in the Statute makes an explicit reference to the Preamble.

[251] This expression had been used by the OTP in its Paper on Some Policy Issues Before the Office of the Prosecutor, September 2003, 5.

defined under articles 17, 18, 19 and 53[252]; the Prosecutor being—under the supervision of the Chambers—the crucial organ in making the selection decisions instrumental to the functioning of the complementarity regime[253]. Again, while stating the principle in a rather laconic fashion, the Preamble sets the 'horizon of possibilities' for the specific provisions establishing the practicalities of the admissibility regime, of which complementarity—in all its aspects—is a fundamental component[254].

The preceding analysis clearly demonstrates that there is a *fil rouge* connecting the general preambular provisions of principle—particularly on seriousness/gravity of the crimes and complementarity—and the corresponding statutory rules governing the Court's jurisdictional reach and the exercise of prosecutorial discretionary powers. Although the purpose of the Preamble is not to provide immediately applicable rules capable of directly regulating the behaviour of the involved actors, the resort to its provisions in various OTP's documents and Court's decisions relating to discretionary choices indicates its potential to express "the moral and political basis for the specific legal provisions thereafter set out"[255], as well as its aptitude to orient their systematic and teleological interpretation in the context of a 'principle-to-rule' relationship.

3.2 Article 15 and the Prosecutor's proprio motu *powers*

Article 15 of the ICC Statute, entitled "The Prosecutor", contains the first unequivocal textual recognition of the Prosecutor's discretionary powers, with

[252] Articles 17 and 18-19 deal respectively with admissibility and challenges to admissibility, while article 53 deals with the parameters and procedures to be followed by the OTP in deciding on whether or not to start an investigation or prosecution.
[253] From the earliest stages of proceedings, such as at the preliminary examination juncture, the Prosecutor assesses the complementarity profiles of a situation under consideration. Articles 53(1)(b) and 2(b) of the Statute explicitly mandate the Prosecutor to positively conclude on the admissibility profiles according to the parameters—and following the procedures—set out in article 17, in order to decide on the opening of an investigation or prosecution. The extent to which such an assessment involves an exercise of discretion has been, rather unconvincingly, called into question by at least one Pre-Trial Chamber (see ICC, Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation, *Situation on the Registered Vessels of the Comoros*, *Greece and Cambodia*, ICC-01/13-34, PTC I, 16 July 2015, par. 14).
[254] The other parameters integrating the admissibility assessment are sufficient gravity and *ne bis in idem* (as defined under article 20(3) of the Statute).
[255] ICJ, *South West Africa, Second Phase (Ethiopia v. South Africa; Liberia v. South Africa)*, Judgment, 18 July 1966, ICJ Reports 1966, 32, par. 50.

particular regard to his or her ability to trigger the Court's jurisdiction *proprio motu*. As pointed out by one Pre-Trail Chamber, this article "is one of the most delicate provisions of the Statute"[256], for its systemic implications on the institutional balance between prosecutorial discretion, judicial controls and states' sovereignty[257].

In essence, the procedural mechanism envisaged under article 15 is relatively straightforward and can be summarised as follows in its consecutive steps:

a) Receipt of information by the OTP (referred to as "communications" in the practice of the OTP)[258] on the potential commission of crimes within the jurisdiction of the Court. The information may be provided by private individuals, groups (such as the alleged victims), NGOs, IOs, states or any other "reliable source"[259].

b) Examination of the information received by the OTP with a view to evaluating their seriousness and reliability (a process referred to as "preliminary examination" in article 15(6) and in the practice of the OTP)[260]. In this phase the OTP may seek on its own motion additional information to assess the reliability of the

[256] ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *Situation in the Republic of Kenya*, ICC-01/09-19-Corr, PTC II, 31 March 2010, par. 17. See also *Corrigendum* to Judge Fernández de Gurmendi's separate and partially dissenting opinion to the Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, *Situation in the Republic of Côte d'Ivoire*, ICC-02/11-15-Corr, 6 October 2011, par. 7.

[257] The analysis of the present paragraph has been limited to the role of the Prosecutor and Pre-Trial Chamber as envisaged under article 15 with regard to the three categories of crimes currently within the concrete jurisdictional reach of the Court (genocide, crimes against humanity and war crimes). It did not delve into the intricate jurisdictional mechanism introduced under articles 15*bis* and 15*ter* with the amendments adopted in 2010 in Kampala, concerning the crime of aggression.

[258] See ICC-OTP, Policy Paper on Preliminary Examinations, November 2013, par. 73, 75, 78. As clarified in paragraph 78 of the policy paper, the mere receipt of such information does not determine *per se* the opening of a preliminary examination. For obvious reasons of judicial economy the OTP first engages in a screening of communications with a view to exclude from further examination those situations that that appear to be "manifestly outside the jurisdiction of the Court", "already under preliminary examination" or "already under investigation or forming the basis of a prosecution".

[259] *Ibidem*. The policy paper echoes the provision of article 15(2) of the Statute concerning the different potential information providers.

[260] See article 15(6) of the Statute: "If, after the *preliminary examination* referred to in paragraphs 1 and 2 . . ." (emphasis added) and ICC-OTP, Policy Paper on Preliminary Examinations, November 2013. In this important policy document the OTP also explains the procedural approach of the Office as regards the concrete conduct of preliminary examinations. In particular, it enucleates four distinct phases of the preliminary examination process, respectively Phase 1 (initial assessment for the purposes of filtering out situations manifestly ill-founded or outside the Court's jurisdiction, see par. 78-79. In this regard W. A. SCHABAS, *The International Criminal Court: A Commentary on the Rome Statute*, cit., 400 speaks of "pre-preliminary examination"); Phase 2 (opening of preliminary examination proper with factual and legal assessment of the "potential cases" within the situation under examination, culminating in an "Article 5 Report" on jurisdictional issues; see par. 80-81); Phase 3 (assessment of the complementarity and gravity profiles; see par. 82); Phase 4 (assessment of the interest of justice; see par. 83). The procedure ends with the issuance of a so-called "Article 53(1) Report", containing the decision of the OTP on the opening—or not opening—of an investigation.

information received, including through written or oral testimony at the seat of the Court[261]. Upon completing such preliminary examination, there are two possibilities:

1) If the OTP concludes that there is "a reasonable basis to proceed with an investigation"[262], it forwards a request of authorisation to open an investigation to the PTC, with any supporting material[263]. The OTP must inform known victims, who may at this stage make representations on the request[264]. Upon consideration of the request and accompanying materials, the PTC can either grant—in whole or in part[265]—the authorisation requested by the Prosecutor, in which case he or she can proceed with the investigation[266], or deny it without prejudice for other future requests based on new facts[267]. The authorisation of the PTC at this stage is nonetheless "without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case"[268].

[261] Article 15(2) of the Statute. It is clear that in this phase the Prosecutor does not enjoy the full investigative powers listed under article 54 of the Statute. Nonetheless, he or she is not—or not exclusively—the passive recipient of information provided by external sources, but can obtain additional information as explicitly contemplated in the aforementioned paragraph of article 15. Rules 46 and 47 of the RPE regulate the relationship between the OTP and the information providers as well as the acquisition of testimonies in this preliminary phase.

[262] See article 15(3) of the Statute, setting this procedural standard as the litmus test to be satisfied in order for the OTP to submit a request for authorisation to the competent PTC.

[263] See article 15(3) of the Statute and Rule 50 of the RPE as regards the procedure to be followed and the substantive and formal requirements of this prosecutorial request.

[264] See article 15(3) of the Statute and Rule 50(1) and (3) of the RPE.

[265] Rule 50(5) of the RPE.

[266] Article 15(4) of the Statute.

[267] See article 15(5) of the Statute and Rule 50(6) of the RPE.

[268] Article 15(4). This means that the PTC's decision of authorisation, while carrying an assessment of the "reasonable basis to proceed" standard and a *prima facie* consideration that the *case* (although at this early stage both the OTP and PTC are in essence dealing with a *situation*) "appear to fall within the jurisdiction of the Court", it does not carry any effect of *res judicata* as regards the issues of admissibility and jurisdiction on which the Chambers are called to rule later in the proceedings, nor it is binding on the OTP as regards the exact legal characterisation of the facts as they emerge during the investigation for the purposes of subsequent prosecutions. In this sense see W. A. SCHABAS, *The International Criminal Court: A Commentary on the Rome Statute*, cit., 399: "findings at the preliminary examination phase are not binding for the purpose of future investigations".

2) If the OTP, on the contrary, concludes that there is no reasonable basis to proceed, it shall notify such decision to those who provided the information[269]. The decision not to proceed by requesting an authorisation to the PTC is again without prejudice to a subsequent reassessment based on new facts[270].

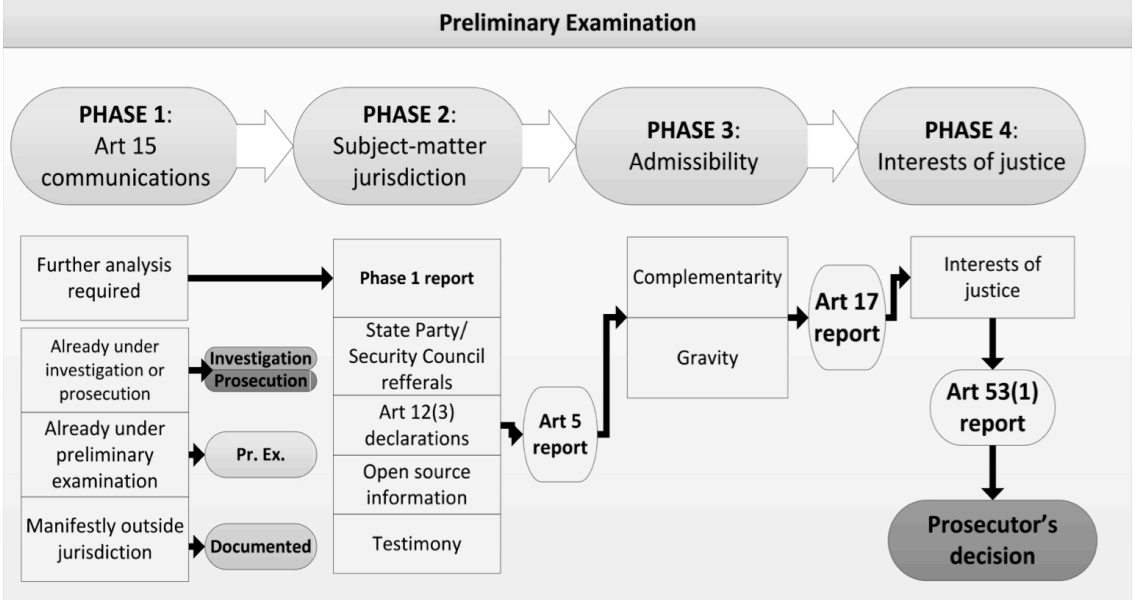

Fig. 1. Diagram showing the procedural steps of the Preliminary Examination (Source: ICC-ASP, Report of the Court on the Basic Size of the Office of the Prosecutor, ICC-ASP/14/21, 17 September 2015, 39).

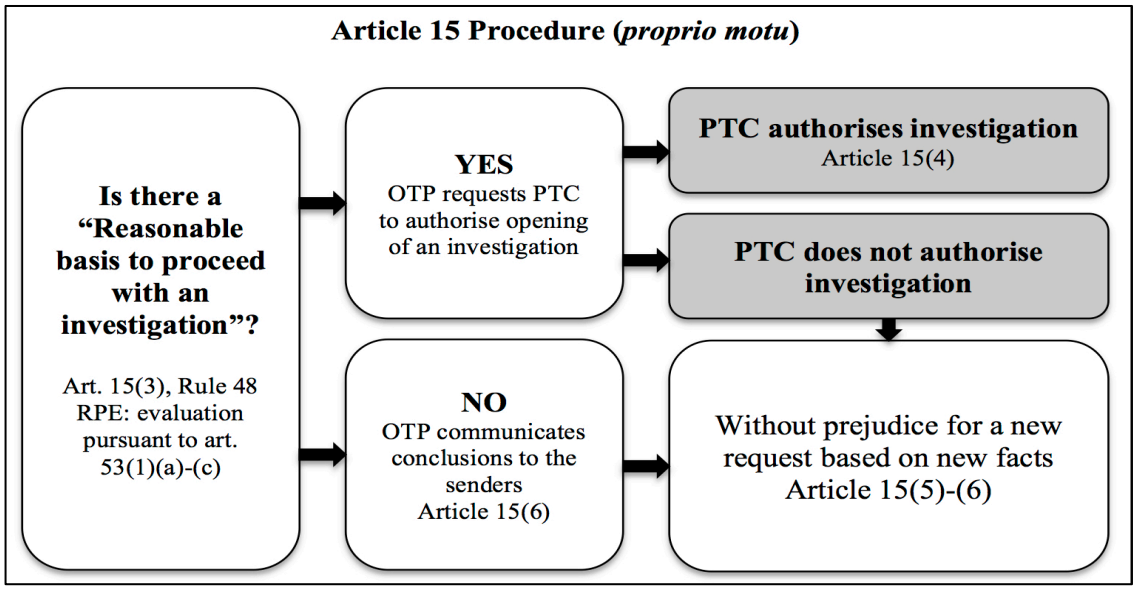

Fig. 2. Diagram showing the *proprio motu* procedural steps pursuant to article 15 of the Rome Statute.

[269] Article 15(6) of the Statute and Rule 49 of the RPE.
[270] Article 15(6) of the Statute.

From the above synthesis of the procedural mechanism of article 15 of the Statute it should be sufficiently clear that the OTP enjoys—directly or indirectly—a significant degree of discretion at this preliminary examination stage, and his or her determinations bear relevant consequences on the subsequent developments of judicial proceedings. A few additional remarks seem necessary at this point.

In the first place, when acting *proprio motu*, the Prosecutor not only enjoys discretion as regards which incidents or sets of incidents—technically defining a situation—to select or prioritise for preliminary examination among the numerous communications received by the OTP, but he or she also has wide discretion with regard to the *conduct* of such examinations. Given the rather scarce indications in the Statute and RPE, the process is largely left to the practice and the self-imposed standards established by the Office in its Regulations and further expanded in the Policy Paper on Preliminary Examinations[271]. Although laudable efforts have been made by the OTP to 'proceduralise' the conduct of preliminary examinations and improve its transparency[272], grey areas still persist as to the methodology and modality of the selection decisions. One relevant example of these uncertainties concerns the 'time factor' in the conduct of preliminary examinations[273]. As a result of the lack of any time limit laid down in the Statute, RPE, Regulations or policy papers, a situation may remain under preliminary examination for an indefinite period of time with only limited information made available to the public and other interested parties (such as states and victims) on the progress of the examination and

[271] Apart from the provisions of the Statute, Rules 46-47 of the RPE only deal with issues of confidentiality and the acquisition of testimonies at the seat of the Court during preliminary examination, without establishing a clear procedural framework for its conduct. One clear example of the OTP's discretion in setting the regulatory framework of preliminary examinations can be found in Regulations 25-31 of the Regulations of the OTP. As clearly stipulated by the Regulations themselves (see, Regulation 1, sub-regulation 1), this document has been adopted in 2009 by the Office pursuant to its administrative independence envisaged under article 42(2) of the Statute and Rule 9 of the RPE. The relevance of this document is more closely examined, *infra*, in paragraph 4 of this Chapter.

[272] For instance the Prosecutor, following the indications contained in Regulation 28 of the Regulation of the OTP, has inaugurated a practice of annually reporting on the status of preliminary examination activities. The reports, which are made available to the public every year in late fall, present the progress of the preliminary examination activities according to the phase-based approach established in the Policy Paper on Preliminary Examinations (see, *supra*, footnote 260)

[273] This issue should be kept conceptually separate from the one concerning the time limit for the conduct of formal investigations and prosecution once the Court's jurisdiction has been triggered, although these two situations raise certain common problems. With regard to the absence of a specified time limit for the conduct of investigations and its potentially negative consequences on the smooth functioning of the complementarity regime, see F. GIOIA, *The Complementarity Role of the International Criminal Court: Are there any Time-limits?*, in M. POLITI, F. GIOIA (eds.), *op. cit.*, Aldershot, 2008, 71-80.

the possible future decisions on the opening of an investigation[274]. Judicial attempts to accelerate the pace of certain preliminary examinations or to require the Prosecutor to explain their current status through trial management measures, such as the convening of so-called Status Conferences[275], have been meet with fierce resistance by the OTP and have not yet resulted in a cooperative relationship among the Prosecutor, Judges and other interested trial actors on the duration and mode of conduct of preliminary examinations[276]. This OTP's strong procedural posture can possibly be explained on at least two grounds. On the one hand, based on the OTP's willingness to defend its discretionary powers at the preliminary examination stage from unwarranted judicial interference[277]. On the other hand, based on the consideration that 'playing' on the timing of preliminary examinations may be a permissible strategy for promoting (positive) complementarity in the relationship

[274] While the annual reports surely help to discern the current status of the different preliminary examinations, they usually contain only a limited and summary presentation of the activities performed by the OTP in the relevant timespan. It should be added that in one of these annual reports, the Prosecutor has unequivocally expressed the view that "there are no timelines provided in the Statute for a decision on a preliminary examination" (see ICC-OTP, Report on Preliminary Examination activities 2015, 12 November 2015, par. 13). On this point see, *infra*, footnote 277.

[275] The power to convene status conferences—as well as the procedural measures that can be indicated by the Chambers on such an occasion—are envisaged by Regulation 30 and 54 of the Regulations of the Court. On one occasion the PTC, faced with the Prosecutor's apparent inaction or delay in the completion of a preliminary examination and on the request of the referring state, has attempted to force him to provide additional information on the on-going activities and a reasonable estimate of the time needed to complete them for the purposes of a decision on the opening of investigations. See, ICC, Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic, *Situation in the Central African Republic*, ICC-01/05-6, PTC III, 30 November 2006.

[276] As recalled by W. A. SCHABAS, *The International Criminal Court: A Commentary on the Rome Statute*, cit., 401-402, in the case of the request of additional information in the situation of the Central African Republic, the OTP, while in the end providing certain information to the Chamber, has clearly stated that it considered that in "doing so, the OTP is neither accepting the existence of a legal obligation to submit this type of information absent any decision under Article 53 being made, nor adopting a precedent that it may follow in future cases" (see OTP, Prosecution's Report Pursuant to Pre-Trial Chamber III's 30 November 2006 Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic, *Situation in the Central African Republic*, ICC-01/05-7, 15 December 2006, par. 11).

[277] *Ibidem*, par. 10: "Finally, the OTP, while committed to reaching decisions under Article 53 (1) as expeditiously as possible, submits that no provision in the Statute or the Rules establishes a definitive time period for the purposes of the completion of the preliminary examination. The OTP submits that this was a deliberate legislative decision that provides the required flexibility to adjust the parameters of the assessment or analysis phase to the specific features of each particular situation. That choice, and the discretion that it provides, should remain undisturbed". This position has been confirmed in the Policy Paper on Preliminary Examination, November 2013, par. 89: "No provision in the Statute or the Rules establishes a specific time period for the completion of a preliminary examination".

with states[278]. Keeping states 'under observation' for a prolonged period of time—with the constant threat of the Court's triggering—could work as an incentive to deal with the alleged crimes at the national level, thereby encouraging genuine national proceedings[279]. Obviously, the time necessary for the OTP to assess the information received, decide whether or not to open a preliminary examination and eventually request an authorisation pursuant to article 15(3) of the Statute cannot be defined in a one-size-fits-all fashion, given the obvious differences in complexity of the various situations under examination[280]. Nevertheless, procedural correctives allowing for a more predictable conduct and outcome of preliminary examinations, premised on good faith cooperation between the OTP and PTC, seem highly desirable in this field.

In the second place, it should be added that discretion at the preliminary examination entails not only the power to 'positively' decide to request an authorization to investigate, but also to 'negatively' reach the decision—subject to certain procedural obligations[281]—not to submit such a request to the PTC[282]. While in the case of state or UNSC's referral the decision not to open an investigation may be subject to a limited form of judicial review[283], in the case of *proprio motu* the

[278] On the concept of positive (or proactive) complementarity see W. W. BURKE-WHITE, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, in *Harvard International Law Journal*, vol. 49, no. 1, 2008, 53-108. The concept has been widely referred to in various OTP statements and policy documents in recent years (see, e.g., ICC-OTP, Policy Paper on Preliminary Examinations, November 2013, par. 100-103).

[279] In this vein, see ICC-OTP, Policy Paper on Preliminary Examination, November 2013, par. 90, where the OTP states that preliminary examinations "may also entail assessing specific relevant national proceedings, where they exist, *over a long period of time* in order to assess their genuineness and their focus throughout the entirety of the proceedings, including any appeals" (emphasis added). *Ibidem*, par. 93-94, 99-103 where the OTP clarifies its policy objectives concerning transparency and positive complementarity, resorting to the expression "encouraging genuine national proceedings".

[280] This position is clearly articulated by the OTP in its Report, quoted *supra* in footnote 276, par. 8-9: "the breadth and scope of an examination under Article 53 (1) is *situation-specific*: it depends on the particular features of each situation, including, *inter alia*, the availability of information, the nature and scale of the crimes, and the existence of national responses in respect of alleged crimes. Accordingly, comparison with other situations previously dealt with by the OTP is not helpful for the purposes of assessing the required length of the analysis phase of a new situation". On the same lines see ICC-OTP, Policy Paper on Preliminary Examination, November 2013, par. 89, where the OTP clarifies that "The deliberate decision by the Statute's drafters [not to impose a time limit] ensures that analysis is adjusted to the specific features of each particular situation, which may include, inter alia, the availability of information, the nature, scale and frequency of the crimes, and the existence of national responses in respect of alleged crimes".

[281] Such as the obligation to notify the decision to the information providers pursuant to article 15(6) of the Statute and Rule 49 of the RPE.

[282] Article 15(6) of the Statute.

[283] Article 53(3)(a) of the Statute.

OTP's 'no-action' decision cannot be challenged, given that the preliminary examination activities are performed prior to the start of a fully jurisdictional—or judicially supervised—procedure[284]. While the legislative choice to bar 'unqualified' information providers (such as generic individuals, NGOs or IO) from challenging the OTP's negative decision is not without merits, the exclusion of any procedural remedy against such decision in the case of the alleged victims—who may on the contrary exercise participatory rights at a later stage of the proceedings—is more problematic, particularly when compared with their procedural rights once a request for authorisation has been filed by the OTP[285].

In the third place, and before taking a closer look at the evidentiary standard to be satisfied for requesting the authorisation to investigate *proprio motu*, it should be added that when submitting the request to the PTC together with the supporting materials, the Prosecutor enjoys a certain discretion with regard to the quantity and quality of the information to provide in order to support the request. Obviously, at this very early stage of pre-investigation proceedings the supporting materials need not to be—and generally cannot be—exhaustive and conclusive[286], but the Prosecutor—in coping with the applicable procedural rules[287]—will carefully measure out the information to disclose at this point, providing the PTC with just

[284] The intervention of the PTC is envisaged only in particular circumstances, such in the case of the acquisition of testimonies at the seat of the Court during the preliminary examination phase, in order to ensure the integrity of the procedure and protect the rights of the involved subjects (among whom there may be potential suspects). See Rule 47(2) of the RPE.

[285] While generic individuals or organisations who have provided the information to the OTP would not in any case enjoy participatory rights in the Court's proceedings (at the exclusion of the possibility to intervene through the *amicus curiae* procedure pursuant to Rule 103 of the RPE), victims enjoy a different legal and procedural status according to the Statute and RPE. With regard to the statutory foundation of victims' rights, see articles 68(3) and 75 of the Statute and Rules 85-99 of the RPE. There is a clear asymmetry between their procedural rights in the case of request of authorisation (see Rule 50(1) and (3) of the RPE) and in the case of denial of such request by the OTP (see Rule 49 of the RPE).

[286] See ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *Situation in the Republic of Kenya*, ICC-01/09-19-Corr, PTC II, 31 March 2010, par. 34 according to which the information provided "need not point towards only one conclusion"; and ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, *Situation in the Republic of Côte d'Ivoire*, ICC-02/11-14-Corr, PTC III, 3 October 2011, par. 24: "Thus, the information available to the Prosecutor is not expected to be "comprehensive" or "conclusive", which contrasts with the position once the evidence has been gathered during the investigation".

[287] Regulation 49 of the Regulations of the Court.

enough to satisfy the relatively low evidentiary standard applicable pursuant to article 15 of the Statute[288].

Lastly, with regard to the substantive content of the request for authorisation, it should be noted that the Statute and RPE do not prescribe a specific content, only requiring that the request be made in writing[289]. The OTP's discretion in the drafting of the request is nevertheless limited by the Regulations of the Court, which establish in some detail its minimum content, not only to the benefit of transparency and predictability, but also to facilitate the PTC's assessment on the merits of the request[290].

3.2.1 The "reasonable basis to proceed" test and the PTC's authorisation

Article 15(3) of the Statute establishes that in order to submit a request for authorisation to investigate to the PTC, the Prosecutor must be satisfied that there is a "reasonable basis to proceed with an investigation". This provision, however, does not directly stipulate the criteria to be taken into consideration to assess whether or not the evidentiary standard is met. This apparent *lacuna* is filled by Rule 48 of the RPE establishing—by means of internal *renvoi*—that the factors to be considered are those set out in article 53(1)(a) to (c)[291]. In other words, the procedural rule introduces a 'normative symmetry' between article 15 and article 53, to the effect of creating a uniform framework of legal factors to be considered for the opening of an investigation in case of referral and for requesting an authorisation pursuant to the *proprio motu* procedure[292]. Therefore, the "reasonable basis to proceed" test requires that the Prosecutor—upon completion of the preliminary examination—be

[288] See, *infra*, next paragraph.
[289] Rule 50(2) of the RPE.
[290] Regulation 49 of the Regulations of the Court. In particular, sub-regulations 1 and 2 refer to the necessary indication of the crimes that the OTP believes have been or are being committed, a statement of the facts (with certain minimum information on the place, time and persons involved) and a reasoned declaration on the existence of the Court's jurisdiction.
[291] Article 53 governs the opening of investigations and prosecutions by the OTP, as well as the supervisory powers of the PTC with respect to the OTP's *nolle prosequi* decisions. Although the provision seems to refer only to those situations where the Court's jurisdiction has been triggered by means of state or UNSC's referral (hence their entitlement to challenge the decision not to open an investigation or start a prosecution), the same factors apply in case of *proprio motu*, with the difference that in this latter case the Prosecutor cannot directly proceed with the investigation and must convince the competent PTC to authorise him or her to open one.
[292] On this point, see W. A. SCHABAS, *The International Criminal Court: A Commentary on the Rome Statute*, cit., 404.

cumulatively satisfied that: a) There is "reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed"[293]; b) The "case" is or would be admissible under article 17[294]; c) That opening a investigation would not run contrary to the "interests of justice"[295].

In order to assess the level of discretion that the OTP enjoys at the stage of deciding whether or not to forward a request for authorisation to the PTC on the basis of the applicable evidentiary standard, it is necessary to reflect on two closely intertwined aspects, namely the legal nature and function of the standard itself—particularly when compared to the other evidentiary standards applicable at different stages of proceedings—and the scope and depth of the PTC's supervision when considering whether to grant or deny the authorisation to investigate.

With regard to the first issue, it should be noted that in the context of the different evidentiary standards envisaged by the Statute[296], the "reasonable basis to proceed" test is characterised by a complex and tripartite structure, due to the *renvoi*

[293] Article 53(1)(a) of the Statute.

[294] Article 53(1)(b) of the Statute. The reference to the "case" in this article should be understood as to the "potential cases within the context of a situation" once the investigation is authorised. For an extensive discussion on the use of the term "case" in article 53, based on a thorough examination of the preparatory works, see ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *Situation in the Republic of Kenya*, ICC-01/09-19-Corr, PTC II, 31 March 2010, par. 40-50. The PTC has determined that it is for the Court to harmonise the interpretation of the term "case" used both in article 17 and 53(1)(b), and that its meaning must be construed having regard to "the [specific] context in which it is applied" (*ibidem*, par. 47-48). Because at the stage of preliminary examination—and judicial control over the authorisation request—there cannot be any distinguishable cases yet, "the admissibility assessment at this stage actually refers to the admissibility of one or more potential cases within the context of a situation" (*ibidem*, par. 48). See also, R. RASTAN, *What is a 'Case' for the Purpose of the Rome Statute?*, in *Criminal Law Forum*, vol. 19, issue 3, 2008, 441-442 (also quoted in the PTC's decision, par. 48, footnote 53).

[295] Article 53(1)(c) of the Statute.

[296] The other applicable evidentiary standards are the "reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed" under article 53(1)(a) of the Statute, to be satisfied for the purposes of the opening of an investigation (which is also a sub-component of the "reasonable basis to proceed"); the "reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court", to be satisfied for the purposes of requesting the Court to issue a warrant of arrest or a summons to appear pursuant to article 58(1)(a) of the Statute; the "sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged" provided for under article 61(7) of the Statute for the purposes of the confirmation of charges by the PTC; and the "beyond reasonable doubt" with regard to the standard to be satisfied for the purposes of convicting an accused pursuant to article 66(3) of the Statute. The idea that the "reasonable basis to believe"—as part of the "reasonable basis to proceed" standard—to be applied in case of *proprio motu* is a distinct and lower evidentiary standard compared to the one envisaged by article 58 of the Statute was first advanced by the PTC in its Kenya authorisation decision (see ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *Situation in the Republic of Kenya*, ICC-01/09-19-Corr, PTC II, 31 March 2010, par. 28).

of Rule 48 to the criteria laid down in article 53(1)(a)-(c) of the Statute. As already pointed out, the standard under examination incorporates three cumulative components—namely the "reasonable basis to believe", admissibility and non-contrariety to the interests of justice—that must form the basis of the OTP's request for authorisation and that are subject to the judicial review of the PTC[297]. As regards the first component, four different PTC's have ruled that the "reasonable basis to believe" test is "the lowest evidentiary standard provided for in the Statute"[298]. Notwithstanding a certain tendency to conflate the interpretation of the overall procedural standard and its first component—thereby falling into a sort of synecdoche[299]—there is wide agreement on the fact that because of the OTP's limited powers at this very early stage of pre-investigation proceedings, the applicable standard should be, considered as a whole, relatively low[300]. As regards the second component, the PTCs have reasonably concluded that given the inexistence of

[297] See ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *Situation in the Republic of Kenya*, ICC-01/09-19-Corr, PTC II, 31 March 2010, par. 26.

[298] *Ibidem*, par. 27 and ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, *Situation in the Republic of Côte d'Ivoire*, ICC-02/11-14-Corr, PTC III, 3 October 2011, par. 24. In its Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in Georgia, *Situation in Georgia*, ICC-01/15-12, PTC I, 27 January 2016, par. 24-25, the Court—while not directly using this expression—made ample references to the previous authorisation decisions on the point, endorsing their conclusions on the evidentiary standard under consideration. Lastly, see ICC, Public Redacted version of the "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi", ICC-01/17-X-9-US-Exp, 25 October 2017, *Situation in the Republic of Burundi*, ICC-01/17-9-Red, PTC III, 9 November 2017, par. 30.

[299] According to 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?*, in *The Law and Practice of International Courts and Tribunals*, vol. 12, issue 1, 2013, 54-56, 60-61, the PTC's analysis in the Kenya and Côte d'Ivoire decisions failed to provide sufficient clarity as regards the nature of the procedural standard under article 15 of the Statute, somehow extending to the overall "reasonable basis to proceed" test the findings made with respect to only one of its components. The Author then goes on to argue that in practical terms and notwithstanding the PTC's contention on the 'ranking' among different evidentiary standards, the test provided for in article 15 and the one provided for in article 58 are substantially identical as far as the intensity of the evidentiary threshold is concerned (*ibidem*, 66-69).

[300] It is not entirely clear how low this standard is in practice. Some discrepancies in judicial interpretation on this point—and on the connected issue of the scope of the PTC's judicial control at the authorisation stage—may be found comparing the views of the Majority and the dissenting and/or concurring opinions attached to the authorisation decisions. See, Dissenting Opinion of Judge Hans-Peter Kaul, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *Situation in the Republic of Kenya*, ICC-01/09-19-Corr, par. 14-15; Separate Opinion of Judge Péter Kovács, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in Georgia, *Situation in Georgia*, ICC-01/15-12-Anx-Corr, par. 3-7.

individual cases at this early stage, the control of admissibility—*sub specie* complementarity and gravity—must be carried out with regard to the "potential cases" likely to arise from the investigation to be opened by the OTP upon authorisation of the PTC[301]. Lastly, with regard to the relevance of the third component, namely the non-contrariety of the investigation to the interests of justice, the PTCs in their authorisation decisions did not provide any detailed analysis, in light of the fact that the OTP had not elaborated on such point in its requests, in accordance with its policy[302].

With regard to the second issue, the PTCs have clarified—with ample reference to the *travaux préparatoires*—that the Chamber's control over the Prosecutor's request for authorisation is meant to "prevent the abuse of power on the part of the Prosecutor" in the selection of situations potentially forming the object of investigations at the ICC in case of *proprio motu*[303]. Nevertheless, the actual intensity of the PTC's judicial control over the Prosecutor's discretionary choice at this stage is the object of some debate, reflected in the dissenting and/or concurring opinions attached to the authorisation decisions adopted to date by the competent Chambers.

[301] See, *supra*, footnote 294.

[302] The OTP in its Policy Paper on the Interests of Justice, September 2007, 2-3, par. 3, maintains that it is not required to positively establish that the opening of an investigation (in case of referral) or the request for authorisation to investigate in the case of *proprio motu* are in the interest of justice and that the Office "shall proceed with investigation unless there are specific circumstances which provide substantial reasons to believe it is not in the interests of justice to do so at that time". In all the authorisation procedures to date, the OTP has not put forward considerations under the heading of the interest of justice, hence the relevant PTCs have not entertained an analysis of this profile. In any event, the PTCs share the OTP's position on this requirement as part of the "reasonable basis to proceed" test for the purposes of authorising an investigation. See, ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *Situation in the Republic of Kenya*, ICC-01/09-19-Corr, PTC II, 31 March 2010, par. 63; ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, *Situation in the Republic of Côte d'Ivoire*, ICC-02/11-14-Corr, PTC III, 3 October 2011, par. 207-208; ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in Georgia, *Situation in Georgia*, ICC-01/15-12, PTC I, 27 January 2016, par. 58; ICC, Public Redacted version of the "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi", ICC-01/17-X-9-US-Exp, 25 October 2017, *Situation in the Republic of Burundi*, ICC-01/17-9-Red, PTC III, 9 November 2017, par. 190.

[303] ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in Georgia, *Situation in Georgia*, ICC-01/15-12, PTC I, 27 January 2016, par. 3; ICC, Public Redacted version of the "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi", ICC-01/17-X-9-US-Exp, 25 October 2017, *Situation in the Republic of Burundi*, ICC-01/17-9-Red, PTC III, 9 November 2017, par. 28. The same concept, although expressed in different words, can be found in ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *Situation in the Republic of Kenya*, ICC-01/09-19-Corr, PTC II, 31 March 2010, par. 18, 32.

Thus far, all the PTCs involved in authorisation proceedings have maintained that the Chamber, in evaluating the OTP's request for authorisation, must carry out its assessment of the relevant facts and information, testing them against the same evidentiary standard applied by the OTP in its submissions[304]. Nevertheless, the Majority in three PTCs—as well as Judge De Gurmendi in her partly dissenting opinion in the Ivorian situation—argued in favour of a significant degree of judicial deference towards the OTP's assessment, confining the PTC's supervisory role to a formal check on the good faith exercise of prosecutorial powers[305]. Quite to the contrary, Judge Hans-Peter Kaul and Judge Péter Kovács, in their dissenting and separate opinion respectively in the Kenyan and Georgian situation, have insisted on the necessity of a more stringent and autonomous judicial analysis for the purposes of granting—in whole or in part—the authorisation[306]. Uncertainties on the breadth of the PTC's supervisory powers also concern the temporal and material scope of the authorised investigation, a point on which the PTCs—as well as the dissenting and

[304] ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *Situation in the Republic of Kenya*, ICC-01/09-19-Corr, PTC II, 31 March 2010, par. 21. See also *Corrigendum* to Judge Fernández de Gurmendi's separate and partially dissenting opinion to the Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, *Situation in the Republic of Côte d'Ivoire*, ICC-02/11-15-Corr, 6 October 2011, par. 13-14 (agreeing with the Majority on the point).

[305] For instance, the Majority in its Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in Georgia, *Situation in Georgia*, ICC-01/15-12, PTC I, 27 January 2016, par. 3, established that "the Chamber's examination of the Request and the supporting material provided by the Prosecutor must be *strictly limited*" (emphasis added). See also *Corrigendum* to Judge Fernández de Gurmendi's separate and partially dissenting opinion to the Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, *Situation in the Republic of Côte d'Ivoire*, ICC-02/11-15-Corr, 6 October 2011, par. 9-10, 15-16, 19-20, 45. In particular the dissenting judge emphasised the risk that the PTC's control might result in an unwarranted "duplication of the preliminary examination conducted by the Prosecutor" (par. 15 of the dissenting opinion). She additionally expressed the view that the Chamber had exceeded the supervisory role of the Chamber under Article 15 of the Statute and that the approach of the Majority "is incompatible with the neutrality that the Chamber needs to maintain with regard to the selection by the Prosecutor of persons and acts to be addressed in the investigation" (par. 45 of the dissenting opinion).

[306] See footnote 300. In particular Judge Kaul has maintained that the authorisation procedure requires "a *substantial and genuine examination* by the judges of the Prosecutor's Request. Any other interpretation would turn the Pre-Trial Chamber into a mere *rubber-stamping* instance" (par. 18 of the Dissenting Opinion, emphasis added). Judge Kovács, along the same lines, explained that in his view the notion of "Judicial control entails more than automatically agreeing with what the Prosecutor presents. It calls for "*an independent judicial inquiry*" of the material presented as well as the findings of the Prosecutor . . . This process requires a full and proper examination of the supporting material relied upon by the Prosecutor . . . To say otherwise means that the Pre-Trial Chamber will not be exercising what the Majority describes as "judicial control". Nor will the Pre-Trial Chamber be acting in a manner which can prevent the abuse of power on the part of the Prosecutor" (par. 6 of the Concurring Opinion, emphasis added).

concurring judges—have shown different approaches, with particular regard to the possibility to extend the investigation to alleged crimes other than those preliminarily hypothesised in the OTP's request and whose commission had begun after the date of such request[307].

From the above analysis it can preliminarily be concluded that while the states' desire to subject the OTP's *proprio motu* powers to a form of judicial review through the authorisation procedure built into article 15 of the Statute, the degree of 'judicial intrusion' in the Prosecutor's discretionary choices surrounding the pre-investigation stage of preliminary investigation—both as regards its conduct and possible outcomes—is rather limited. Therefore, these early selection choices, also taking into account the margin of manoeuvre enjoyed by the OTP in correcting and adjusting the geographical, material and personal target of the investigation during its conduct, stand out as a clear example of prosecutorial discretion, whose exercise is likely to influence in a decisive way the subsequent unfolding of proceedings in front

[307] The *Kenya* PTC, adopted a rather restrictive approach to the temporal and material scope of the authorised investigation, establishing that the authorisation to investigate was granted exclusively for alleged crimes occurred between the entry into force of the Statute for the state concerned (1 June 2005) and the date of the OTP's request for authorisation (26 November 2009), and at the exclusion of crimes other than those envisaged in the authorisation request (see ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *Situation in the Republic of Kenya*, ICC-01/09-19-Corr, PTC II, 31 March 2010, par. 201-207, 208-209). To the contrary the *Côte d'Ivoire* PTC, adopted a significantly more liberal approach to the material and temporal scope of the authorised investigation, extending the authorisation to the "continuing crimes" occurring after the date of the OTP's request, provided that "the contextual elements of the continuing crimes are the same as for those committed prior [to the date of the OTP's request]", and establishing that in principle also crimes preceding the "starting date" requested by the OTP can be the object of investigation, again under the *proviso* that they are part of the same situation (see, ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, *Situation in the Republic of Côte d'Ivoire*, ICC-02/11-14-Corr, PTC III, 3 October 2011, par. 179-180). Nevertheless, Judge De Gurmendi, in her partly dissenting opinion, considered this approach to the definition of the temporal scope of the investigation too restrictive, also criticising the Majority's recourse to the concept of "continuing crimes" as elaborated by the *ad hoc* Tribunals. In her view the authorisation should have been extended also to crimes whose commission had begun after the date of the OTP's request, provided that the crimes "are sufficiently linked to the situation of [on-going] crisis" under consideration (see, *Corrigendum* to Judge Fernández de Gurmendi's separate and partially dissenting opinion to the Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, *Situation in the Republic of Côte d'Ivoire*, ICC-02/11-15-Corr, 6 October 2011, par. 64-73). This latter approach has been endorsed by the *Georgia* PTC (see, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in Georgia, *Situation in Georgia*, ICC-01/15-12, PTC I, 27 January 2016, par. 60-64) and by the *Burundi* PTC (see ICC, Public Redacted version of the "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi", ICC-01/17-X-9-US-Exp, 25 October 2017, *Situation in the Republic of Burundi*, ICC-01/17-9-Red, PTC III, 9 November 2017, par. 191-194).

of the Court, bearing consequences on the rights of states, potential accused persons and victims.

3.3 Preliminary rulings on admissibility and challenges to jurisdiction and admissibility from the point of view of the Prosecutor's discretion

The enquiry on the Prosecutor's discretionary powers at the pre-investigation and investigation stage would not be complete without mentioning the role of the OTP in the procedures laid down by article 18 and 19 of the Statute, respectively with regard to "Preliminary rulings regarding admissibility" and "Challenges to the jurisdiction of the Court or the admissibility of a case".

Article 18 of the Statute, which applies exclusively in cases of state referral and *proprio motu*[308], provides for a procedural mechanism to solve disputes concerning admissibility as early as at the situation stage, by means of a prosecutorial request for a preliminary ruling on the admissibility of the situation as a whole (or, *rectius*, of the "potential cases" likely lo arise from an investigation into the situation)[309]. This procedure is built around a procedural 'dialogue' between the OTP and the State Parties[310], with the possible intervention of the competent Pre-Trial Chamber, in order ensure the proper functioning of the complementarity mechanism with regard to the admissibility limb and for purposes of judicial economy[311]. According to paragraph 1 of the article the OTP, when it determines that there is a reasonable basis to open an investigation pursuant to a state referral or *proprio motu*, it shall notify such intention to the State Parties and in particular to those "which would normally exercise jurisdiction over the [alleged] crimes

[308] The plain text of paragraph 1 of this article refers to situations referred pursuant to article 13(a) (i.e. state referrals) and those selected *proprio motu* by the OTP pursuant to article 13(c) and 15, with the exclusion of those referred by the UNSC pursuant to article 13(b) of the Statute.
[309] Article 18(2) of the Statute. See W. A. SCHABAS, *The International Criminal Court: A Commentary on the Rome Statute*, cit., 487. On the concept of "potential cases" see, *supra*, footnote 294.
[310] In this sense see J. T. HOLMES, *Complementarity: National Courts versus the ICC*, in A. CASSESE, P. GAETA, J. R. W. D. JONES (eds.), *op. cit.*, 681.
[311] It is of immediate evidence that solving issues of admissibility as early as at the situational stage could ensure that the scarce prosecutorial and jurisdictional resources of the Court are not used in the pursuit of investigations that will ultimately result in inadmissible cases. This mechanism could also promote a more effective allocation of work between national jurisdictions and the ICC.

concerned"[312]. Within thirty days of the receipt of the notification a state can inform the Prosecutor that it is carrying out investigations (or has already investigated) on the facts relating to the information contained in the OTP's notification, thereby requesting the Prosecutor to defer to national proceedings[313]. The OTP at this point faces a discretional choice: either to allow the state's request and defer the situation to national proceedings, or to apply to the PTC for a preliminary determination on the admissibility of the situation and an authorisation to investigate[314]. The preliminary nature of such determination lies in the fact that admissibility is assessed *before* any formal investigation has taken place and, consequently, well before any individual case is identified for prosecution. Both in case of deferral to state authorities and of request of a preliminary ruling on admissibility, the Prosecutor's discretion plays an additional role in the subsequent development of proceedings. In fact, in case of deferral the OTP has the faculty to oversee national proceedings and can review—after six months or in the presence of a significant change of circumstances—the original deferral decision[315]. On the contrary, if the PTC rules the situation inadmissible, the Prosecutor may either acquiesce to the decision or appeal to the Appeals Chamber for a final determination on admissibility[316]. It should be noted that if the PTC rules the situation admissible and the AC rejects the state's appeal, this is without prejudice to the right of the state to challenge the admissibility of individual cases that will later arise out of the situation, pursuant to article 19 of the Statute[317].

As interesting as this procedural mechanism may be from the point of view of the interplay between the OTP, states and judges with regard to the prosecutor's discretional choices with a view to determine the admissibility of a situation, it has never so far been used in practice. All interested states have failed to trigger the procedure within the specified thirty-day time limit, thereby making the provision dead letter. In most of the situations arising out of state referrals, such behaviour may

[312] Article 18(1), last part. The OTP may submit such notification to the state on confidential basis and, under the circumstances exemplified in the provision, it "may limit the scope of the information provided to States". More details on this notification are provided for under Rule 52 of the RPE.
[313] Article 18(2) of the Statute and Rule 53 of the RPE.
[314] Article 18(2) of the Statute (last part) and Rules 54-55 of the RPE.
[315] Article 18(3) of the Statute and Rule 56 of the RPE.
[316] Article 18(4) of the Statute.
[317] Article 18(7) of the Statute.

be explained on grounds that states have self-referred situations concerning their own territory, a choice that seems at odds with the intention to carry out genuine investigations at the national level and to request a deferral to that effect[318].

Article 19 of the Statute, contrary to the one just examined whose application is limited to situations, deals with the procedures for challenging the Court's jurisdiction and/or admissibility with regard to cases[319]. This very complex provision[320] has been the object of extensive scholarly comments[321] and, contrary to article 18, has received a number of practical applications[322]. For the present analysis,

[318] Although referred to the context of article 19 challenges to admissibility, the observation of C. STAHN, *Admissibility Challenges before the ICC: From Quasi-Primacy to Qualified Deference?*, cit., 231 that "cases of self-referrals … are often based on a tacit agreement between the prosecution and the referring state on the forum of jurisdiction" seems pertinent also with regard to article 18 proceedings. There is no real incentive for the state which has self-referred a situation to the Court to challenge its admissibility and ask for deferral within the specified thirty-days time limit.

[319] Article 19 explicitly makes reference to "cases" both in its heading and in the subsequent formulation. On the structural differences between article 18 and 19 along the line of the situation/case distinction see W. A. SCHABAS, *The International Criminal Court: A Commentary on the Rome Statute*, cit., 487: "In contrast with article 18 of the *Statute*, where admissibility of a 'situation' is contemplated, article 19 only applies once a 'case' has been identified". See also ICC, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute', ICC-01/09-01/11-307, *Prosecutor v. Ruto et. al., Situation in the Republic of Kenya,* AC, 30 August 2011, par. 340: "In contrast [with article 18], article 19 of the Statute relates to the admissibility of concrete cases". It should be noted that according to paragraph 1 of the same article, the Court "*shall* satisfy that it has jurisdiction in any case brought before it" (emphasis added), while it "*may*, on its own motion, determine the admissibility of a case in accordance to article 17" (emphasis added). In other words the Court, while it must always ascertain whether or not it has jurisdiction—a clear manifestation of the *kompetenz-kompetenz* principle—it is not mandated to positively ascertain, failing an explicit request or challenge of the interested parties to that effect, that the case is admissible.

[320] The article is composed of 11 paragraphs and must be read in conjunction with the procedural norms relating to the conduct of these incidental proceedings found in Rules 58-62 of the RPE.

[321] See, e.g., W. A. SCHABAS, *The International Criminal Court: A Commentary on the Rome Statute*, cit., 483-500; C. K. HALL, D. D. NTANDA NSEREKO, M. J. VENTURA, *Article 19, Challenges to the jurisdiction of the Court or the admissibility of a case*, in O. TRIFFTERER, K. AMBOS (eds.), *op. cit.*, 849-898; C. STAHN, *Admissibility Challenges before the ICC: From Quasi-Primacy to Qualified Deference?*, cit., 228-259. On specific issues of admissibility and the related decisions see, e.g., C. STAHN, *Libya, the International Criminal Court and Complementarity. A Test for 'Shared Responsibility'*, in *Journal of International Criminal Justice*, vol. 10, issue 2, 2012, 325-349; M. BO, *The Situation in Libya and the ICC's Understanding of Complementarity in the Context of UNSC-referred Cases*, in *Criminal Law Forum*, vol. 25, issue 2-3, 2014, 505-540; F. MÉGRET, M. G. SAMSON, *Holding the Line on Complementarity in Libya. The Case for Tolerating Flawed Domestic Trials*, in *Journal of International Criminal Justice*, vol. 11, issue 3, 2013, 571-589; T. O. HANSEN, *Reflections on the ICC Prosecutor's Recent "Selection Decisions"*, in *Max Planck Yearbook of United Nations Law Online*, vol. 17, issue 1, 2013, 125-158; S. SÁCOUTO, K. CLEARY, *The Katanga Complementarity Decisions: Sound Law but Flawed Policy*, in *Leiden Journal of International Law*, vol. 23, issue 2, 2010, 363-374.

[322] Proceedings regarding admissibility of cases pursuant to article 19 of the Statute have been brought both under paragraph 2(a) by the Defendants against whom a warrant of arrest had been issued in accordance with article 58 of the Statute, and under paragraph 2(b) by a State "which has jurisdiction

suffices it to focus on the aspects dealing with the Prosecutor's authority to provoke a ruling on jurisdiction or admissibility of a case [323] (and to pursue certain investigative steps pending such a ruling)[324], to request the review of a decision of inadmissibility in the presence of new circumstances, and/or to ultimately defer to

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over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted". See ICC, Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute, *Prosecutor v. Lubanga*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-512, PTC I, 3 October 2006; ICC, Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006, *Prosecutor v. Lubanga*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-772, AC, 14 December 2006; ICC, Decision on the admissibility of the case under article 19(1) of the Statute, *Prosecutor v. Kony et al.*, *Situation in Uganda*, ICC-02/04-01/05-377, PTC II, 10 March 2009; ICC, Judgment on the appeal of the Defence against the 'Decision on the admissibility of the case under article 19 (1) of the Statute' of 10 March 2009, *Prosecutor v. Kony et al.*, *Situation in Uganda*, ICC-02/04-01/05-408, AC, 16 September 2009; ICC, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), *Prosecutor v. Katanga and Ngudjolo Chui*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-1213-tEng, TC II, 16 June 2009; ICC, Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, *Prosecutor v. Katanga and Ngudjolo Chui*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-1497, AC, 25 September 2009; ICC, Decision on the Admissibility and Abuse of Process Challenges, *Prosecutor v. Bemba*, *Situation in the Central African Republic*, ICC-01/05-01/08-802, TC III, 24 June 2010; ICC, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled 'Decision on the Admissibility and Abuse of Process Challenges', *Prosecutor v. Bemba*, *Situation in the Central African Republic*, ICC-01/05-01/08-962, AC, 19 October 2010; ICC, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, *Prosecutor v. Ruto et al., Situation in the Republic of Kenya,* ICC-01/09-01/11-101, PTC II, 30 May 2011; ICC, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute', ICC-01/09-01/11-307, *Prosecutor v. Ruto et al., Situation in the Republic of Kenya,* AC, 30 August 2011; ICC, Decision on the admissibility of the case against Abdullah Al-Senussi, *Prosecutor v. Gaddafi and Al-Senussi*, *Situation in Libya*, ICC-01/11-01/11-466-Red, PTC I, 11 October 2013; ICC, Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled 'Decision on the admissibility of the case against Abdullah Al-Senussi', *Prosecutor v. Gaddafi and Al-Senussi*, *Situation in Libya*, ICC-01/11-01/11-565, AC, 24 July 2014; ICC, Public redacted Decision on the admissibility of the case against Saif Al-Islam Gaddafi, *Prosecutor v. Gaddafi and Al-Senussi, Situation in Libya*, ICC-01/11-01/11-344-Red, PTC I, 31 May 2013; ICC, Judgment on the Appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi', *Prosecutor v. Gaddafi and Al-Senussi, Situation in Libya*, ICC-01/11-01/11-547-Red, AC, 21 May 2014; ICC, Public redacted version of Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo, *Prosecutor v. Simone Gbagbo, Situation in Côte d'Ivoire*, ICC-02/11-01/12-47-Red, PTC I, 11 December 2014; ICC, Judgment on the appeal of Côte d'Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled 'Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo', *Prosecutor v. Simone Gbagbo*, *Situation in Côte d'Ivoire*, ICC-02/11-01/12-75-Red, AC, 27 May 2015.

[323] Article 19(3) of the Statute.

[324] According to article 19(7) the OTP must suspend the investigation pending a determination of the Court on the admissibility of a challenge brought by a state under paragraph 2 (a) or (b) of the same article. In any event the OTP, pending such ruling, may seek authority from the Court in order to take the investigative actions listed in paragraph 8 (a) to (c) of article 19.

national jurisdictions for the prosecution of individual cases[325]. While the OTP could potentially be inclined, under certain conditions, to directly seek a ruling pursuant to article 19(3) especially on issues of admissibility, practice so far has shown a tendency of the Prosecutor only to 'react' to challenges first brought by the Defence on behalf of the Accused or by the interested state. Depending on the occasion leading to the triggering of the Court, the specific circumstances surrounding each case, the subject bringing the jurisdiction/admissibility challenge and the prospects of effective national prosecutions, the OTP may either argue for the admissibility of the case or its inadmissibility[326]. In other words, there is no fixed pattern of behaviour on the part of the relevant actors of this *sui generis* incidental procedure[327]. It is nevertheless evident that the OTP's discretional analysis, especially on admissibility and through the prism of complementarity, may play a significant role in the judicial outcome leading either to retain the case at the international level or defer it to domestic authorities.

[325] Article 19(11) of the Statute.

[326] For instance, in *Al-Senussi* the OTP—adhering to the position of the interested state and in contrast with the Accused's defence and victims represented at trial by the OPCV—argued that at the relevant time the Libyan authorities were both willing and able to conduct genuine national proceedings in line with the principle of complementarity, thereby soliciting a decision of inadmissibility (see ICC, Decision on the admissibility of the case against Abdullah Al-Senussi, *Prosecutor v. Gaddafi and Al-Senussi*, *Situation in Libya*, ICC-01/11-01/11-466-Red, PTC I, 11 October 2013, par. 189-190). Both the PTC and AC agreed, deferring the case to the national authorities (see, *supra*, footnote 322 for the reference to the Chamber's decisions). In *Gaddafi* on the contrary, both the PTC and AC confirmed that the case, although arising out of the same situation, was admissible in light of the different factual background concerning the specific case at hand. The Court has clarified that in its view there is no contradiction between the two opposing conclusions on admissibility reached respectively in *Al-Senussi* and *Gaddafi* (see ICC, Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled 'Decision on the admissibility of the case against Abdullah Al-Senussi', *Prosecutor v. Gaddafi and Al-Senussi*, *Situation in Libya*, ICC-01/11-01/11-565, AC, 24 July 2014, par. 94-97). *Contra* see M. TEDESCHINI, *Complementarity in Practice: the ICC's Inconsistent Approach in the Gaddafi and Al-Senussi Admissibility Decisions*, in *Amsterdam Law Forum*, vol. 7, no. 1, 2015, 76-97. It should be noted that the position of the Accused might be significantly influenced by the concrete circumstances of the case and his or her trust in the overall fairness of national proceedings. For instance, the Al-Senussi Defence expressed—in contrast with the state which had brought the admissibility challenge—a clear preference for a trial at the ICC, whereas the Accused persons in the cases arising out of the Kenyan situation argued in favour of inadmissibility and (potential) domestic prosecution.

[327] On the *sui generis* nature of the procedure see the Dissenting Opinion of Judge Anita U§acka, Judgment on the Appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi', *Prosecutor v. Gaddafi and Al-Senussi, Situation in Libya*, ICC-01/11-01/11-547-Red, AC, 21 May 2014, par. 61.

Since the admissibility assessment *sub specie* complementarity is an "ongoing process throughout the pre-trial phase"[328]—for the obvious reason that the situation present at the moment of either deferral or declaration of inadmissibility may significantly change over time and make it appropriate to revise the initial assessment—procedural instruments are provided in order to cope with such changing circumstances. The Prosecutor is therefore discretionally entitled to ask for a review of the inadmissibility decision "when he or she is fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible"[329]. If the case had initially been deferred to the national authorities, the Prosecutor may subsequently decide to proceed with an investigation after having considered the information made available to him or her by the state on the status of national proceedings[330].

3.4 Article 53 of the Statute and the OTP's decisions on investigation and prosecution

Earlier in this work the ICC's institutional design as regards the mechanisms leading to the Prosecutor's decisions to open (or not to open) an investigation and to start a prosecution has been analysed with a view to comparing it with those of other international(ised) criminal justice mechanisms[331]. In the following paragraphs attention is turned in particular to the *normative and functional nexus* between articles 53, 17 and 15 of the Rome Statute and on the legal nature of the parameters contained therein. Although the Court's practice has already contributed to clarify the 'discretionary potential' of at least certain of these parameters, a systematic

[328] See ICC, Decision on the admissibility of the case under article 19(1) of the Statute, *Prosecutor v. Kony et al.*, *Situation in Uganda*, ICC-02/04-01/05-377, PTC II, 10 March 2009, par. 25-28, 52.
[329] Article 19(10) of the Statute and Rule 62 of the RPE. For instance, in the *Al-Senussi* case it could be argued that due to the fragmentation of governmental authority that took place in the territory of Libya *after* the inadmissibility decision, there is margin to request a review of the inadmissibility decision and to refer the case back at the ICC, although practical obstacles—both political and legal—may make this difficult to achieve. In any event, the Prosecutor Fatou Bensouda in her 13th Report to the UNSC on the Libyan situation of 8 May 2017, taking note of the conviction of Al-Senussi by the Court of Assize of Tripoli in July 2015 and of the UNHCHR report on the many procedural shortcomings of this trial, stated that her Office is considering whether these circumstances represent new facts that negate the basis of the inadmissibility decision, making it appropriate to apply to the Court for its reconsideration (see Records of UNSC Meeting on the Situation in Libya, UN Doc. S/PV.7934, 8 May 2017, 3).
[330] Article 19(11) of the Statute.
[331] See, *supra*, Part One, Chapter One, par. 3.2 and Chapter Two, par. 5.

reading of these provisions is necessary in order to interpret the institutional interplay between the prosecution and judges as regards the exercise of discretionary powers and the check and balances thereof at this crucial procedural juncture.

The structure of article 53 visually reflects the already examined distinction between situations and cases, dealing separately with the criteria that the OTP must consider in reaching his or her selection decision to open (or not to open) an investigation[332]—resulting in the opening of a situation—and to start (or not to start) a prosecution[333]—resulting in the opening of a case. As it will be seen in greater detail, the criteria laid down in the first two paragraphs of article 53 partially coincide, differing only to the extent of reflecting the contextual differences between the procedural stages at which the discretionary decision is taken, with particular regard to the factors relevant to the determination concerning the interests of justice[334].

As regards the systematic connection between article 53 and 17 of the Statute, it is the very text to institute an internal normative link between these provisions, by requiring the Prosecutor to consider—pursuant to article 17 of the Statute—the admissibility of the—potential or concrete—cases, respectively when deciding whether or not to open an investigation and to proceed (or not to proceed) with a prosecution[335]. A similar normative connection, although mediated by a regulatory provision contained in the RPE[336], can be traced between article 53 and 15 of the Statute, making it clear that the evaluation under the former must be carried out irrespective of the triggering mechanism[337]. Rule 48 of the RPE establishes that the OTP, when carrying out the preliminary examination in case of *proprio motu* and with a view to decide whether to request to the PTC the authorisation to investigate

[332] Article 53(1) of the Statute.
[333] Article 53(2) of the Statute.
[334] Compare article 53(1)(c) and 53(2)(c) of the Statute. Differences can also be found comparing article 53(1)(a) and 53(2)(a) of the Statute. At the pre-investigation stage the OTP is required to assess whether there is a reasonable basis to believe that at least one crime within the jurisdiction of the Court has been or is being committed in the situation referred to the Office (or under preliminary examination pursuant to a *proprio motu*) for the purposes of deciding on the opening of an investigation. Conversely, at the time of the decision to start or not to start a prosecution—i.e. once the investigation has taken place—the OTP is required to assess whether there is sufficient legal and factual basis to seek a warrant of arrest or a summons to appear with regard to specific individuals, pursuant to article 58.
[335] Article 53(1)(a) and 53(2)(a) of the Statute.
[336] Rule 48 of the RPE.
[337] See G. TURONE, *op. cit.*, 1147-1148.

pursuant to article 15(3) of the Statute, shall consider the same criteria laid down in article 53(1)(a)-(c)[338].

Notwithstanding the fact that article 53 with its criteria represents the crucible for all pre-investigation and pre-trial discretionary decisions, both 'positive' and 'negative', it is particularly in this second negative sense relating to the Prosecutor's ability to deny action that it reveals its (potential) function as a procedural selection tool in the hands of the prosecution. Nevertheless, the actual degree of discretion allowed under this procedural mechanism, and in particular the margin for legitimate *nolle prosequi* decisions, rests on one hand on the legal nature and interpretation of the criteria laid down in article 53 and, on the other hand, on the nature of judicial review of prosecutorial decisions pursuant to paragraph 3 of the same article. In this sense, any attempt to *measure in the abstract*—both quantitatively and qualitatively—the OTP's margin of discretion at this procedural stage would be a purely speculative exercise. For these reasons, an estimation of the concrete latitude of such discretion can only be attempted by reference to the OTP's understanding of the relevant criteria and to the analysis of the Court's decisions bearing on the interpretation of article 53, through a careful assessment of the relevant practice in the OTP-PTC institutional relations[339].

It should also be recalled that the OTP's decisions based on article 53 of the Statute are not irrevocable, since article 53(4) of the Statute recognises the Prosecutor's power to reconsider a previous decision—and particularly a negative one—on the basis of new facts or information. This is nothing but the natural recognition that factual changes of circumstances and/or the quantity or quality of the available information—together with strictly legal reasoning—have a critical impact on the OTP's determinations pursuant to article 53 of the Statute.

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[338] In this regard K. AMBOS, *Treatise on International Criminal Law*, *Vol. III*, *International Criminal Procedure*, Oxford, 2016, 337, speaks of a partial conflation of the requirements under article 15 and 53 of the Rome Statute. On the relationship between these two provisions see also W. A. SCHABAS, *The International Criminal Court: A Commentary on the Rome Statute*, cit., 394, 828: "Article 53 is closely related to article 15. Together, these two provisions define the exercise of discretion by the Prosecutor. They are the key to her independent role in the selection of situations for prosecution by the International Criminal Court".

[339] These issues are introduced in the remaining two chapters of Part Two, and analysed in detail on the basis of the practice of the involved actors in Part Three and Four of this work.

3.4.1 The reasonable/sufficient basis to proceed/believe tests, jurisdictional parameters and the admissibility assessment

The criteria contained in article 53(1) and (2), respectively with regard to the decision to open an investigation and the decision to proceed with a prosecution, do not possess the same discretionary intensity. It can be argued that letters (a)-(c) of these articles, which reproduce the same scheme with some differentiations, 'topographically' place these criteria in order of increasing selection capacity.

With regard to the decision on the opening of an investigation and notwithstanding a certain tendency to conflate the concepts of "reasonable basis to proceed" and "reasonable basis to believe"[340]—the latter being just one of the three components of the former[341]—it is uncontested from the practice of the OTP and of various the PTCs that the evidentiary threshold at stake is relatively low (the lowest in the statutory framework)[342]. The formulation in the negative of article 53(1) and the use of mandatory language ("The Prosecutor *shall* . . . initiate an investigation unless he or she determines that there is no reasonable basis to proceed") suggest that if the OTP is faced with "a sensible or reasonable justification for a belief that a crime falling within the jurisdiction of the Court"[343] has been or is being committed, he or she *shall* open an investigation[344]. Nevertheless, this apparently mandatory language is somehow diluted in practice by the fact that only upon completion of the preliminary examination activities—whose conduct entails a significant degree of discretion and is not subject to any definite time limit according to the Statute or

[340] On the point see, *supra*, paragraph 3.2.1 of this chapter.
[341] See M. J. VENTURA, *op. cit.*, 54-56, 60-61.
[342] *Ibidem*. See in particular footnotes 296-300 of this chapter for precise reference to case law.
[343] ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *Situation in the Republic of Kenya*, ICC-01/09-19-Corr, PTC II, 31 March 2010, par. 35.
[344] Compare with the language of article 15(1): "The Prosecutor *may* initiate an investigation *proprio motu*". In any event, even in the case of *proprio motu*, if upon completion of the preliminary examination the OTP finds that there is a reasonable basis to proceed, it *shall* submit to the PTC a request for authorisation according to article 15(3) of the Statute. See also ICC, Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation, *Situation on the Registered Vessels of the Comoros*, *Greece and Cambodia*, ICC-01/13-34, PTC I, 16 July 2015, par. 13, where the judges established that by virtue of the use of the verb *shall* there is a "presumption … that the Prosecutor investigates in order to be able to properly assess the relevant facts". See, *contra*, ICC-OTP, Final decision of the Prosecution concerning the "Article 53(1) Report" (ICC-01/13-6-AnxA), dated 6 November 2014, *Situation on the Registered Vessels of the Comoros*, *Greece and Cambodia*, ICC-01/13-57-Anx1, 30 November 2017, par. 54: "The Prosecution does not consider that the word "shall" supports any broader presumption favouring investigation where there is *not* a reasonable basis to proceed in accord with articles 53(1)(a) to (c)".

RPE—the OTP will be able to conclusively assess whether such "reasonable basis to proceed" standard is met. In other words, the OTP may avoid an explicit determination that a reasonable basis to proceed exists pursuant to article 53(1)—hence avoiding the opening of an investigation—by simply holding a situation at the stage of preliminary examination for a potentially indefinite period of time[345].

If we then proceed to consider the specific criteria listed under letters (a)-(c) of article 53(1) of the Statute, it is reasonably clear that they proceed from the least discretion-oriented (jurisdiction) [346], to a moderately discretion-oriented (admissibility[347], especially *sub specie* gravity), to end with the most heavily discretion-oriented (the interests of justice)[348]. With regard to jurisdiction, the strictly legal nature of the assessment is particularly evident, since the OTP only needs to verify whether the information in his or her possession reveals the potential commission of crimes falling within the jurisdictional parameters *ratione materiae*, *loci*, *personae* and *temporis* according to the relevant statutory provisions[349]. Things are less clear-cut with regard to the assessment of admissibility pursuant to article 17 of the Statute and on whether this criterion in its two main components (complementarity and gravity) allows for a real discretionary margin of appreciation on the part of the Prosecutor. While it seems fair to argue that at least in the evaluation of sufficient (situational) gravity the OTP enjoys a certain degree of discretion, a consideration implicitly reflected in the drafting of the Policy Paper on Preliminary Examinations[350], various scholars have suggested that it is necessary to distinguish between *legal* (non-discretionary) gravity pursuant to article 53(1)(b) and (2)(b) and *relative* (discretionary) gravity pursuant to article 53(1)(c), whereby only

[345] On the issues related to the timing and duration of preliminary examinations see, critically on the current practice of the OTP, A. PUES, *Towards the 'Golden Hour'?: A Critical Exploration of the Length of Preliminary Examinations*, in *Journal of International Criminal Justice*, vol. 15, issue 3, 2017, 435-453.
[346] Article 53(1)(a) of the Statute, establishing that there must be a reasonable basis to believe that a crime "*within the jurisdiction of the Court* has been or is being committed" (emphasis added).
[347] Article 53(1)(b) of the Statute.
[348] Article 53(1)(c) of the Statute.
[349] See W. A. SCHABAS, *The International Criminal Court: A Commentary on the Rome Statute*, cit., 833-834. In the same vein, see the position expressed in the ICC-OTP, Policy Paper on Preliminary Examinations, November 2013, par. 36-41.
[350] ICC-OTP, Policy Paper on Preliminary Examinations, November 2013, par. 59-66. This part of the document analyses in detail the criteria to be taken into consideration in the assessment of gravity, and particularly the quantitative-qualitative factors of scale, nature, manner of commission and impact of the alleged crimes.

the latter would be a true expression of the OTP's discretionary powers[351]. This line of reasoning, taken to its extreme logical consequences, seems to have been followed by a PTC in the first-ever review decision pursuant to article 53(3)(a) of the Statute, where judges established that the assessment of sufficient gravity in the context of article 53(1) decisions on the opening of investigations requires the application of "exacting legal requirements"[352]. This position has been criticised by various scholars[353]—as well as by a dissenting Judge[354]—on grounds that it represents an excessive encroachment on the Prosecutor's independence and discretion, and that it introduces a sort of unconditional prosecutorial duty to open an investigation in all instances where, on the basis of the available information, the scale, nature, manner of commission and impact of the crimes are not already reasonably clear at the pre-investigation stage[355].

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[351] See K. AMBOS, *Treatise on International Criminal Law*, *Vol. III*, *International Criminal Procedure*, cit., 292-295, citing the work of I. STEGMILLER, *The Pre- Investigation Stage of the ICC*, cit., 332-335. On the issue of gravity see, *infra*, the next paragraph.

[352] ICC, Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation, *Situation on the Registered Vessels of the Comoros*, *Greece and Cambodia*, ICC-01/13-34, PTC I, 16 July 2015, par. 14.

[353] See the critiques expressed on numerous international law blogs, for instance by 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 accessed 6 November 2018), according to whom the PTC's decision on this point is "nothing less than a frontal assault on the OTP's discretion"; A. WHITING, *The ICC Prosecutor Should Reject Judges' Decision in Mavi Marmara*, Just Security, 20 July 2015 (available at http://justsecurity.org/24778/icc-prosecutor-reject-judges-decision-mavi-marmara/, last accessed 6 November 2018). Other commentators have praised the decision as an example of "good health" of the ICC checks and balances mechanism, see e.g., G. PECORELLA, *The Comoros situation, the Pre-Trial Chamber and the Prosecutor: the Rome Statute's system of checks and balances is in good health*, An International Law Blog, 30 November 2015 (available at https://aninternationallawblog.wordpress.com/2015/11/30/the-comoros-situation-the-pre-trial-chamber-and-the-prosecutor-the-rome-statutes-system-of-checks-and-balances-is-in-good-health/, last accessed 6 November 2018).

[354] See Partly Dissenting Opinion of Judge Péter Kovács, *Situation on the Registered Vessels of the Comoros*, *Greece and Cambodia*, ICC-01/13-34-Anx-Corr, par. 2, 7-8. The dissenting Judge lamented that the Majority decided to "conduct a stringent review, which clearly interferes with the Prosecutor's margin of discretion", and that the PTC should have opted for "a more deferential approach" in the review of her decision not to open an investigation in the *Flottilla* incident.

[355] For the OTP's evaluation of these aspects see ICC-OTP, Article 53(1) Report, *Situation on the Registered Vessels of the Comoros, Greece and Cambodia*, 6 November 2014, par. 138-141. The Majority of the PTC in the *Comoros* review decision stigmatised these reasoning, affirming that: "Making the commencement of an investigation contingent on the information available at the pre-investigative stage being already clear, univocal and not contradictory creates a short circuit … Facts which are difficult to establish, or which are unclear, or the existence of conflicting accounts, are not valid reasons not to start an investigation but rather call for the opening of an investigation … only by investigating could doubts be overcome" (see, ICC, Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation, *Situation on the Registered Vessels of the Comoros*, *Greece and Cambodia*, ICC-01/13-34, PTC I, 16 July 2015, par. 13). This line of reasoning has been recently rejected by the OTP upon reconsideration, on grounds

Turning the attention to the criteria laid down in article 53(2) of the Statute, one has to consider the slight but sensible differences in formulation when compared to article 53(1), reflecting the 'procedural shift' from investigation (of a situation) to prosecution (of individual cases)[356]. Since the assessment at this stage must point to single individuals worth prosecuting, the whole process reflects a greater degree of individualisation in the exercise of prosecutorial discretion. With regard to the overall evidentiary standard required under this provision, the text imposes a "slightly higher threshold"[357] when it mandates the OTP to consider whether there is "sufficient basis"[358] for a prosecution (instead of "reasonable basis"). The same holds true as regards the first prong of the OTP's evaluation, namely the ascertainment on whether there is sufficient legal or factual basis to seek a warrant of arrest or summons to appear[359]. Moreover, the evaluation of admissibility at this later—and procedurally more advanced stage—focuses on *actual* and *concrete* cases and not, as under article 53(1) as interpreted by the OTP and Chambers, on *potential* cases. In this context, it has been argued that nothing prevents that the gravity prong of the admissibility assessment may be subject to slightly differing standards under article 53(1)(a) and 53(2)(a), being less stringent in the first hypothesis (concerned with the less in-depth and individualised knowledge available at the stage of the situation) and more demanding in the second (concerned with a more developed case hypothesis and individualised evidence)[360]. It is debatable whether the PTC's understanding of

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that the PTC had allegedly failed to accord *any* deference to the Office's assessment of the facts (see ICC-OTP, Final decision of the Prosecution concerning the "Article 53(1) Report" (ICC-01/13-6-AnxA), dated 6 November 2014, *Situation on the Registered Vessels of the Comoros*, *Greece and Cambodia*, ICC-01/13-57-Anx1, 30 November 2017, par. 61-62, 65).

[356] See W. A. SCHABAS, *The International Criminal Court: A Commentary on the Rome Statute*, cit., 839-840; K. AMBOS, *Treatise on International Criminal Law, Vol. III, International Criminal Procedure*, cit., 380-381.

[357] *Ibidem*.

[358] Article 53(2)(a) of the Statute.

[359] Again, see W. A. SCHABAS, *The International Criminal Court: A Commentary on the Rome Statute*, cit., 839-840; K. AMBOS, *Treatise on International Criminal Law, Vol. III, International Criminal Procedure*, cit., 380-381. Obviously, at the stage of the prosecution of a case the OTP must have positively concluded on the issue of jurisdiction, since there would be no merit in starting a prosecution with regard to conducts that fall outside the jurisdictional parameters set out in the Statute.

[360] In this vein, see M. LONGOBARDO, *Everything Is Relative, Even Gravity. Remarks on the Assessment of Gravity in ICC Preliminary Examinations, and the Mavi Marmara Affair*, in *Journal of International Criminal Justice*, vol. 14, issue 4, 2016, 1022-1024. The Author sympathises with the PTC's approach in the Comoros review decision, arguing that the OTP "should have taken into account the lower threshold required to establish admissibility—including sufficient gravity—at the preliminary examination stage" (*ibidem*, 1024).

gravity as an "exacting legal requirement", theorised in the *Comoros* decision, could be automatically transposed at the level of the decision on the starting of a prosecution, thereby confining the OTP's discretion to the sole interests of justice pursuant to 53(2)(c) of the Statute[361].

The preceding analysis shows that among the legal criteria to be considered under the heading of article 53, the gravity requirement, with its "elusive" character[362], has contributed to a certain degree of inconsistency and uncertainty in both prosecutorial and judicial practice, with particular regard to its possibly different conceptualisation at the situation and case stage[363]. It can be argued that the OTP can contribute to reduce at least in part this uncertainty by clarifying in a more consistent and principled fashion—through its article 53 reports—on what 'gravity paradigm' it is acting upon[364]. In this connection, the extent to which the current practice of the OTP conforms not only to the statutory and regulatory framework but also to the self-imposed policy papers will be the object of a more detailed analysis in the next part of this work.

3.4.2 The "interests of justice" as the true (and only) 'general clause' for prosecutorial discretion at the ICC?

In the words of the OTP

> The issue of the interests of justice, as it appears in Article 53 of the Rome Statute, represents one of the most complex aspects of the Treaty. It is the point where many of the philosophical and operational challenges in the pursuit of international criminal justice coincide (albeit implicitly), but there is no clear guidance on what the content of the idea is[365].

The lack of any detailed definition of the interests of justice in the Statute and in all the other legal texts governing the ICC is strong evidence of the drafters' intention to leave the door open for discretional considerations in the adoption of

[361] ICC, Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation, *Situation on the Registered Vessels of the Comoros*, *Greece and Cambodia*, ICC-01/13-34, PTC I, 16 July 2015, par. 14.
[362] In the words of C. STAHN, *Damned If You Do, Damned If You Don't: Challenges and Critiques of Preliminary Examinations at the ICC*, in *Journal of International Criminal Justice*, vol. 15, issue 3, 2017, 426.
[363] *Ibidem*, 426-427.
[364] In this sense see K. AMBOS, *Treatise on International Criminal Law, Vol. III, International Criminal Procedure*, cit., 295.
[365] See ICC-OTP, Policy Paper on the Interests of Justice, September 2007, 2.

crucial prosecutorial decisions at the pre-investigation and investigation stage[366]. In contrast with the other legal criteria relevant for a decision under article 53(1) or 53(2), this concept introduces a wider margin for policy considerations, although mediated by integrative legal parameters, in the equation of the exercise of prosecutorial discretion[367]. The indication of—non-exhaustive[368]—criteria to be taken into consideration in the assessment of the interests of justice only partially contributes to give content and meaning to this evasive 'general clause'[369].

Similarly to the case of the other criteria provided for under article 53, there are some textual differences between the legal formulation of the considerations integrating the interests of justice at the situational stage and at the case stage[370]. Again, such differences reflect the individualisation that occurs at the case stage, whereby the decision not to prosecute can be *additionally* based also on subjective factors relating to the alleged perpetrator, such as his or her age or infirmity or role in the commission of the crime[371]. Another difference relates to the fact that under paragraph (1)(c) of article 53 the Statute requires that, upon consideration of the relevant circumstances, there are "*substantial reasons* to believe that an investigation would not serve the interests of justice". The same language is not reproduced *verbatim* in paragraph (2)(c). It may prove difficult to conclude, only based on this

[366] See W. A. SCHABAS, *The International Criminal Court: A Commentary on the Rome Statute*, cit., 836 and K. AMBOS, *Treatise on International Criminal Law, Vol. III, International Criminal Procedure*, cit., 387-391.

[367] On the policy aspects of the interests of justice see M. VARAKI, *Revisiting the 'Interests of Justice' Policy Paper*, in *Journal of International Criminal Justice*, vol. 15, issue 3, 2017, 462-465.

[368] See for instance the language of article 53(2)(c): "A prosecution is not in the interests of justice, taking into account all the circumstances, *including* …" (emphasis added), followed by a list of four relevant criteria. On the non-exhaustive nature of the factors listed in these provisions see M. DELMAS-MARTY, *Interactions between National and International Criminal Law in the Preliminary Phase of Trial at the ICC*, in *Journal of International Criminal Justice*, vol. 4, issue 1, 2006, 9.

[369] This syntagm describes legal provisions that incorporate certain evaluative standards, characterised by a variable degree of generality and vagueness. This kind of provisions, which are abundant in both national and international law, function as 'safety valves' for the functioning of a given legal order, allowing a certain margin of interpretive discretion and empowering judges—and other institutional actors such as prosecutors—to give consideration to eminently policy-based considerations of fairness, reasonableness, appropriateness, proportionality, opportunity, etc. in the construction and application of legal texts. For a sophisticated analysis of the concepts of vagueness and uncertainty in international law see J. KAMMERHOFER, *Uncertainty in International Law. A Kelsenian perspective*, New York, 2011, 118-125.

[370] Compare article 53(1)(c) with article 53(2)(c) of the Statute. On these textual differences see also M. VARAKI, *op. cit.*, 458-460.

[371] See Article 53(2)(c) of the Statute. These criteria can be considered in addition to those already mentioned, namely the gravity of the crime and the interests of victims. In particular, the reference to age or infirmity allows room for humanitarian considerations that may induce the OTP to decline to prosecute certain individuals.

wording, that the threshold for resorting to the interests of justice in order to justify a no-action decision is higher at the situational stage than at the case stage. Nevertheless, from the point of view of distributive justice this textual discrepancy may be appreciated on grounds that a decision not to open an investigation of an entire situation precludes—unless the OTP later changes its position[372]—any chance of ascertaining criminal responsibility of potential perpetrators at the ICC; hence the need that such decision be based on a particularly thorough assessment of the relevant circumstances[373]. To the contrary, if a decision not to prosecute a specific individual is based on the interests of justice, this choice is made in the context of a situation that has already been the object of investigation and that is likely to give rise (or has already given rise) to other individual cases. The different degree of 'generality/preliminarity' at which these decisions are made and the different downstream consequences they produce on the Court's jurisdictional reach may therefore call for partially different standards in the assessment and application of the interests of justice clause, in order to justify a no-action decision under article 53(1)(c) and (2)(c) of the Statute.

As already pointed out in this work, the current practice of the Court has not yet substantively contributed to a more precise understanding of the *content* of this clause—which is the object of some elaboration in a dedicated prosecutorial policy paper[374]—for the plain reason that the OTP has never made recourse to it as a justification for not opening an investigation or starting a prosecution[375]. Nevertheless, at least with regard to the scope of the clause in the limited context of preliminary examinations, a PTC has ruled that "discretion expresses itself *only* in

[372] The decision not to start an investigation can always be subject to reconsideration based on new facts, pursuant to article 53(4) of the Statute.
[373] In particular, the consideration of the interests of victims in seeing justice done may play a significant role in the OTP's assessment. On this point see ICC-OTP, Policy Paper on the Interests of Justice, September 2007, 5-6.
[374] ICC-OTP, Policy Paper on the Interests of Justice, September 2007.
[375] To the present day, the OTP has denied the opening of an investigation based on failure to meet jurisdictional criteria (such as the situation of the Republic of Korea, see ICC-OTP, Article 5 Report, *Situation in the Republic of Korea*, 23 June 2014, par. 57, 70, 81-82; the situation of Honduras, see ICC-OTP, Article 5 Report, *Situation in Honduras*, 28 October 2015, 141-143 and most recently in the Situation in the Gabonese Republic) or failure to meet the required gravity threshold (such as in the situation regarding the conduct of UK troops in Iraq, see ICC-OTP, Letter to the Senders, *Situation in Iraq/UK*, 9 February 2006, p. 8-10 and in the situation emerging from the *Flottilla* incident, see ICC-OTP, Article 53(1) Report, *Situation on the Registered Vessels of the Comoros, Greece and Cambodia*, 6 November 2014, par. 148-150).

paragraph (c), i.e. in the Prosecutor's evaluation of whether the opening of an investigation would not serve the interests of justice"[376]. While this finding is still isolated—and has not been further elaborated by the AC on the merits[377]—it seems highly problematic to construe article 53 in a way that limits prosecutorial discretion in such stringent terms, with the risk of mandating an investigation in any situation of gravity comparable to that of the *Flottilla* incident[378].

Notwithstanding the apparently appealing nature of the interests of justice clause in terms of discretionary empowerment for the OTP, there are valid pragmatic reasons for its extremely narrow understanding from the point of view of the Prosecutor[379] and for her refusal to resort to this clause in practice so far. As it will be seen in greater detail dealing with judicial review of prosecutorial discretion, the Rome Statute introduces with regard to no-action decisions based *solely* on the interests of justice a form of *ex officio* judicial review that endows the PTC with the power to confirm or not to confirm the OTP's decision, thereby mandating the opening of an investigation or prosecution in case of disagreement[380]. As VARAKI convincingly points out

> It is difficult to understand why a Prosecutor would ever invoke the 'interests of justice', knowing that this would empower the PTC to review prosecutorial decisions not to investigate/prosecute and to order that investigations/prosecutions are actually carried out[381].

[376] ICC, Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation, *Situation on the Registered Vessels of the Comoros*, *Greece and Cambodia*, ICC-01/13-34, PTC I, 16 July 2015, par. 14 (emphasis added).
[377] ICC, 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', *Situation on Registered Vessels of Comoros, Greece and Cambodia*, ICC-01/13-51, AC, 6 November 2015. The AC declared inadmissible the OTP's appeal against the review decision of the PTC, reasoning that the decision could not be impugned as one "with respect to admissibility" (*ibidem*, par. 60). The inadmissibility of the appeal relieved the AC from entering into an in-depth analysis of the PTC's decision, including the aspects concerning gravity. Nevertheless, the AC clarified that the scope of the Chamber's review under article 53(3)(a) is limited to the possibility of asking the OTP to reconsider her previous decision. In other words, in this scenario the final (discretional) word on the opening of an investigation or initiation of a prosecution lies exclusively with the Prosecutor (*ibidem*, par. 58).
[378] See, *supra*, footnote 353, for references to doctrinal critiques to the PTC's decision.
[379] ICC-OTP, Policy Paper on the Interests of Justice, September 2007, 2-4. On this restrictive approach see, critically, M. VARAKI, *op. cit.*, 467-470.
[380] See the language of article 53(3)(b) of the Statute.
[381] M. VARAKI, *op. cit.*, 466.

In other words, "whit great power there must also come great responsibility"[382]: the wider the discretionary power allowed to the Prosecutor, the more careful its exercise needs to be and the more intrusive the judicial review of the concerned decision can be [383].

4. The influence of procedural rules on the exercise of discretion

In the previous paragraphs the enabling clauses for the exercise of prosecutorial discretion have been analysed adopting as a focus the provisions of the Statute, the primary source among the ICC's legal texts[384]. Nevertheless, due consideration given to the eminently procedural dimension of the rights and obligations concerning the exercise of prosecutorial discretion at the pre-investigation and pre-trial stage, attention must also be given to the relevant procedural rules mainly contained in the RPE, Regulations of the Court and Regulations of the OTP. The content and function of the most significant of said provisions, as well as their interaction with the Statute, are analysed in the present paragraph, with a view to completing the systematic study of the principles and rules governing the ICC's system of prosecutorial discretion.

The main function of the pertinent procedural rules contained in the RPE and Regulations is to establish in greater detail the concrete modes of exercise of prosecutorial discretion, with particular regard to the procedural obligations of the OTP in respect to—*inter alia*—certain duties in the conduct of preliminary examinations; the duty to give notice and to communicate its decisions to the interested subjects; the formal and substantive requirements of such decisions; and the OTP's relations with the PTC in the context of judicial review of the Prosecutor's discretionary choices.

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[382] The exact attribution of this famous saying and variations thereof is uncertain, the most recent and popular reference being a caption from a 1962 issue of the Marvel comic Spiderman (see S. LEE, S. DITKO, *"Spider-Man!"*, in *Amazing Fantasy 15#,* New York, 1962).

[383] This principle will be referred to, in the following part of this work, as the principle of proportionality between prosecutorial discretion and judicial oversight (see, *infra*, Part Three, Chapter One, par. 3).

[384] See article 21(1)(a) of the Statute, listing the Statute first among the primary sources of the ICC legal regime, before the Elements of Crimes and Rules of Procedure and Evidence.

Before entering a summary and thematic analysis of these provisions, it must be recalled that the RPE explicitly recognise to the OTP's a self-regulative power with regard to the adoption of regulations that must "govern the operation of the Office"[385], thereby giving substance to the statutory recognition of the OTP's administrative independence enshrined in article 42(2) of the Statute[386]. As it will be seen, various provisions of the Regulations of the OTP deal with the exercise of prosecutorial discretion, with particular regard to the 'proceduralisation' of preliminary examinations.

A first set of procedural rules deserving consideration comprises those provisions that impose on the OTP a duty to give notice of its discretionary decisions at the pre-trial stage—especially the negative ones—and to communicate them to other interested subjects such as victims, providing reasons in support of said decisions. Examples of this kind of provisions are Rules 49(1) and 50(1) of the RPE concerning the duty to give notice of decisions adopted under article 15 of the Statute, respectively in the case of the OTP's decision not to seek an authorisation to investigate pursuant to article 15(6) of the Statute and in the case of request for authorisation pursuant to paragraph 3 of the same article[387]. The latter provision is specifically concerned with the legal position of victims, in the attempt to balance their right to be informed of the OTP's decision and the potentially competing needs of confidentiality, integrity of the investigation and security and well-being of both victims and witnesses[388]. An analogous duty of notification is imposed on the OTP with regard to the decision not to open an investigation under article 53(1) of the Statute[389], or not to initiate a prosecution under article 53(2) of the Statute[390]. In such cases, the addressees of the notification may be either the referring entity (state or UNSC) or the information providers in case of *proprio motu* followed by a decision

[385] See Rule 9 of the RPE.
[386] See article 42(2) of the Statute: "The Prosecutor shall have full authority over the management and administration of the Office".
[387] See Rules 49(1) and 50(1) of the RPE. According to Reg. 102 of the Regulations of the Registry, when the OTP has a duty to inform victims, he or she may request the assistance of the Registry in order to communicate such information.
[388] See Rule 50(1) of the RPE. In particular, this provision establishes that the OTP, in performing these informative functions that may touch upon the interests and rights of victims, may seek the assistance of the VWU.
[389] See Rule 105 of the RPE.
[390] See Rule 106 of the RPE.

not to seek authorisation to investigate[391]. The same rules impose on the OTP—although under partially different conditions—the additional duty to inform the competent PTC of its negative decision[392]. According to the Regulations of the Court the OTP is also under the duty to inform the Presidency of the Court of its intention to submit a request for authorisation under 15(3) of the Statute, in order to allow for the timely formation of the competent PTC[393].

A second group of provisions deals with the formal and substantive requirements for the OTP's decisions concerning the exercise of discretion. Examples of this kind are Rule 50(2) of the RPE, providing that a request for authorisation under article 15(3) of the Statute must be made in writing[394], and Regulation 49 of the Regulations of the Court establishing in detail the required content of such a request[395]. One very significant aspect these provisions, as well as of those concerning the prosecutorial duties of information, is their explicit reference to the OTP's obligation to provide reasons for its discretionary decisions[396].

A third group of provisions, mainly contained in the Reg. of the OTP, relate to the rules governing the conduct of preliminary examinations and the concrete steps leading to decisions under article 53 of the Statute. These provisions reflect a

[391] Rule 105(2) of the RPE refers to the already examined Rule 49 with regard to the duty to give notice to the information providers in case of *proprio motu*.
[392] According to Rule 105(4) the OTP must inform the PTC of the decision not to open an investigation only when he or she decides to do so *solely* on the basis of the interests of justice. To the contrary, when the OTP decides that there is not a sufficient basis to proceed with a prosecution he or she shall always inform in writing the competent PTC (see Rule 106(1) of the RPE).
[393] See Regulation 45 of the Regulations of the Court and Regulation 28(3) of the Regulations of the OTP. For instance, in November 2017, on the basis of these provisions the OTP, has communicated to the Presidency its intention to submit a request for authorisation to investigate in the situation concerning the Islamic Republic of Afghanistan, which has long been under preliminary examination. See ICC-OTP, Statement of ICC Prosecutor, Fatou Bensouda, regarding her decision to request judicial authorisation to commence an investigation into the Situation in the Islamic Republic of Afghanistan, 3 November 2017 and ICC, Decision assigning the situation in the Islamic Republic of Afghanistan, *Situation in the Islamic Republic of Afghanistan*, ICC-01/17-1, Presidency, 3 November 2017 (and in particular the Annex I, reproducing the OTP's notice to the Presidency under Regulation 45 of the Regulations of the Court). The request concerning the situation in Afghanistan was later made known to the public as ICC-OTP, Public redacted version of "Request for authorisation of an investigation pursuant to article 15", 20 November 2017, ICC-02/17-7-Conf-Exp**,** *Situation in the Islamic Republic of Afghanistan*, ICC-02/17-7-Red, 20 November 2017.
[394] The same holds true for the decisions under article 53 of the Statute, as explicitly established by Rule 105(1) and (4) and 106(1) of the RPE.
[395] See Regulation 49 of the Regulations of the Court.
[396] See Rules 49(1), 105(1) and (5), 106(2) of the RPE as well as Regulation 49(1)(b) of the Regulations of the Court. It is evident that the duty to provide reasons in support of the OTP's discretionary decisions is a necessary logical premise for the possibility to ask their judicial review by the PTC, in the cases and within the limits provided for under the Statute and applicable rules.

tendency to the proceduralisation of preliminary examinations, in line with the OTP's policy documents[397]. Examples of this kind are Reg. 27-31 of the Regulations of the OTP, dealing *inter alia* with the initial filtering of information at the beginning of preliminary examinations[398]; the publicity (and the connected issues of confidentiality) of the OTP's activities under article 15[399]; the reaching of a decision on the opening of an investigation and starting of a prosecution[400] and the decision not to proceed based on the interests of justice[401]. On these last two crucial issues, the Regulations of the OTP stipulate that the Office shall decide on the basis of an internal report prepared by the competent divisions in which the OTP is articulated[402], providing hints on how the administrative and organisational self-regulation of the Office influences the decision-making process at the preliminary stage[403].

A fourth and last group of provisions relates to the mechanisms leading to the judicial review of the OTP's discretionary decisions, dealing with the OTP-PTC relations for the purposes of the exercise of the Court's supervision. These provisions impose on the OTP certain duties to inform the judges of its decisions, in particular when the Prosecutor decides not to proceed with an investigation based solely on the

[397] See, in particular the ICC-OTP, Policy Paper on Preliminary Examinations, November 2013, par. 72-92.
[398] Reg. 27 of the Regulations of the OTP. This regulation stipulates that the OTP, in the examination of the information received, shall distinguish between: a) those relating to matters that are manifestly outside of the jurisdiction of the Court; b) those relating to ongoing activities situation and that are already under examination or already form the basis of a prosecution; c) those information that do not present the characteristics *sub* a) and b), and that therefore warrant further examination pursuant to Rule 48 of the RPE.
[399] See Reg. 28 of the Regulations of the OTP. The provision does nothing more than restating the OTP's duties of information and notification to the interested subjects, already established under the pertinent Rules, but it articulates in greater detail the OTP's duty to strike a balance between the needs of publicity and transparency on the one side, and those of confidentiality and safety on the other (see, in particular par. 1 and 2 of the Regulation).
[400] See Reg. 29 of the Regulations of the OTP. Sub-Reg. 1-4, dealing with the decision on the opening of an investigation, apply *mutatis mutandis* also to the decision on prosecutions, as per sub-Reg. 5.
[401] See Reg. 31 of the Regulations of the OTP.
[402] See Reg. 29, sub-reg. 1-2 on the content on such report and sub-reg. 3 on the relevance of the report for the determination on the reasonable basis to proceed with an investigation. Reg. 31, dealing with decisions not to proceed based on the interests of justice, additionally establishes that the internal report must be submitted to, and approved by, the Executive Committee (ExCom), an organ composed of the Prosecutor and the Heads of the three divisions of the Office, namely the Jurisdiction, Complementarity and Cooperation Division; the Investigation Division and the Prosecution Division (see Reg. 4 and 7-9 of the Regulations). On the internal structure of the OTP, see I. STEGMILLER, *The Pre- Investigation Stage of the ICC*, cit., 50-55.
[403] This administrative articulation and division of labour within the Office is premised on the administrative autonomy recognised to the Prosecutor by the Statute and RPE as a fundamental component of the OTP's independence (see article 42(2) of the Statute and 9 of the RPE).

interests of justice[404] or when, after having investigated, he or she decides that there is not a sufficient basis for a prosecution[405]. They also provide a more detailed procedure for the exercise of judicial review of such decisions[406].

Interestingly, one crucial aspect that is almost completely neglected by the Rules and Regulations concerns the timing (and more importantly the time limits) of preliminary examinations, and more generally of the pre-investigation and pre-trial phases. The applicable rules do not establish any time limit for the duration of preliminary examinations or of the investigation, thereby giving to the OTP a 'discretionary weapon' based on the modulation of the time and manner of conducting these pre-trial activities. In this sense it must be recalled that from the silence of the legal texts on the issue, the OTP insists on inferring that preliminary examinations—as well as investigations—cannot be subject to specified time limits[407]. The only procedural rule that touches upon the OTP's discretional use of time is the one dealing with the PTC's decision—in the exercise of its power of judicial oversight—to request the reconsideration of a prosecutorial decision not to proceed under article 53 of the Statute. In such a case, the Rules stipulate that the OTP "shall reconsider that decision *as soon as possible*"[408]. Nevertheless, the indication of a time constraint—albeit not precisely determined—with regard to the OTP's reconsideration is not assisted by appropriate remedies in case of prosecutorial failure to act promptly[409]. The only instance of practice on the point reveals that the OTP did not consider itself compelled to act within a reasonably short period of time upon the PTC's request for reconsideration concerning the *Flottilla* incident[410]. As a matter of fact, the OTP rendered its "final decision" on the *Flottilla* incident only in late 2017, by confirming its previous assessment and the

[404] See Rule 105(4) of the RPE.
[405] See Rule 106(1) of the RPE.
[406] See Rules 107-110 of the RPE.
[407] On this issue see, *supra*, par. 3.2, footnotes 273-277.
[408] See Rule 108(2) of the RPE (emphasis added).
[409] The Rules do not provide the subjects who asked the judicial review of a no-action decision with any instrument to 'force'—or at least incentivise—the OTP to put forward, irrespective of its outcome, a prompt reconsideration of its previous decision. It can be doubted that the undue procrastination of such reconsideration is in any case compatible with the OTP's general duty to act *bona fide* vis-à-vis the Chambers.
[410] The decision of the PTC was issued on 16 July 2015, while the AC declared the OTP's appeal against it inadmissible on 6 November 2015. The OTP did not adopt a final decision until the end of 2017, over two years after the AC's decision, a behaviour hardly reconcilable with the duty to reconsider its decision "as soon as possible" (see, *infra*, next footnote).

decision not to open an investigation, manifesting its stark disagreement with the PTC's request for reconsideration, especially on the methodology and standard of review under article 53(3)(a) of the Statute as applied by the preliminary judges[411].

5. An overall evaluation of the statutory and regulatory framework: Intermediate conclusions

After having examined the relevant statutory and regulatory provisions that, from the point of view of the OTP, enable and regulate the exercise of prosecutorial discretion at the pre-investigation and pre-trial stage, a few preliminary conclusions can be drawn in order to summarise the main features of the *static* dimension of the ICC legal regime on the issue.

a) The Rome Statute, based on the composite outcomes of the intense debates concerning the role and functions of the Prosecutor and his or her discretionary powers, provides the original source of legitimacy of the OTP's selection powers, through both enunciations of principle (mainly contained in the Preamble)[412] and structural provisions establishing and regulating the Prosecutor's *proprio motu* powers and his or her ability—irrespective of the triggering mechanism—to adopt discretionary decisions[413]. Nevertheless, the pertinent statutory provisions—due to their general lack of precision—leave significant leeway to the OTP as regards many crucial aspects of the exercise of discretion, subject to rather vague (and generally low) evidentiary standards at the pre-investigation and investigation stage, and to a limited degree of judicial review of the selection decisions[414].

b) Secondary legal sources such as the RPE and applicable Regulations provide a slightly more detailed framework for the concrete exercise of discretion, establishing certain duties on the OTP as regards the conduct of preliminary examinations and the process leading to decisions on the opening of investigations

[411] See ICC-OTP, Final decision of the Prosecution concerning the "Article 53(1) Report" (ICC-01/13-6-AnxA), dated 6 November 2014, *Situation on the Registered Vessels of the Comoros, Greece and Cambodia*, ICC-01/13-57-Anx1, 30 November 2017.
[412] See, *supra*, par. 3.1 of this Chapter.
[413] See, *supra*, par. 3.2 and 3.4 of this Chapter.
[414] See, *supra*, par. 3.2.1 of this Chapter and, *infra*, Chapter Three of this Part concerning the role of judges in the judicial review of prosecutorial discretionary choices.

and/or the starting of prosecutions[415]. It must be recalled that these procedural rules differ *internally* as to their legal status within the Rome legal regime[416]. While both the RPE and all the Regulations must always be consistent with the Statute[417], the following hierarchical order of precedence can be established among the various sets of procedural rules: i) Rules of Procedure and Evidence; ii) Regulations of the Court[418]; iii) Regulations of the OTP and Regulations of the Registry[419] (on equal footing). The actual capacity of these rules to shape the concrete exercise of prosecutorial discretion, by integrating or developing the provisions of the Statute, can only be assessed based on an accurate survey of their practical interpretation and application on the part of the interested actors.

c) From the above points derives that the space left to the confirmative, integrative and/or transformative practice of the OTP and Chambers (with particular regard to the supervisory role that may be exercised on negative decisions by the PTC either *ex parte* or *ex officio*)[420] is significant and reflects the drafters' intention to provide a sufficient degree of *flexibility* in the exercise of discretion and judicial review thereof. While the legal texts clearly reserve to the OTP a pivotal role in the adoption of discretionary decisions at the pre-trial stage, the concrete outcomes of the institutional interplay between the referring entities, the OTP and the Chambers are not easily predictable based on a purely *normativistic* and *static* analysis of the pertinent provisions. In particular, the potentially *dialectical* relations between the

[415] See, *supra*, par. 4 of this Chapter.
[416] See, G. BITTI, *op. cit.*, 414-422.
[417] See article 51(4) and (5) of the Statute, respectively establishing that the RPE "shall be consistent with [the] Statute" and that in the event of conflict between the two sources "the Statute shall prevail". See also the Explanatory Note accompanying the Rules of Procedure and Evidence, stating that "The Rules of Procedure and Evidence are an instrument for the application of the Rome Statute of the International Criminal Court, *to which they are subordinate in all cases*" and that "In all cases, the Rules of Procedure and Evidence should be read in conjunction with *and subject to* the provisions of the Statute" (emphasis added). The subordination of Regulations to the Statute is explicitly established by Reg. 1, sub-reg. 1, of the Regulations of the Court; Reg. 1, sub-reg. 2 of the Regulations of the OTP and Reg. 1, sub-reg. 1 of the Regulations of the Registry.
[418] The subordination of the Regulations of the Court to both the Statute *and* the RPE is established under Reg. 1, sub-reg. 1, of the Regulations of the Court: "These Regulations … shall be read subject to the Statute *and* the Rules" (emphasis added).
[419] The subordination of the Regulations of the OTP and Registry to both the RPE and the Regulations of the Court is clearly postulated under Reg. 1, sub-reg. 1 of the Regulations of the Registry and Reg. 1, sub-reg. 2 of the Regulations of the OTP. The latter adds that the Regulations of the OTP shall be read "*in conjunction with* the Regulations of the Registry" (emphasis added), somehow recognising that the two documents enjoy the same hierarchical position among the legal sources of the ICC regime.
[420] See Article 53(3)(a)-(b) of the Rome Statute.

OTP and PTC in the different contexts of exercise of prosecutorial discretion may give rise to practices capable of strategically orienting the functioning of the checks and balances mechanism with regard to prosecutorial discretion. In any event, these institutional relations will necessarily take time to stabilise and to reach a reasonable balance between the need for consistency and flexibility.

d) The role of the OTP as the primary engine of the Court's selection decisions is not limited to its formal statutory and regulatory attributions (and limitations thereof) as a fundamental organ of the Court and as a party to the proceedings, but extends also to the OTP's own 'informal'—and non legally binding—definition of a general prosecutorial strategy and to the Office's policies that touch upon various aspects of exercise of selection powers. These documents, irrespective of their (debatable) aptitude to inform the OTP's actual discretionary choices, must be carefully considered as manifestations of the Office's self-understanding with regard to its institutional role and may additionally be used as performance indicators to test the consistency of the OTP's prosecutorial practice[421].

[421] See, *infra*, the next Chapter. On the evaluation of the OTP's performances according to performance indicators see, recently, B. KOTECHA, *The ICC's Office of the Prosecutor and the Limits of Performance Indicators*, in *Journal of International Criminal Justice*, vol. 15, issue 3, 2017, 543-565.

CHAPTER TWO

BEYOND THE TEXT AND TOWARDS (SELF-REGULATORY) PRACTICE: THE ROLE OF THE OTP

1. Introduction

The static analysis of the sources and procedures for the exercise of prosecutorial discretion conducted in the previous chapter allowed to draw the preliminary conclusion that the OTP—within the statutory and regulatory legal framework—plays a decisive role in shaping the strategic lines guiding discretionary choices[422]. Attention must therefore be turned on how—and through which instruments—the Office has interpreted in practice its priority-setting responsibilities in recent years.

The necessity to establish—and to update on periodic basis—both the broad lines of the prosecutorial strategy and the OTP's position on specific substantive and procedural issues had already emerged in the early years of the Court's institutional experience[423]. The first documents dealing with these issues were adopted during the tenure of Luis Moreno Ocampo, and have later been significantly and continuously expanded, modified and increased in number during the tenure of the incumbent Prosecutor, also as part of the OTP's general effort to provide greater transparency with regard to its working methods and decision-making processes[424].

The practice of the Office on this point has gradually consolidated, resulting in the periodic adoption and renewal of the so-called Prosecutorial Strategy (or more recently Strategic Plan), a broad and detailed document covering a three-year period, and of a number of single-topic policy documents referred to as Policy Papers. This

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[422] In this vein see K. AMBOS, *Treatise on International Criminal Law, Vol. III, International Criminal Procedure*, cit., 131-132.

[423] See for instance ICC-OTP, Paper on some policy issues before the Office of the Prosecution, September 2003 (including the Annex) and ICC-OTP, Report on Prosecutorial Strategy, 14 September 2006, which are the first examples of such documents.

[424] At the beginning these documents were relatively limited in scope and rather concise, to become more complex and detailed through the years. In particular the last two Strategic Plans (respectively for 2012-2015 and 2016-2018) are much longer and analytical when compared to the earlier ones. Obviously, this is also due to the increased number of situations and cases to deal with, and to the necessity to adapt and enrich the strategy in order to better reflect the various challenges emerged in the OTP's practice.

practice has later been institutionalised and legitimised through the adoption of Regulation 14 of the Regulations of the OTP, which mandates the Office to "make public its Prosecutorial Strategy" and, as appropriate, "policy papers that reflect the key principles and criteria of the Prosecutorial Strategy"[425].

The necessity to adapt to changing institutional circumstances and to learn from on-going practices (and mistakes)—such as situations revealing a degree of friction between the OTP and judges—made it also appropriate to integrate these strategy and policy documents with administrative or regulatory measures, in particular in the form of Codes of Conduct or Guidelines[426].

Moreover, the obvious institutional, organisational and financial consequences of OTP's priority-setting efforts, made it necessary to put forward a detailed analysis of what would be the optimal size and appropriate funding to allow the Office to effectively—and efficiently—meet its strategic objectives. This effort resulted in the elaboration of the concept of "Basic Size" of the OTP, which is the object of a report presented to the ASP in 2015 in order to "ensure that the Office has the requisite resources to fully meet its mandate under the Rome Statute; and . . . to offer States Parties a reasonably stable basis for budgetary planning"[427].

These documents need to be briefly analysed in order to provide a better understanding of their justification, legal nature and effects (both in the domain of the OTP's activities and vis-à-vis the other organs of the Court), as well as of their

[425] See, respectively Regulation 14, Sub-regulation 1 and 2 of the Regulations of the OTP. The Regulations entered into force on 23 April 2009, well after the first strategy and policy papers had been adopted by the OTP, thereby recognising the role of the previous practice of the Office on the point.

[426] See, e.g., the ICC-OTP, Code of Conduct for the Office of the Prosecutor, entered into force on 5 September 2013. An example of confrontation between the OTP and judges leading to the adoption of a set of guidelines relates to the use of intermediaries in the conduct of investigations. In the *Lubanga* trial the questionable manner in which the OTP dealt with intermediaries came under scrutiny of the Court, leading to the subsequent adoption of the Court's Guidelines Governing the Relations between the Court and Intermediaries for the Organs and Units of the Court and Counsel working with intermediaries, of March 2014. This document, although particularly relevant for the work of the OTP, contains provisions that apply *mutatis mutandis* to the other organs of the Court and to Counsels for the victims and Defence. See, *infra*, par. 4.

[427] See ICC-ASP/14/21*, Report of the Court on the Basic Size of the Office of the Prosecution, 17 September 2015, 7. The report was prepared by the OTP and transmitted to the Committee on Budget and Finance of the ASP, which had originally requested it. The overall consequences of the model have later been the object of further discussion at the 15th session of the ASP, held in The Hague on 16-24 November 2016 (see, ICC-ASP/15/33, Interim Report of the Court on the Court-wide Impact of "OTP Basic-Size", 14 November 2016).

function as potential instruments for an *ex post* empirical scrutiny of the Office's prosecutorial performances[428].

2. Prosecutorial Strategies and Plans

In the absence of a 'heteronomous' determination of the overall criminal policy objectives and prosecutorial priorities, it was certainly the responsibility of the OTP to elaborate on them, translating the general indications contained in the Statute into practice-oriented directives for the fulfilment of its mandate[429]. The source of this responsibility can be traced back both to the administrative and operative independence of the OTP enshrined in article 42(2) of the Statute and, more generally, to the inherent role of the Prosecution in the selection of situations and cases.

The idea to set up a document detailing the broad lines of the prosecutorial strategy over a three-year period was put forward in 2006, when the first version of such strategy was adopted by the OTP, based on the previous three years of institutional experience (and early case law) of the Court[430]. Since then, the Office has renewed and updated the strategy on other three occasions, always for the same temporal horizon[431]. It should be emphasised that there is no requirement that the strategy paper be adopted or amended periodically or at fixed terms, being the three-year timeframe used by the OTP purely a matter of conventional practice of the Office. It is particularly instructive to look at how the prosecutorial strategy has changed over time—based on the assessment of previous practice and the judicial

[428] For an in-depth discussion and critical review of these documents see the articles published in the *Special Issue: The International Criminal Court's Policies and Strategies*, in *Journal of International Criminal Justice*, vol. 15, issue 3, 2017, 407-640.

[429] Contrary to certain national criminal systems, where the setting of priorities for the exercise of prosecutorial discretion is co-determined by an external body (such as the legislature), in the context of the ICC the ASP, the Court's political governing body, enjoys no specific power or attribution in this area (see article 112 of the Statute). Nevertheless, the ASP can indirectly influence prosecutorial strategies through the leverage provided by its power to consider and approve the Court's budget pursuant to article 112(2)(d) of the Statute.

[430] See ICC-OTP, Report on Prosecutorial Strategy, 14 September 2006. Certain priority-setting issues had already been envisaged by the ICC-OTP, Paper on some policy issues before the Office of the Prosecution of September 2003.

[431] See ICC-OTP, Prosecutorial Strategy 2009-2012, 1 February 2010; ICC-OTP, Strategic Plan 2012-2015, 11 October 2013; ICC-OTP, Strategic Plan 2016-2018, 16 November 2015.

developments of the various situations and cases—by retaining, refining, amending, reframing or sometimes rejecting certain criteria and objectives.

The 2006-2009 Strategy formulated three Strategic Goals and five Strategic Objectives for the three subsequent years, including a forecast on the number of on-going trials to be completed and of the new investigations to be launched during the relevant term[432]. In addition, the OTP set the three fundamental principles guiding the prosecutorial strategy, namely (positive) complementarity, "focused investigations and prosecutions", and the maximization of the impact of the OTP's activities. From the point of view of the exercise of prosecutorial discretion the most interesting of these principles relates to the OTP's elaboration of the concept of "focused investigations and prosecutions". The Office pointed out that its activity focuses on "the most serious crimes and on those who bear the greatest responsibility". This is to be achieved through a "sequenced approach" to selection choices, whereby cases within a given situation are selected one after the other according to their gravity (assessed on the basis of scale, nature, manner of commission and impact of the alleged crimes)[433]. The number of incidents to be investigated must be limited but at the same sufficient to "provide a sample that is reflective of the gravest incidents and the main types of victimisation"[434]. Only in this way the OTP could carry out short investigations and expeditious trials, including through the request of warrants of arrest or summons to appear "only when a case is nearly trial-ready"[435].

These principles were later substantially confirmed—and partially refined—by the Prosecutorial Strategy for 2009-2012, despite the difficulties in meeting the objectives envisaged in the previous document[436]. Concerning the policy of focused investigations the OTP clarified that its selection decisions should point to "those

[432] ICC-OTP, Report on Prosecutorial Strategy, 14 September 2006, 4 (particularly the summary contained in Table 1), 6-9. As regards the number of trials the OTP had envisaged to complete two trials by the end of the period and to launch at least 4-6 new investigations. The first objective proved to be way too optimistic and was clearly missed by the Office. The first judgment of the Court in the *Lubanga* trial was rendered only in 2012.
[433] *Ibidem*, 5. These criteria have later been reproduced in Regulation 29(2) of the Regulation of the OTP as well as in the Policy Paper on Preliminary Examinations (see, *infra*, next paragraph).
[434] *Ibidem*, 5-6.
[435] *Ibidem*, 6.
[436] See ICC-OTP, Prosecutorial Strategy 2009-2012, 1 February 2010, 4-7. Nevertheless, the sequenced approach was not explicitly mentioned in the new strategy. As recalled by K. AMBOS, *Treatise on International Criminal Law*, *Vol. III*, *International Criminal Procedure*, cit., 134, in the Kenyan situation the OTP did not follow this approach and instead carried out simultaneous investigations and more than one prosecution at a time.

situated at the highest echelons of responsibility, including those who ordered, financed, or otherwise organised the alleged crimes"[437].

The Strategic Plan for 2012-2015 marked a relevant policy shift from the concept of "focused investigations" to that of "in-depth, open-ended investigation, while maintaining focus"[438]. Based on the experience—and given the evidentiary standards progressively imposed by the Chambers[439]—the new policy allowed for greater flexibility through the formulation of "multiple case hypotheses" (open-ended character) and renounced to a purely top-down approach, subscribing to a strategy that builds upwards from mid to high-level perpetrators, without ignoring even low-level perpetrators, where their conduct has been particularly grave[440]. Together with this shift in the selection strategy, the OTP integrated in its document a more pragmatic approach towards the collection of evidence and the subsequent decisions on prosecution. In particular, the document stated that the OTP shall make applications for a warrant of arrest or summons to appear only when there are reasonable prospects of collecting additional evidence, and shall present cases at the confirmation stage that are as trial-ready as possible (in-depth character)[441]. Other aspects of the Plan deal with issues of resources, organisation and cooperation[442].

The most recent Strategic Plan, the one covering the 2016-2018 period, builds on the previous and confirms its approach to selection strategies, which according to the figures provided by the OTP have increased the efficacy and efficiency of

[437] ICC-OTP, Prosecutorial Strategy 2009-2012, 1 February 2010, 6. This last strategic directive to concentrate on the highest echelons may have contributed to the partial conflation between the concept of "those who bear the greatest responsibility" and the category of senior leaders. The Court has in any case clarified that any such confusion must be avoided, confirming that medium and low-level perpetrators are perfectly legitimate targets for prosecution (see ICC, Judgment on the Prosecutor's Appeal against the Decision of the Pre-Trial Chamber I Entitled: "Decision on the Prosecutor's Application for a Warrant of Arrest, Article 58", *Prosecutor v. Lubanga*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-169, AC, 13 July 2006, par. 73-75, 78-79). PTC I, in the Court's first review decision pursuant to article 53 of the Statute, has criticised the OTP's approach in deciding not to open an investigation precisely based on this conflation (see ICC, Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation, *Situation on the Registered Vessels of the Comoros*, *Greece and Cambodia*, ICC-01/13-34, PTC I, 16 July 2015, par. 23-24).
[438] ICC-OTP, Strategic Plan 2012-2015, 11 October 2013, par. 4, 23.
[439] *Ibidem*, par. 22.
[440] *Ibidem*, par. 23.
[441] *Ibidem*.
[442] *Ibidem*, par. 24-26, 27-31, 64-65 respectively.

prosecutorial action, especially at the confirmation of charges stage[443]. The Plan also focuses on the relations between the overall strategy and certain specific policies as elaborated in various policy papers, and additionally refers to the implementation of the Basic Size Model[444]. Among the objectives for the subsequent three years, the document focuses on the improvement of the quality and efficiency of preliminary examinations (in what the OTP calls a "holistic approach")[445]. In this regard, it is important to take note of the OTP's focus on the transparency and publicity of the information on preliminary examinations and to the issue of their timely completion[446].

Notwithstanding the importance of these strategies from the point of view of transparency and justification of prosecutorial choices, it is doubtful whether they can alone determine a reasonable degree of foreseeability of the OTP's discretionary decisions, for at least two reasons. On the one hand, they clearly lack any binding character and cannot *per se* be enforced upon the OTP[447]; on the other, they are independently adopted and amended by the same subject that is supposed to follow their programmatic provisions. The periodic changes to some of the core principles of these strategies in the absence of an overarching long-term or permanent strategy give the impression that the OTP is simply adapting to the circumstances in order to accommodate the practicalities (and difficulties) encountered in discharging its mandate[448]. It must nevertheless be recognised that striking a balance between flexibility and predictability is an extremely complex exercise and it is only in the practice of the Office—in its interaction with the Chambers—that a reasonable and pragmatic outcome can be reached. From the point of view of outreach and

[443] ICC-OTP, Strategic Plan 2016-2018, 16 November 2016, par. 1, 2, 15-18, 35-36 (see also Annex I for the detailed analysis of improvements in the confirmation of charges). In particular, the OTP focuses on the performance increase in the confirmation of charges (23% increase on the number of charges confirmed, 28% increase when considering the confirmation rate per accused).
[444] *Ibidem*, par. 38-39 and 67-77.
[445] *Ibidem*, par. 55 on the objectives for the improvement of preliminary examinations.
[446] *Ibidem*, number 3 and 5. However, on the issue of duration of preliminary examinations, the OTP confirmed its position that their conduct cannot be subject to specified time limits. The Strategic Plan merely states that the Office shall ensure that they are conducted "without undue delays" and completed "as soon as all relevant sources of information have been explored".
[447] Of course, if the Strategy were to envisage criteria or objectives in conflict with the duties and responsibilities of the Prosecutor as set out in the Statute and RPE (or stemming from the case law of the Court), a subsequent and indirect judicial control over the strategy could be the exercised by the judges in deciding specific contentious issues, both at the preliminary and trial stage.
[448] On the desirability of a general long-term strategy see K. AMBOS, *Treatise on International Criminal Law*, *Vol. III*, *International Criminal Procedure*, cit., 135.

communication, these strategies (as well as the policy papers) are double-edged swords: while trying to meet the stakeholders' demand for transparency and accountability they increase the degree of scrutiny over prosecutorial choices, thereby exposing the Office to critique when its choices do not appear to be in line with the stated strategy or policy.

3. Policy Papers

While prosecutorial strategies are meant to establish the general principles, priorities and objectives that should guide the action of the OTP, the so-called Policy Papers deal with discrete issues relevant to the implementation of such strategies. Similarly to prosecutorial strategies, these documents where initially elaborated in the practice of the Office and received subsequent formal recognition under Regulation 14 of the Regulations of the OTP[449]. The OTP has so far adopted a number of separate policy papers dealing with various substantive and procedural issues, some of them being relevant to the present discussion concerning the scope and limits of prosecutorial discretion at the ICC[450]. In providing an overview of the function and scope of these documents it is useful to distinguish between policies that relate to specific substantive criminal policy topics, and those relating to crosscutting procedural and institutional topics.

The first group comprises, in particular, the Policy Paper on Sexual and Gender-Based Crimes and the Policy on Children. Through their elaboration the OTP sought to integrate in its prosecutorial policy specific considerations relating to certain categories of crimes or groups of victims. Pressures from international civil society in order to recognise the specificity of sexual and gender-based crimes or crimes involving children—crimes that have been historically underrepresented in

[449] Sub-regulation 2 establishes that "As appropriate, the Office shall make public policy papers that reflect the key principles and criteria of the Prosecutorial Strategy".

[450] The policy paper adopted so far are the following, in chronological order: ICC-OTP, Paper on some policy issues before the Office of the Prosecutor, September 2003; ICC-OTP, Policy Paper on the Interest of Justice, September 2007; ICC-OTP, Policy Paper on Victims' Participation, April 2010; ICC-OTP, Policy Paper on Preliminary Examinations, November 2013; ICC-OTP, Policy Paper on Sexual and Gender-Based Crimes, June 2014; ICC-OTP, Policy Paper on Case Selection and Prioritisation, 15 September 2016; ICC-OTP, Policy on Children, 15 November 2016. Some of these papers have already been referred to in other parts of the present work. In this paragraph attention has been devoted to their systematic and practical relevance for the purposes of understanding the OTP's role in designing the prosecutorial policy.

international prosecutions—made it necessary for the OTP to express its position on these topics. The OTP has therefore integrated sex/gender-sensitive and child-oriented approaches into its pre-existing prosecutorial policies[451]. The OTP has clarified its commitment to the investigation and prosecution of these crimes both in terms of case selection and policy on charges[452], institutional and procedural measures necessary to minimise safety risks and (re)traumatisation of the victims[453], as well as maximisation of the significance of reparations[454]. One common element of these policies is the recognition of the role of experts in assisting the OTP to deal with victims of such crimes at the various stages of proceedings and the recognition of the necessity to recruit or contract specialised personnel for that purpose[455]. These documents surely represent a laudable effort to recognise and accommodate the specificities of certain categories of crimes and victims, but do not always provide a solid justification for prioritising them over other equally grave crimes[456]. To a certain extent they may be perceived more as a response to the criticism that surrounded the first selection choices of the OTP than as a principled elaboration of criteria for prioritising situations or cases[457].

[451] See ICC-OTP, Policy Paper on Sexual and Gender-Based Crimes, June 2014, par. 6, 7, 20 and ICC-OTP, Policy on Children, 15 November 2016, par. 9, 15, 17, 22-23.
[452] *Ibidem*, respectively, par. 40-45, 71-74 and 39-52, 58, 62, 64, 84-88. The OTP underlines the crimes that are more frequently characterised by sex or gender profiles or that are likely to affect children. It also deals with charging practices, such as the possibility to charge certain conducts as discrete or individual crimes when this can better reflect the social stigma of such conducts, or to proceed to cumulative charges when necessary to increase the prospects of conviction.
[453] *Ibidem*, respectively, par. 22, 51, 60-61, 64, 70, 85-90 and 21, 28-30, 71-77, 81-82, 93-95 where the documents focus on the special measures needed to guarantee the safety and well being of the victims and witnesses at the investigation and trial stage. With regard to children a reference is made to the principle of the "best interest of the child" enshrined in the UN Convention on the Rights of the Child.
[454] *Ibidem*, respectively, par. 102 and 105-107.
[455] *Ibidem*, respectively, par. 21, 113, 115, 118-119 and 69, 71, 73, 77, 78-79. It should be reminded that the OTP has appointed special advisers both for gender and children issues based on article 42(9) of the Statute and has created a dedicated Gender and Children Unit under Regulation 12 of the Regulations of the OTP.
[456] In this sense see K. AMBOS, *Treatise on International Criminal Law, Vol. III, International Criminal Procedure*, cit., 134-135.
[457] Good reasons may obviously be put forward for prioritising sexual or gender-based crimes or children-related crimes, but it is hard to find such an elaboration in the respective policy papers, at least besides general enunciations of principle (see, e.g., ICC-OTP, Policy Paper on Sexual and Gender-Based Crimes, June 2014, par. 44-45 which tautologically state that sexual and gender-based crimes are amongst the gravest under the Statue, without elaborating on the rationale behind their prioritisation). In the case of the policy paper on sexual and gender-based crime, the OTP—under the tenure of Fatou Bensouda—evidently sought to show its renewed commitment to prosecute these crimes, after the severe criticism of the first Prosecutor's decision to completely exclude sexual crimes from the charges in the *Lubanga* trial.

The second group of papers comprises the Policy Paper on the Interest of Justice and, most importantly, the Policy Paper on Preliminary Examinations and the Policy Paper on Case Selection and Prioritisation. These documents stand at the core of the OTP's understanding of its own institutional role in the exercise of prosecutorial discretion and provide a more precise definition of the principles and criteria that should guide selection decisions, within the general framework contained in the Strategic Plan.

The OTP's extremely narrow construction of the interests of justice has already been the object of reflection in previous chapters of this work, with particular regard to the Prosecutor's discretionary powers under article 53 of the Statute[458]. The OTP has so far avoided delving into the normative content of this undefined general discretionary clause, maintaining that its should be resorted to only under exceptional circumstances[459]. Therefore, this policy paper only contributes to shape prosecutorial discretionary practices in a 'negative' sense, given the OTP's self-restraint in interpreting the scope of the Statute's provision, especially through the distinction between the semantic field of the interests of justice and that of international peace and security (considering the latter outside the OTP's institutional mandate)[460].

The Policy Paper on Preliminary Examinations is more relevant for the present discussion. A draft of this document was first circulated in 2010, and the final version was adopted only in 2013[461]. As the timing of its adoption suggests, this document builds on the previous informal—and not overly transparent—preliminary examination practice of the Office, drawing lessons from both relevant case law and scholarly reflection on central legal issues such as jurisdiction and admissibility (*sub specie* complementarity and gravity). The first part of the paper is dedicated to the general principles that must guide prosecutorial action at the preliminary examination stage, namely *independence*, *impartiality* and *objectivity*[462]. It then goes on to analyse the criteria that need to be considered during preliminary examination

[458] See Chapter One, par. 3.4.2 of this Part.
[459] ICC-OTP, Policy Paper on the Interest of Justice, September 2007, 1, 3-4.
[460] *Ibidem*, 8-9. For a recent critical appraisal of this paper see M. VARAKI, *op. cit.*, 467-470.
[461] See ICC-OTP, *Draft* Policy Paper on Preliminary Examinations, 4 October 2010 and ICC-OTP, Policy Paper on Preliminary Examinations, November 2013. It is important to note that, to promote transparency and inclusiveness, this policy paper and the one on case selection and prioritisation were publicly circulated and discussed in their draft form, before the OTP adopted their final version.
[462] *Ibidem*, par. 25-33.

for the purposes of a decision on the investigation under article 53 of the Statute[463]. This section is not particularly original and largely builds on statutory analysis through the prism of the Court's pertinent case law[464]. From the point of view of the 'creative' role of prosecutorial practices, the most relevant parts of the paper relate to the conduct of preliminary examinations (part V) and policy objectives (part VI).

In part V of the Paper the OTP sheds some light on the way in which it processes the enormous amount of information it receives and that may disclose the potential commission of crimes within the Court's jurisdiction. In particular, the OTP explains how the process of evaluation begins (depending on the nature of the information provider and/or the triggering mechanism)[465], the way in which information is filtered out[466] and, most importantly, the four sequential phases of the assessment that may ultimately lead to the opening of an investigation[467]. Of particular interest is the possibility—already used in practice—to issue *interim* reports during the course of the assessment with regard to the statutory requirements pertinent to each of these phases, as well as to adopt a final report containing the OTP's determination on whether or not to open an investigation pursuant to article 53 of the Statute[468]. The OTP also refers to the termination of preliminary examinations and their possible outcomes, including the possibility of judicial review of *nolle prosequi* decisions[469]. In part VI, the OTP formulates the policy objectives of *transparency*, *promotion of positive complementarity* and *prevention*[470]. In particular, as regards transparency, the OTP generally confirms its reporting practice, through both annual comprehensive reports on the whole of preliminary examination

[463] *Ibidem*, par. 34-35, 36-41 (jurisdiction); 42-45 (admissibility in general); 46-58 (complementarity); 59-66 (gravity); 67-71 (interests of justice).
[464] Among these statutory criteria, gravity is the one probably receiving the greatest deal of attention and elaboration, with particular regard to the factors to be considered in its assessment.
[465] ICC-OTP, Policy Paper on Preliminary Examinations, November 2013, par. 72-76.
[466] *Ibidem*, par. 78-79.
[467] *Ibidem*, par. 78-83.
[468] *Ibidem*, par. 84.
[469] *Ibidem*, par 89-92. With regard to judicial review it should be recalled that after the first PTC's review decision in the *Comoros* situation the OTP has recently decided—upon reconsideration—to confirm its previous article 53 decision not to open an investigation. See ICC-OTP, Final decision of the Prosecution concerning the "Article 53(1) Report" (ICC-01/13-6-AnxA), dated 6 November 2014, *Situation on the Registered Vessels of the Comoros*, *Greece and Cambodia*, ICC-01/13-57-Anx1, 30 November 2017.
[470] ICC-OTP, Policy Paper on Preliminary Examinations, November 2013, par. 93-106.

activities and situation-specific reports[471]. Moreover, the OTP establishes that its decision on the opening (or not opening) of an investigation under article 53 of the Statute shall be made public and state the reasons for the decision[472]. It is undeniable that the more structured and 'proceduralised' approach provided for in these two parts of the document is a significant improvement when compared to the previous working methods of the Office. Nevertheless, this policy—if consistently followed by the Office—demands a greater effort on the part of the OTP and may expose its decisions to deeper public scrutiny.

More recently the OTP has complemented its policy paper on preliminary examinations with the long-awaited Policy Paper on Case Selection and Prioritisation[473]. The elaboration of a public document detailing the OTP's approach on case selection and prioritisation had been the object of extensive debate, with many scholars and civil society insisting on the necessity of introducing more precise criteria to guide discretionary decisions[474]. Quite predictably—given the OTP's interest in preserving a good measure of flexibility—the document does not elaborate a set of binding (or particularly stringent) criteria for the exercise of prosecutorial discretion at the case stage[475]. The document preliminarily confirms the general principles governing the Office's action[476], as well as the legal criteria concerning jurisdiction, admissibility and the interests of justice already elaborated in the paper on preliminary examinations, adding that these shall apply *mutatis mutandis* at the case stage[477]. The paper then importantly introduces the "Case Selection Document", a confidential document of dynamic nature—i.e. continuously subject to update and review—that shall be compiled by the Office to gradually collect all potential cases (and case hypotheses) to form the basis for subsequent selection decisions across the

[471] *Ibidem*, par. 94-97.
[472] *Ibidem*, par. 97. The duty to provide reasons for negative decisions stems from Rules 105(3) and 106(2) of the RPE.
[473] A draft was first circulated in February 2016 (ICC-OTP, *Draft* Policy Paper on Case Selection and Prioritisation, 29 February 2016), while the final document was made public on 15 September 2016.
[474] See, for instance, the in-depth analysis contained in the volume edited by M. BERGSMO, *op. cit.*, with contributions from both academics and representatives of civil society, such as NGOs.
[475] ICC-OTP, Policy Paper on Case Selection and Prioritisation, 15 September 2016, par. 2-3, 52.
[476] *Ibidem*, par. par. 16-23 (independence, impartiality, objectivity).
[477] *Ibidem*, par. 24-25, 26-28 (jurisdiction), 29-32 (admissibility), 33 (interest of justice). The paper explains that the *proprium* of the case stage is the more focused and individualised nature of the assessment of these legal criteria, which are here considered in relation to identified incidents, persons and conducts.

various situations[478]. The policy paper mentions as criteria for case selection the gravity of crimes, the degree of responsibility of the alleged perpetrators and the potential charges[479].

With regard to gravity, the OTP clarifies that while its assessment for the purpose of case selection is conducted "similarly to [that of] gravity as a factor for admissibility", in light of the high number of cases potentially admissible, the Office may apply a stricter test for the purposes of case selection than the one legally required for the purposes of the admissibility of situations[480]. This simply means that not all potentially admissible cases shall be invariably selected for prosecution.

With regard to the degree of responsibility of the alleged perpetrators, the OTP recalls the approach taken by the last two Strategic Plans (in-depth and open-ended investigations through a building-upwards strategy) and goes on to elaborate on its understanding of the notion of "most responsible ones". The document—in line with the Court's case law—clarifies that the notion "does not necessarily equate with the *de jure* hierarchical status of an individual within a structure, but will be assessed on a case-by-case basis depending on the evidence"[481]. The degree of responsibility shall also be taken into account in defining the most appropriate mode of liability for charging purposes, also considering "the *deterrent* and *expressive* effects that each mode of liability may entail"[482].

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[478] *Ibidem*, par. 10-15. The OTP mentions the influence of the resources and capacity constraints on the selection and prioritisation policies and the role of the Case Selection Document in monitoring the appropriate allocation of time and resources across the different situations and in "manag[ing] the overall workload of the Office". As regards the OTP's disengagement from a situation the OTP announces that this topic shall be the object of a separate policy paper.

[479] *Ibidem*, par. 34.

[480] *Ibidem*, par. 36.

[481] *Ibidem*, par. 43. See, *supra*, footnote 437 for the Court's case law clarifying this distinction.

[482] *Ibidem*, par. 44 (emphasis added). It is interesting to note that the OTP specifically mentions command responsibility under article 28 of the Statute as "a key form of liability". On this point, the influence of the *Bemba* case—where the PTC somehow 'forced' the OTP to amend the charges as regards the mode of liability from co-perpetration to command responsibility—cannot be underestimated. See, ICC, Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute, *Prosecutor v. Bemba*, *Situation in the Central African Republic*, ICC-01/05-01/08-388, PTC III, 3 March 2009, par. 19-20, 38-39, 46, 49 and ICC, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, *Prosecutor v. Bemba*, *Situation in the Central African Republic*, ICC-01/05-01/08-424, PTC II, 15 June 2009, par. 344, 369, 372, 402-403, 444. See also K. AMBOS, *Critical Issues in the Bemba Confirmation Decision*, in *Leiden Journal of International Law*, vol. 22, issue 4, 2009, 724-726. For an in-depth analysis of the role played by the PTC's decisions on the confirmation of charges in the judicial supervision over the OTP's charging choices see, *infra*, par. 2.4, Chapter Three, of this Part.

Lastly, with regard to charges, the OTP elaborates on the concept of representativity, namely the idea that charging decisions should be able to provide a representative sample of the main types of victimisation in the affected communities[483]. Additionally, the OTP confirms its commitment to the selection of traditionally under-prosecuted offences, such as sexual and gender-based crimes, crimes involving children and—interestingly—crimes against religious, historical and cultural property and crimes against humanitarian personnel and peacekeepers[484].

With regard to the issue of prioritisation, the OTP clarifies that while it aims at prosecuting *all* crimes that have been selected according to the already examined criteria, it is necessary to prioritise certain cases over others, due to the "practical realities" of the Office's work (including the availability of information and evidence, and the available resources)[485]. It then goes on to establish five strategic and four operational criteria for prioritisation[486]. None of these criteria seems to be particularly stringent, reflecting the pragmatic and flexible approach adopted by the OTP in order to prioritise those cases that present the best prospects of conviction within a reasonable period of time. This flexibility is reinforced by the provision that the criteria "stand in no hierarchical order" and that "The specific weight to be given

[483] ICC-OTP, Policy Paper on Case Selection and Prioritisation, 15 September 2016, par. 45. This is in line with both the Strategic Plan and the policy papers on sexual and gender-based crimes and children.

[484] *Ibidem*, par. 46. This last reference has a clear connection to some of the most recent developments in the Court's case law, such as the first conviction for the war crime under article 8(2)(e)(iv) of the Statute (attack against protected objects) in the *Al-Mahdi* case. Attacks against peacekeepers and their potential qualification as war crimes have been the object of a public statement of the OTP (see ICC-OTP, Statement of the Prosecutor, Attacks against peacekeepers may constitute war crimes, 19 July 2013).

[485] *Ibidem*, par. 47-49.

[486] *Ibidem*, respectively par. 50 and 51. The five strategic prioritisation criteria are: a) a comparative assessment across the selected cases, based on the same factors that guide the case selection; b) whether a person, or members of the same group, have already been subject to investigation or prosecution either by the Office or by a State for another serious crime; c) the impact of investigations and prosecutions on the victims of the crimes and affected communities; d) the impact of investigations and prosecutions on ongoing criminality and/or their contribution to the prevention of crimes; and e) the impact and the ability of the Office to pursue cases involving opposing parties to a conflict in parallel or on a sequential basis. The four operational criteria are: a) the quantity and quality of the incriminating and exonerating evidence already in the possession of the Office, as well as the availability of additional evidence and any risks to its degradation; b) international cooperation and judicial assistance to support the Office's activities; c) the Office's capacity to effectively conduct the necessary investigations within a reasonable period of time, including the security situation in the area where the Office is planning to operate or where persons cooperating with the Office reside, and the Court's ability to protect persons from risks that might arise from their interaction with the Office; and d) the potential to secure the appearance of suspects before the Court, either by arrest and surrender or pursuant to a summons.

to each individual criterion will depend on the circumstances of each case"[487]. According to the concrete developments of the case the Office can also decide to deprioritise or postpone the investigation or prosecution of a case (or set of cases) as well as to seek the amendment or withdrawal of charges, or approach the Trial Chamber for the legal re-characterisation of the facts or modes of liability pursuant to Regulation 55 of the Regulations of the Court[488].

Those who advocated for the adoption of an exhaustive list of clear selection and prioritisation criteria might be disappointed by the rather vague content of this policy paper. It must nevertheless be recognised that the realities of international criminal justice—considering in particular the OTP's necessary reliance on state cooperation—probably militate against too rigid and formalistic criteria for the exercise of prosecutorial discretionary choices[489]. Nevertheless, an overall evaluation of the policy documents as a whole reveals a rather fragmented, overlapping and repetitive set of principles and guidelines that do not always seem to be premised on solid criminal policy objectives.

4. Codes of Conduct and Guidelines: Relevant to the exercise of prosecutorial discretion?

The strategy and policy papers analysed in the previous paragraph do not exhaust the list of internal documents that may touch upon—albeit indirectly—the exercise of prosecutorial selection choices. Mention must be made of a different category of documents that stands at the intersection between procedural law and professional ethics such as Codes of Conduct and Guidelines[490]. Although their effectiveness is largely dependent on the spontaneous compliance—and potential enforcement via disciplinary action—by the Court and OTP personnel, their

[487] *Ibidem*, par. 52.
[488] *Ibidem*, par. 53.
[489] In this vein see, F. MÉGRET, *Accountability and Ethics*, cit., 418; M. M. DEGUZMAN, *Choosing to Prosecute: Expressive Selection at the International Criminal Court*, cit., 297; J. A. GOLDSTON, *op. cit.*, 386-387; W. A. SCHABAS, *Selecting Situations and Cases*, cit., 380-381.
[490] See Code of Conduct for Investigators, ICC/AI/2008/005, 10 September 2008 (unclassified on 22 November 2012); Code of Conduct for Staff Members, ICC/AI/2011/002, 4 April 2011(unclassified on 22 November 2012); Code of Conduct for the Office of the Prosecutor, 5 September 2013; Code of Conduct for Intermediaries, March 2014; Guidelines Governing the Relations between the Court and Intermediaries for the Organs and Units of the Court and Counsel working with intermediaries, March 2014.

provisions may contribute to provide greater clarity on the outer boundaries of prosecutorial discretion as regards specific procedural issues and, more generally, the discharge of the OTP's functions.

The judicial practice of the Court in certain trial proceedings revealed the necessity to integrate existing statutory and regulatory provisions regarding the duties and responsibilities of the Prosecutor with more specific and detailed rules[491]. In this sense, the long-awaited Code of Conduct for the Office of the Prosecutor—although not particularly original its formulation[492]—is a step forward both in the definition of the general ethical principles that should guide the OTP's action and of the prosecutorial duties of impartiality; confidentiality; objective truth-seeking; effective investigation and prosecution; disclosure and regarding the relations with other organs of the Court, defence and victims[493]. Obviously, the purpose of any such code is not—and cannot be—to deprive prosecutors of their discretion in the conduct of proceedings, but its adoption can nevertheless be helpful to avoid situations that risk to undermine the mutual trust between organs of the Court, with detrimental consequences for the integrity of judicial proceedings and fair trial rights[494]. The

[491] On the opportunity of the adoption of such a code see M. MARKOVIC, *The ICC Prosecutor's Missing Code of Conduct*, in *Texas International Law Journal*, vol. 47, issue 1, 2011, 201-236. For a succinct analysis of the content of the Code see L. PACEWICZ, *Introductory Note to International Criminal Court Code of Conduct for the Office of the Prosecutor*, in *International Legal Materials*, vol. 53, no. 2, 2014, 397-412.

[492] Some have considered that the Code is largely a repetition of what is already envisaged by the Statute and Staff Rules and Regulations, and does not live up to the standards of a standalone code of conduct for prosecutorial action. See, e.g., A. HEINZE, *International Criminal Procedure and Disclosure: An Attempt to Better Understand and Regulate Disclosure and Communication at the ICC on the Basis of a Comprehensive and Comparative Theory of Criminal Procedure*, Berlin, 2014, 471 and A. ORIOLO, *The 'Inherent Power' of Judges: An Ethical Yardstick to Assess Prosecutorial Conduct at the ICC*, in *International Criminal Law Review*, vol. 16, issue 2, 2016, 304.

[493] See Code of Conduct for the Office of the Prosecutor, 5 September 2013, Rules 7-8 (General principles); 15-20 (General standards of professional conduct); 21-24 (Independence); 29-31 (Impartiality); 32-36 (Confidentiality); 49-50 (Objective truth-seeking); 51 (Effective investigation and prosecution); 52-54 (Disclosure), 62-65 (Relations with other organs of the Court), 66-68 (Relations with victims and witnesses), 69 (Relations with persons under investigation and accused persons), 70 (Relations with counsel). See also K. AMBOS, *Treatise on International Criminal Law*, *Vol. III*, *International Criminal Procedure*, cit., 135-137.

[494] In particular, the OTP's behaviour with regard to issues such as the disclosure of evidence obtained under confidentiality agreements and its refusal to comply with the Chamber's orders of disclosure sparked controversy and led to harsh disagreements between the Office and judges in the *Lubanga* case, with two stays of proceedings imposed by the relevant TC. For an example of these disagreements see, e.g., ICC, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, *Prosecutor v. Lubanga*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-1401, TC I, 13 June 2008. On the OTP's approach towards disclosure obligations and its assessment by the

Codes may also play a role in the administration of disciplinary measures, as a result of a failure to comply with its provisions[495].

At the same time, given the OTP's necessity to rely on external personnel in order to discharge some of its activities at the stage of investigations, Guidelines have been put in place as regards the Office's relations with these subjects, generally referred to as "intermediaries"[496]. Again, practice has shown how delicate the relationship between the OTP and these external subjects can be, and how an inappropriate management of such forms of collaboration can undermine court proceedings and even the very integrity of the evidence used at trial. The Guidelines Governing the Relations between the Court and Intermediaries try to address some of these issues, building on the case law that has on previous occasions strongly criticised the OTP's discretionary use of intermediaries[497]. A separate Code of Conduct for Intermediaries has also been adopted[498].

In terms of legal nature these documents are different from the strategy and policy papers in that they are mainly regulatory/administrative in character and they do not share the same predominantly *internal* and *policy-setting* function. Their main role is to integrate the primary legal texts governing the Court as regards the day-by-day management of the relations between its organs and with external relevant subjects[499].

Lubanga TC see, K. AMBOS, *The First Judgment of the International Criminal Court (Prosecutor v. Lubanga): A Comprehensive Analysis of the Legal Issues*, in *International Criminal Law Review*, vol. 12, no. 2, 2012, 124-128.

[495] Code of Conduct for the Office of the Prosecutor, 5 September 2013, Rule 75.

[496] See Guidelines Governing the Relations between the Court and Intermediaries for the Organs and Units of the Court and Counsel working with intermediaries, March 2014.

[497] On the issue of the use of intermediaries see C. BUISMAN, *Delegating Investigations, Lessons to be Learned from the Lubanga Judgment*, in *Northwestern Journal of International Human Rights*, vol. 11, issue, 3, 2013, 30-82. See also the very critical position taken by the *Lubanga* TC in ICC, Redacted Decision on the Prosecution's Urgent Request for Variation of Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU, *Prosecutor v. Lubanga*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2517-Red, TC I, 8 July 2010 and ICC, Judgment pursuant to Article 74 of the Statute, *Prosecutor v. Lubanga*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2842, TC I, 14 March 2012, par. 10, 124, 482: "The Chamber is of the view that the prosecution should not have delegated its investigative responsibilities to the intermediaries in the way set out above, notwithstanding the extensive security difficulties it faced … The prosecution's negligence in failing to verify and scrutinise this material sufficiently before it was introduced led to significant expenditure on the part of the Court. An additional consequence of the lack of proper oversight of the intermediaries is that they were potentially able to take advantage of the witnesses they contacted".

[498] See Code of Conduct for Intermediaries, March 2014.

[499] This seems clear when one reads Code of Conduct for the Office of the Prosecutor, 5 September 2013, rules 9 and 10 on the relations with other normative materials.

5. The "Basic Size" of the OTP and the relationship between resources and prosecutorial discretion

The OTP is an extremely complex structure from the point of view of the administration, allocation and management of its material and human resources. It is of outmost evidence that running in an effective and efficient manner such a complex institutional machinery—which is in charge of the most sensitive choices for the functioning of the Court—requires certainty on the availability of the financial resources necessary to its functioning. Most importantly it is necessary that these resources are commensurate to the strategy and policy objectives set out by the OTP.

In this sense the effort made by the Office to estimate its "Basic Size", i.e. the scale of the necessary human and material resources needed to deliver its proposed policy goals—both in quantitative and qualitative terms—is to appreciate. The 2015 Report on the Basic Size goes into great detail in defining the methodology to calculate the nature and amount of these resources, and is particularly interesting in that it breaks down complex prosecutorial activities in their individual constituent tasks, revealing their future projection in terms of resources' allocation[500]. This analysis also sheds light on the working methods of the office, particularly on its planning decisions across the spectrum of the various procedural stages of proceedings at the ICC[501].

The OTP has come to the conclusion that a significant increase in the amount of resources—both human and financial—allocated to it by the ASP is necessary in order to meet its strategic objectives[502]. While this request may be considered as a

[500] See ICC-ASP/14/21*, Report of the Court on the Basic Size of the Office of the Prosecution, 17 September 2015, par. 6-7 of the executive summary, as well as par. 13, 15, 18-19, 21, 27 and 30-34 of the main text of the Report. Annex I to the Report, based on the methodology identified in its main text, goes on to extrapolate data from previous experience, breaking down prosecutorial tasks according to the different procedural phases, namely preliminary examinations (par. 4-7); investigations (8-16); management of hibernated investigations (17-21); pre-trial phase (22-24); prosecutions (25-26) and appeals (27-29). Annex II then seeks to exactly determine and justify the demand for increased human and financial resources, based on the same phase-based approach. The many tables that integrate the analysis are particularly helpful to visualise the 'procedural algorithm' followed by the OTP in the conduct of its activities. Annex III deals with support, technical, administrative and ancillary activities carried out by the OTP.

[501] *Ibidem*.

[502] *Ibidem*, par. 10, 14 of the executive summary and 4 of the main text. As regards human resources the OTP envisages a 33,3% increase (from 405 to 540 staff members), while the yearly budget would require a 43,6% increase (from 44,2 to 60,6 million euros). Both figures are based on the human and financial resources allocated for the year 2015.

common dialectic between organs of an international organisation—one of which is endowed with budgetary powers—it shows the inevitable connection between the level of financing and the concrete perimeter of exercise of discretion on the part of the OTP. The role of the ASP, a political body, must therefore be considered as part of the equation of prosecutorial discretion, in connection with the external and indirect influence of budgetary allocation decisions. In this sense, the OTP is trying to show the provisional results—in terms of efficiency—of its current strategies, in the effort to persuade the ASP to provide the requested resources[503]. In conclusion, documents such as the Report on the Basic Size are not strictly legal in nature and rather reflect a 'managerial' and technical approach in structuring prosecutorial activities.

6. An overall evaluation of the OTP's documents

In concluding this brief survey of the heterogeneous group of documents adopted by the OTP in recent years, a few general observations may be formulated both as regards the legal significance of these materials and their practical relevance in orienting prosecutorial discretionary practice.

In the first place, it must be observed that these documents lack any formal bindingness[504]. This is particularly true for the Strategies and Policy Papers, which clearly stipulate that they must be considered as internal documents that "[do] not give rise to legal rights"[505], which are subject to continuous adaptation and review based on experience and that are made public only for transparency purposes[506]. Nevertheless, the fact that they do not give rise to legal rights—and to corresponding obligations on the part of the OTP—does not mean that they are devoid of any legal

[503] *Ibidem*, 4-8.
[504] On the concept of bindingness in international law see J. D'ASPREMONT, *Bindingness*, in *Amsterdam Law School Legal Studies Research Paper No. 2015-19*, 2015, 1-18.
[505] See ICC-OTP, Policy Paper on Preliminary Examinations, November 2013, par. 20; ICC-OTP, Policy Paper on Case Selection and Prioritisation, 15 September 2016, par. 2; ICC-OTP, Policy Paper on the Interest of Justice, September 2007, par. 1; ICC-OTP, Policy Paper on Sexual and Gender-Based Crimes, June 2014, par. 11; ICC-OTP, Policy on Children, 15 November 2016, par. 12 and ICC-OTP, Policy Paper on Victims' Participation, April 2010, par. 2.
[506] See, e.g., the references to transparency in ICC-OTP, Policy Paper on Preliminary Examinations, November 2013, par. 21, 94-95; ICC-OTP, Policy Paper on Case Selection and Prioritisation, 15 September 2016, par. 3; ICC-OTP, Policy Paper on Sexual and Gender-Based Crimes, June 2014, par. 12.

significance. When the OTP adopts discretionary decisions purportedly based on these strategies or policies—which reflect a certain understanding of the pertinent statutory and regulatory norms—these decisions may eventually come under the judicial review of the Chambers, which can therefore indirectly rule on the underlying legality and reasonableness of the criteria contained in the policies[507]. The same holds true for Codes of Conduct and Guidelines which largely share with strategy and policy papers the lack of bindingness, although in some circumstances they confirm or specify the content of primary legal texts such as the Statute, RPE or Regulations and may therefore play a role in the interpretation of such norms. They nevertheless differ from strategy and policy papers in that they are mainly adopted for administrative purposes, in order to establish *standards of conduct* for certain organs of the Court or other subjects that may otherwise come in contact with the ICC. In connection with strategies and policies, the Report on the Basic Size of the OTP adds an operative, administrative and management-oriented dimension, dealing with issues of intra-institutional relations between the OTP and the ASP, particularly as regards the resources needed to meet the policy objectives. It seems reasonable to conclude that notwithstanding the different scopes and functions of these materials, their legal nature can be traced back to the general—and highly debated—concept of *soft law*[508]. Their contribution to the development of prosecutorial discretionary practices—as well as their general compatibility with primary sources—is therefore an eminently empirical issue, which can only be studied through careful comparison

[507] For instance, the PTC in the *Comoros* review decision questioned the way in which the OTP had applied the criteria—object of elaboration in the Policy Paper on Preliminary Examinations—for the assessment of sufficient gravity as regards the *Mavi Marmara* incident. Judges disagreed in particular with the OTP's approach as regards the scale, nature, manner of commission and impact of the alleged crimes. See, ICC, Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation, *Situation on the Registered Vessels of the Comoros*, *Greece and Cambodia*, ICC-01/13-34, PTC I, 16 July 2015, par. 23-24, 26, 28-30, 34-36, 38, 41, 43-45, 47-49.

[508] Discussions on the role, relevance and flaws of the concept of *soft law* in the realm of international law have been extensive in the recent past. See, e.g., the contributions in D. SHELTON (ed.) *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System*, Oxford, 2000 and J. PAUWELYN, R. A. WESSEL, J. WOUTERS (eds.), *Informal International Lawmaking*, Oxford, 2012. See also the seminal papers of P. WEIL, *Towards Relative Normativity in International Law?*, in *American Journal of International Law*, vol. 77, issue 3, 1983, 413-442; J. KLABBERS, *The Redundancy of Soft Law*, in *Nordic Journal of International Law*, vol. 65, issue 2, 1996, 167-182 and the various contributions edited by J. D'ASPREMONT, T. AALBERTS, *Symposium on Soft Law*, in *Leiden Journal of International Law*, vol. 25, issue 2, 2012, 309-378.

between the text and context of these documents and the actual practice of the relevant actors.

In the second place, it must be observed that there is great merit in the elaboration, public discussion and adoption of these documents and more generally in the OTP's effort to progressively incorporate in them new instruments and objectives, including through a revision or abandonment of previous approaches when considered ineffective or counterproductive. Nevertheless, the perception is that these documents—and particularly those containing strategies and policies—lack a sufficient degree of internal consistency, are excessively vague and characterised by a piecemeal approach to the most important issues surrounding the exercise of prosecutorial discretion. It can be argued that a more integrated and forward-looking approach would be beneficial both in terms of consistency of the OTP's choices and for the purposes of an external assessment of the Offices' performances, without renouncing to the necessary periodical adaptation and fine-tuning of both strategies and policies[509].

In the third and last place, these documents may play a role in the *ex post* evaluation of the OTP's performances. In other words, despite the lack of binding force, the public nature of these documents allows to check the concrete prosecutorial choices against the strategy and policy background self-elaborated by the OTP. The same can be done as regards Codes and Guidelines, through a comparison between the standards of conduct and the actual behaviour of the OTP across the different proceedings. In this sense the choice in favour of greater transparency on the prosecutorial policy objectives—given their lack of sufficient consistency—may expose the Office to an additional level of public scrutiny, making the onus to provide reasons for discretionary choices more difficult to satisfy.

In sum, the documents analysed in this chapter provide an example of how prosecutorial self-regulatory practices may result in the adoption of acts that—despite the lack of bindingness and their primary administrative character—contribute to inform the exercise of prosecutorial discretion, thereby complementing

[509] In this sense see K. AMBOS, *Treatise on International Criminal Law*, *Vol. III*, *International Criminal Procedure*, cit., 135, who argues in favour of "prosecutorial strategy in one master document serving as overall guidance", while recognising that "there are also arguments against one master document", including the "dynamics of international crimes, investigations, and jurisdictional triggers" and the "volatility of the Court's situations and caseload".

the legal parameters derived from the statutory and regulatory provisions analysed in the previous chapter, that represent the original source of the OTP's discretionary powers.

CHAPTER THREE

LIMITS OF AND REMEDIES AGAINST THE OTP'S DISCRETIONARY DECISIONS: THE ROLE OF JUDGES (IN PARTICULAR OF PRELIMINARY JUDGES)

1. Introduction

The substantive outcomes of a criminal justice system premised on a wide margin of prosecutorial discretion depend on the institutional interplay between the organ in charge of selection choices and those in charge of judicial oversight of such choices, against the backdrop of the statutory and regulatory principles and rules—as integrated by non legally-binding standards, guidelines, etc.—applicable in that system.

In the previous chapters the analysis focused on the prosecutor's side of this 'institutional equation', with particular regard to the legal sources of prosecutorial discretion and to the practices that contribute to give them substance. In the present chapter the attention has been turned to the other side of the equation, namely to the institutional role of judges in the exercise of judicial review (or other forms of judicial supervision) with respect to prosecutorial selection choices. The purpose of the following paragraphs is to elaborate on the legal nature and purpose of the different instruments and procedures through which judges exercise such supervisory power, with a view to better understand the *dialectic* relations among these actors. Considering that this study generally limits the observation of the Court's institutional practice to the preliminary examination and pre-trial phase, the judicial formation whose role is paramount in shaping the limits of the OTP's discretion is undoubtedly the Pre-Trial Chamber.

The adoption of the *subjective* institutional point of view of judges and the focus on the *constraining rules and remedies* mainly administered by the PTC completes the static analysis of the OTP-Judges relations and will constitute firm ground for analysing more closely the prosecutorial and judicial practices in Part Three of the work, in order to attempt an explanation of the regularities and

discontinuities of such practices at the current state of development of the ICC's prosecutorial and judicial experience.

2. The role of the Pre-Trial Chamber at the pre-investigation and investigation phases in general

The PTC performs a number of functions in the framework of the Statute and constitutes one of the most distinctive institutional features of the ICC legal regime when compared with other international or internationalised criminal tribunals, and has rightly been described as a "building block in the bridging of different legal traditions" [510]. The Rome Statute—together with the RPE and applicable Regulations—provides an enumerated list of functions and procedures centred on the role of either a three-judge or a single-judge formation that interrelate with the exercise of prosecutorial discretion by the OTP[511]. Nevertheless, most of these provisions relate to the investigation stage of proceedings proper and are the necessary counterbalance to the powers and duties of the OTP in respect to investigations[512]. Relatively little is said about the PTC's powers at the preliminary examination stage of proceedings, considering the limited prosecutorial powers at that early procedural juncture[513]. A preliminary distinction can therefore be traced between the supervisory role of the PTC at these two different procedural phases.

[510] See H. FRIMAN, *The Rules of Procedure and Evidence in the Investigative Stage*, in H. FISCHER, C. KRESS, S. R. LÜDER (eds.), *International and National Prosecution of Crimes under International Law: Current Developments*, Berlin, 2001, 191-192. On the powers and attributions of the PTC see the commentaries of F. GUARIGLIA, G. HOCHMAYR, *Article 57, Functions and Powers of the Pre-Trial Chamber*, in O. TRIFFTERER, K. AMBOS (eds.), *op. cit.*, 1421-1436; O. FOURMY, *Powers of the Pre-Trial Chamber*, in A. CASSESE, P. GAETA, J. R. W. D. JONES (eds.), *op. cit.*, 1207-1230, and in the same volume, M. MARCHESIELLO, *Proceedings before the Pre-Trial Chamber*, 1231-1246.

[511] See, e.g., article 15 of the Statute on the authorisation procedure in case of *proprio motu*; articles 18 and 19 of the Statute on the PTC's rulings concerning admissibility and jurisdiction; article 53 of the Statute on the supervisory role of the PTC as regards the OTP's *nolle prosequi* decisions; articles 56 and 57 of the Statute, respectively dealing with the powers of the PTC in relation to the so-called "unique investigative opportunities" and to its functions at the investigation stage of proceedings. See also article 58 on the procedure for the issuance of a warrant of arrest or summons to appear, and article 61 on the hearing for the confirmation of charges. The RPE and Regulations of the Court provide a more detailed set of provisions for each of these procedures, setting the formal and substantive requirements for the involvement of the PTC and its powers in relation with the other procedural actors (OTP, Defence, victims).

[512] See article 54 of the Statute, enumerating the powers and duties of the OTP during investigations.

[513] See, *infra*, footnote 515.

Further distinctions relate to the nature of the PTC's involvement and the effects and consequences of the exercise of its powers and duties vis-à-vis the OTP.

With regard to the preliminary examination phase, the involvement of the PTC is extremely limited both in terms of general supervision on prosecutorial early selection choices and of remedies against decisions not to proceed with a preliminary examination upon the receipt of information (either from private individuals or organisations or by means of a referral). In particular, before the conclusion of a preliminary examination and a request for authorisation to open an investigation by the OTP, little is the influence that judges can exercise on the discretionary conduct of the pre-investigation phase by the OTP[514]. While this lack of 'supervisory grip' of the PTC could be justified on grounds that at the preliminary examination stage the OTP "has limited powers which cannot be compared to those provided in article 54 of the Statute at the investigative stage"[515], it cannot be denied that there is a significant grey area where prosecutorial discretionary choices—bearing decisive consequences on the subsequent development of proceedings—are substantially immune from any judicial supervision[516]. Therefore there is a clear asymmetry between the latitude of prosecutorial discretion at the pre-investigation stage—that

[514] For instance, at least one PTC attempted to use its pre-trial management powers as a proactive measure to incentivise the OTP to provide information about the status of a preliminary examination. See, *supra*, footnotes 275 and 276 and *infra*, next paragraph.

[515] In this sense see ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *Situation in the Republic of Kenya*, ICC-01/09-19-Corr, PTC II, 31 March 2010, par. 27.

[516] For instance, when the OTP decides not to open a preliminary examination of a situation based on an 'individual communication', the information providers do not have any remedy against the Prosecutor's negative decision. The same holds true for private information providers (i.e. those that unlike states and the UNSC cannot formally qualify as referring entities), who cannot challenge the OTP's decision not to proceed with an investigation under article 53 of the Statute (or not to ask a judicial authorisation to investigate under article 15). On this issue see, *supra*, Part. One, Chapter Two, par. 5 (especially footnote 216). Given the sheer number of these communications in the practice of the Office, the drafters' choice not to entrust the senders with an individual right to challenge the OTP's determination—especially at such an early stage as the preliminary examination—may be considered wise. Nevertheless, especially as regards *nolle prosequi* decisions under article 15(6) and 53(1) of the Statute, the lack of any remedy for subjects such as the alleged victims—who have a vested interest in the continuation of proceedings—seems particularly striking. According to A. SCHÜLLER, C. MELONI, *Quality Control in the Preliminary Examination of Civil Society Submissions*, in M. BERGSMO, C. STAHN (eds.), *Quality Control in Preliminary Examinations: Vol. 2*, Brussels, 2018, 549: "The fact that, under the Rome Statute, there is no review mechanism that can be triggered in such circumstances by those who provided the information deserves strong criticism". Along the same lines, see S. WILLIAMS, *Civil Society Participation in Preliminary Examinations*, in M. BERGSMO, C. STAHN (eds.), *Quality Control in Preliminary Examinations: Vol. 2*, cit., 569-571 and F. FOKA TAFFO, *Le pouvoir discrétionnaire du Procureur de la Cour pénale internationale*, Baden-Baden, 2018, 81-82.

must be kept conceptually distinct from the specific investigative powers—and the (lack of) opportunities for judicial supervision of the respective discretionary choices.

As proceedings approach the investigation stage, with the OTP enjoying greater powers, the role of the PTC becomes significantly more visible. The degree and scope of the PTC's involvement at this juncture and beyond nevertheless differs according to the specific procedures or acts under consideration, and have different rationales. At a first approximation it is possible to concur with one commentator who describes the tripartite role of the PTC as "filtering, safeguarding and pushing ahead"[517]. The following paragraphs seek to introduce a few additional distinctions that may prove useful in understanding and classifying the different roles played by the PTC at the investigation stage vis-à-vis the Prosecutor, according to their rationale and the outcomes of the PTC's intervention.

2.1 Pre-trial management measures and the power to request additional information

As it has been stressed on multiple occasions, the conduct of preliminary examinations is largely left to prosecutorial discretion, on the premise that this phase is not concerned with the exercise of investigative powers and merely serves the purpose of building the requisite factual and legal knowledge necessary to further determinations on the possibility and opportunity of opening an investigation. More generally, the pre-trial phase (including the investigation phase) is mainly focused on the discretionary choices of the OTP, although it may involve preliminary judges for the performance of certain crucial supervisory tasks.

Nevertheless, besides the enumerated specific powers entrusted to preliminary judges that will be more closely examined in the next paragraphs, the Pre-Trial Chamber may use—and has in the past used—certain general and 'functional' powers to indirectly influence the conduct of preliminary examinations and the OTP's decisions as regards investigations. Examples of this kind are the

[517] See M. MARCHESIELLO, *op. cit.*, 1238. On the role of the PTCs and their jurisprudence see also J. COURTNEY, C. KAOUTZANIS, *Proactive Gatekeepers: The Jurisprudence of the ICC's Pre-Trial Chambers*, in *Chicago Journal of International Law*, vol. 15, no. 2, 2015, 518-558.

Chamber's powers to convene status conferences[518] and to request the OTP to provide "specific or additional information or documents" that the PTC deems necessary to exercise its functions and responsibilities according to the pertinent statutory provisions[519]. The 'functional' character of these procedural powers consists in that they are instrumental to the exercise of the other enumerated powers—such as the power to issue a warrant of arrest or summons to appear—allowing the PTC to gather all the relevant information and to rule on parties' requests in a timely and efficient manner. In practice, the powers to convene a status conference and to request additional information or documents have been often used in a cumulative way in the same procedural context.

With regard to the Chambers' power to convene status conferences, the PTC has made recourse to it on some occasions, allegedly in connection with the necessity to "provide for the protection and privacy of victims and witnesses, the preservation of evidence, the protection of persons who have been arrested or appeared in response to a summons"[520]. In one instance, the OTP criticised as "unauthorised" (in law) and "unwarranted" (in fact) the decision of the PTC, which later confirmed it denying a leave to appeal the decision[521]. This power has also been exercised in the

[518] See Rules 121(2)(b) of the RPE and Regulation 30 of the Regulations of the Court. See also the ICC, Pre-Trial Practice Manual, September 2015, 8: "Pre-Trial Chambers should make full use of the possibility to hold status conferences with the parties. Oral orders and clarifications in relation to the conduct of the proceedings can be provided to the parties during such status conferences, increasing efficiency and eliminating the need for cumbersome written decisions. Parties' procedural requests can also be received, debated and decided at status conferences". On the use of the power to convene status conferences in the early practice of the Court see M. MIRAGLIA, *The First Decision of the ICC Pre-Trial Chamber*, in *Journal of International Criminal Justice*, vol. 4, issue 1, 188, 193.

[519] See Regulation 48(1) of the Regulations of the Court. An analogous power can be exercised by the PTC in the context of article 15 authorisation procedures, pursuant to Rule 50(4) of the RPE. Additionally, the PTC may avail itself of the power to ask any participant to the proceedings to "clarify or to provide additional details on any document" or to "address specific issues", pursuant to Regulation 28(1) and (2) of the Regulations of the Court.

[520] See article 57(3)(c) of the Statute. This, together with Regulation 30 of the Regulations of the Court, is the legal basis relied on by the PTC in ICC, Decision to convene a Status Conference, *Situation in the Democratic Republic of the Congo*, ICC-01/04-9, PTC I, 17 February 2005, 2.

[521] See ICC-OTP, Prosecutor's Position on Pre-Trial Chamber I's 17 February 2005 Decision to Convene a Status Conference, *Situation in the Democratic Republic of the Congo*, ICC-01/04-12-Anx, 8 March 2005, par. 3-4, 12-19, 25-27. The OTP insisted on the line of separation between the "independence and autonomy of the Prosecutor in conducting investigations" and "the *specific supervisory powers* of the Pre-Trial Chamber", clarifying that in his view the system "includes a *closed number of provisions empowering the Pre-Trial Chamber to engage in specific instances of judicial supervision of the Prosecution's investigative powers*" (*ibidem*, par. 3, emphasis added). The OTP also lamented the likely violation of the *audiatur et altera pars* principle on the ground that it had not been invited to make submissions on the Chamber's authority to convene a status conference at the investigation stage (*ibidem*, par. 8-9), and the risk of undermining the PTC's appearance of

Ugandan situation, in the face of the OTP's apparently unjustified delay in taking a decision on prosecution pursuant to article 53 of the Statute, well after the warrants of arrest against certain suspects had been issued[522]. More recently a request by the defence for Laurent Gbagbo to convene a status conference—ahead of a hearing for the confirmation of charges—has been rejected by a PTC[523].

With regard to the Chamber's power to ask the OTP to provide additional information or documents, it should be recalled that a PTC has once made recourse to it with the aim of encouraging the OTP to take a decision on the outcome of a preliminary examination which had been on-going for a prolonged period of time[524]. As already recalled elsewhere in this work[525], the OTP has strongly objected to what it deemed an unwarranted judicial interference in the discretional conduct of preliminary examinations, allegedly contrary to the legislative choice made by the drafters[526]. While in the end the OTP did provide at least some of the requested information, it clarified that this did not amount to accepting the PTC's proactive posture[527]. More frequently this power has been used during the investigation phase—particularly pending the issuance of a warrant of arrest or in preparation of a

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impartiality through the interference with investigative activities (*ibidem*, par. 20-24). Nevertheless, the PTC declined *in limine* to consider the OTP's requests for procedural reasons (see ICC, Decision on the Prosecutor's Position on Pre-Trial Chamber I's 17 February 2005 Decision to Convene a Status Conference, *Situation in the Democratic Republic of the Congo*, ICC-01/04-11, PTC I, 9 March 2005, 2-4) and later rejected the OTP's request for leave to appeal this decision (see ICC, Decision on the Prosecutor's Application for Leave to Appeal, *Situation in the Democratic Republic of the Congo*, ICC-01/04-14, PTC I, 14 March 2005, 2-4).

[522] See ICC, Decision to Convene a Status Conference on the Investigation in the Situation in Uganda in Relation to the Application of Article 53, *Prosecutor v. Ongwen*, *Situation in Uganda*, ICC-02/04-01/05-68, PTC II, 2 December 2005. This decision was preceded by the PTC's request to the OTP to "promptly inform the Chamber in writing of any decision concluding that "there is not a sufficient basis for prosecution under article 53, paragraph 2" of the Statute, and the reasons for this conclusion, in view of the Chamber's powers under article 53, paragraph 3 (b), of the Statute" (see ICC, Decision on the Prosecutor's Application for Unsealing of the Warrant of Arrest, *Prosecutor v. Kony et al.*, *Situation in Uganda*, ICC-02/04-01/05-52, PTC II, 13 October 2005, par. 32).

[523] See ICC, Decision on a Defence request for a status conference, *Prosecutor v. Laurent Gbagbo*, *Situation in the Republic of Côte d'Ivoire*, ICC-02/11-01/11-604, PTC I, 5 February 2014.

[524] See ICC, Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic, *Situation in the Central African Republic*, ICC-01/05-6, PTC III, 30 November 2006, 4.

[525] See, *supra*, Part One, Chapter Two, par. 5.

[526] See ICC-OTP, Prosecution's Report Pursuant to Pre-Trial Chamber III's 30 November 2006 Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic, *Situation in the Central African Republic*, ICC-01/05-7, 15 December 2006, par. 10.

[527] *Ibidem*, par. 11: "doing so, the OTP is neither accepting the existence of a legal obligation to submit this type of information absent any decision under Article 53 being made, nor adopting a precedent that it may follow in future cases".

hearing for the confirmation of charges[528]. Similarly, the PTC has availed itself of the power to order the OTP to provide additional information or documents for the purpose of ruling on the Prosecutor's request for authorisation pursuant to article 15 of the Statute, based on Rule 50(4) of the RPE[529].

Overall, these procedural powers—as interpreted and used by some PTCs especially in the early days of the Court's activity—while potentially being useful as pre-trial management tools to influence the exercise of prosecutorial discretion, did not alter the 'balance of power' between the OTP and the PTC as regards the conduct of preliminary examinations and investigations; a balance clearly leaning towards the Prosecutor's discretion, and where judicial supervision is limited to the specific instances provided for in the Statute, RPE and applicable regulations[530]. As correctly pointed out by some scholars—a position largely shared by more recent case law—it is accepted that in the ICC procedural system the PTC does not generally act as an "investigative Chamber" or exercise shared investigative powers together with the OTP[531].

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[528] See, e.g., ICC, Decision Requesting Additional Information and Supporting Materials, *Situation in Darfur, Sudan*, ICC-02/05-166, PTC I, 9 December 2008, 3-4; ICC, Order to the Prosecutor for the Submission of Additional Information on the Status of the Execution of the Warrants of Arrest in the Situation in Uganda, *Prosecutor v. Kony et al.*, *Situation in Uganda*, ICC-02/04-01/05-131, PTC II, 30 November 2006, 3-5; ICC, Public Redacted Version of the Order for the Provision of Additional Information Relating to the Prosecutor's Application for Unsealing of Warrants of Arrest Issued on 8 July 2005, and Other Related Relief, *Prosecutor v. Kony et al.*, *Situation in Uganda*, ICC-02/04-01/05-137, PTC II, 21 September 2005, 3-10.

[529] See, e.g., ICC, Decision Requesting Clarification and Additional Information, *Situation in the Republic of Kenya*, ICC-01/09-15, PTC II, 18 February 2010, par. 8-9, 13-14. See, more recently, ICC, Public Redacted Version of "Order to the Prosecutor to Provide Additional Information", ICC-01/17-X-6-US-Exp, 15 September 2017, *Situation in the Republic of Burundi*, ICC-01/17-6-Red, PTC III, 9 November 2017. Two similar orders have been issued by the PTC in relation to the OTP's request for authorisation to open an investigation pursuant to article 15 of the Statute in the situation of Afghanistan (ICC-OTP, Public redacted version of "Request for authorisation of an investigation pursuant to article 15", 20 November 2017, ICC-02/17-7-Conf-Exp**,** *Situation in the Islamic Republic of Afghanistan*, ICC-02/17-7-Red, 20 November 2017). See ICC, Order to the Prosecutor to Provide Additional Information, *Situation in the Islamic Republic of Afghanistan*, ICC-02/17-8, PTC III, 5 December 2017 and ICC, Second Order to the Prosecutor to Provide Additional Information, *Situation in the Islamic Republic of Afghanistan*, ICC-02/17-23, PTC III, 5 February 2018, par. 4. This last order curiously requests the OTP to provide, *inter alia*, documents that are—in the own words of the PTC—"publicly available". It is not entirely clear why the Court couldn't acquire such public documents autonomously without resorting to its power under Rule 50(4) of the RPE.

[530] In this sense K. AMBOS, *Treatise on International Criminal Law, Vol. III, International Criminal Procedure*, cit., 384-385. See also F. GUARIGLIA, G. HOCHMAYR, *Article 57, Functions and Powers of the Pre-Trial Chamber*, cit., 1424 on the OTP-PTC contrasts as regards the interpretation of article 57(3)(c) of the Statute and the possible expansion of the PTC's supervisory and 'directive' powers.

[531] *Ibidem*, 1423 (particularly footnote 8). *Contra*, on the opportunity of a formal involvement of the PTC in the conduct of investigations see J. DE HEMPTINNE, *The Creation of Investigating Chambers at the International Criminal Court. An Option Worth Pursuing?*, in *Journal of International Criminal*

2.2 Authorisation powers

Despite the OTP's functional autonomy in the conduct of preliminary examinations and investigations, there are certain acts or decisions that the Office cannot adopt alone. In these cases the relationship between the OTP and PTC, with particular regard to the latter's supervision on the discretionary choices of the former, is based on a 'request-and-authorisation' scheme. In other words, in order to put in place these actions, the OTP must apply in the prescribed form to the competent PTC and acquire its authorisation. The resulting prosecutorial action can therefore be described as a 'complex act', the product of the institutional interplay between the Prosecutor's discretion and judicial authorisation powers. There are various examples of this kind of OTP-PTC relation in the Statute, the most visible ones being the authorisation mechanism envisaged by article 15 in case of *proprio motu*[532] and the issuance of warrants and orders requested by the OTP for the purposes of an investigation[533]. It can be argued that also the Prosecutor's requests to the PTC for the issuance of a warrant of arrest or summons to appear belong to this procedural scheme[534].

It is important to reflect on the reasons for the involvement of a PTC for adopting or completing—by means of a judicial authorisation—specific prosecutorial acts. Most of these hypotheses have in common the fact that states' interests might be impinged on by the Prosecutor's discretional action or otherwise presuppose the conduct of certain activities on their territories, even in the absence of their consent[535]. Therefore, the PTC's judicial authorisation serves the purpose of

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Justice, vol. 5, issue 2, 2007, 402-418 and, more recently and with detailed proposals, G. S. GORDON, *Reconceptualizing the Birth of the International Criminal Case: Creating an Office of the Examining Magistrate*, in M. BERGSMO, C. STAHN (eds.), *Quality Control in Preliminary Examinations: Vol. 2*, cit., 296-301, 303-317.

[532] See article 15(3) and (4) of the Statute. Other relevant examples are the OTP's request of an authorisation to investigate despite a state's request for deferral to national authorities pursuant to article 18(2) of the Statute; the OTP's request made "on exceptional basis" pursuant to article 18(6) of the Statute—pending a PTC's ruling on admissibility or when the OTP has deferred to national authorities—to take investigative steps for the preservation of evidence, and the OTP's request to be authorised to conduct on-site investigation without the consent of the state concerned pursuant to article 57(3)(d) of the Statute.

[533] See article 57(3)(a) of the Statute.

[534] See article 58 of the Statute.

[535] By the same token, the request for authorisation pursuant to article 15 of the Statute presupposes, *inter alia*, the OTP's negative assessment on the state's ability and willingness to genuinely investigate and prosecute the crimes allegedly committed on its territory or by its nationals.

validating and putting into practical effect, upon a legal assessment based on the prescribed evidentiary standards or enabling circumstances[536], the Prosecutor's discretional choice and of conferring him or her the concrete authority—which only exists in potentiality—to entertain certain intrusive actions vis-à-vis the State Parties[537]. By contrast, with regard to the issuance of a warrant of arrest or summons to appear, the involvement of the PTC is functional to the protection of the suspected persons' right to personal freedom (or freedom of movement), on the assumption that such fundamental rights can be restricted for the purposes of exercising criminal jurisdiction only upon the intervention of a judicial authority[538].

It must be clarified that this legal configuration of the OTP-PTC relations does not mean that the PTC is 'acting together' with the OTP, directly or indirectly participating to the prosecutorial conduct of investigative or prosecutorial tasks. Its role is in fact generally confined to the authorisation (or denial of authorisation) of specified actions—or to the issuance of certain orders or judicial measures—based

[536] See, e.g., article 15(3) and (4) of the Statute introducing the "reasonable basis to proceed" evidentiary standard. See also article 18(6) of the Statute establishing that an authorisation to the OTP to take steps for the preservation of evidence pending a ruling on admissibility can be entertained only "on an exceptional basis" and provided that the OTP demonstrates a *periculum in mora* ("a significant risk that such evidence may not be subsequently available"). With regard to the authorisation of investigative steps within the territory of a State Party without its consent, article 57(3)(d) of the Statute establishes that the PTC must be satisfied that "the State is *clearly unable* to execute a request for cooperation due to the *unavailability of any authority* or any component of its judicial system competent to execute the request for cooperation" (emphasis added). These conditions set a very high threshold for the OTP in order to persuade the preliminary judges to authorise such actions.

[537] For instance, the drafting history of article 57(3)(d) clearly shows that the 'request-and-authorisation' scheme to enable the conduct of on-site investigations against the will of the State Party, based on the PTC's assessment of particularly stringent factual and legal requirements, constituted a pragmatic mediation among the differing views of the delegations represented at the Preparatory Committee. See, F. GUARIGLIA, G. HOCHMAYR, *Article 57, Functions and Powers of the Pre-Trial Chamber*, cit., 1433-1434.

[538] It should be borne in mind that article 21(3) of the Statute establishes that the interpretation and application of the sources of law outlined in paragraphs 1 and 2 of the same article "must be consistent with internationally recognized human rights". It is undeniable that internationally recognised human rights standards include the right to personal liberty and freedom from arbitrary detention (see, e.g., article 9 of the ICCPR, whose paragraph 3 also clarifies that "it shall not be the general rule that persons awaiting trial shall be detained in custody"). For a reference to article 21(3) of the Statute and to the international human rights standards in ruling on the necessity to issue a warrant of arrest see ICC, Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, *Prosecutor v. Bemba*, *Situation in the Central African Republic*, ICC-01/05-01/08-14-tENG, PTC III, 10 June 2008, par. 24 (footnotes 30-32), 90 (footnote 139). Preliminary judges have derived guidance from the relevant provisions of the ECHR and the ACHR—as interpreted by the human rights courts in Strasbourg and San José—both as regards the evidentiary standard for the issuance of a warrant of arrest (referring to the "reasonable suspicion" test contained in article 5(1)(c) of the ECHR) and the fundamental right to liberty (referring to article 7 of the ACHR).

on a request which is the sole (discretional) responsibility of the OTP to put forward; one that is based on the Prosecutor's autonomous assessment of the legal and factual circumstances, as well as of the opportunity and necessity of the request. In particular, the OTP bears the burden of convincing the PTC that the required evidentiary standards or the legal and factual circumstances enabling the adoption of the specified investigative steps are met in relation to each request for authorisation. For these reasons, the actual degree of judicial supervision embedded in such a 'request-and-authorisation' procedural scheme depends on the PTC's approach—either more liberal or more rigorous—to the construction of the evidentiary standard and/or enabling circumstances.

In conclusion, it must be observed that the PTC, with regard to these authorisation procedures, is not in the position to exercise a significant judicial discretion—besides the inherent margin of appreciation in interpreting the pertinent legal texts—for two fundamental reasons. First, the PTC is merely 'reacting' to the OTP's request and must generally confine its legal assessment (and the scope of its authorisation) to the specific measure or action requested by the Prosecutor, based on the information and evidence provided in support by the OTP[539]. Failing a request to that effect, the PTC cannot overcome the OTP's inaction and engage directly in investigative or quasi-investigative tasks[540]. Second, when the evidentiary standards or the circumstances enabling the concession of an authorisation are met, the PTC cannot deny an authorisation or the issuance of the requested measure (such as a warrant of arrest or summons to appear) and is legally bound to grant the OTP's request[541].

[539] For instance, it must be excluded that the PTC can issue a warrant of arrest on its own motion, failing a request of the OTP to that effect. See C. K. HALL, C. RYNGAERT, *Article 58, Issuance by the Pre-Trial Chamber of a warrant of arrest or a summons to appear*, in O. TRIFFTERER, K. AMBOS (eds.), *op. cit.*, 1444. As regards the evidence and information necessary to grant the authorisation or the issuance of another measure, the Authors, while recognising that the PTC's assessment shall generally be based only on the information provided by the OTP and contained in the request, underline that a certain margin of discretion may be exercised by the preliminary judges based on their authority with respect to a "unique investigative opportunity" (article 56 of the Statute, on which see, *infra*, par. 2.5 of this chapter). In addition, they correctly point out that no provision explicitly precludes the PTC from considering information presented by other relevant actors such as victims (*ibidem*, footnote 26).
[540] *Ibidem*.
[541] *Ibidem*.

2.3 Judicial review of negative decisions: 'Persuasive' and 'corrective' powers

In other circumstances, depending on the interests at stake at the different procedural junctures, the supervisory role of the PTC is based on a different legal scheme, namely on the *subsequent* and *potential* judicial control over a prosecutorial discretionary choice. In these cases, the Prosecutor does not need the previous authorisation of the preliminary judges in order to adopt a discretional decision or to put in place a specific investigative action. Only once such decision or action is adopted according to the applicable legal standards—and ritually communicated to the other procedural subjects—there is an opportunity for certain qualified actors—or the PTC itself—to provoke the judicial review of the OTP's act or decision. This judicial review may either be premised on an *ex parte* request or, in at least one hypothesis, be based on the PTC's *ex officio* powers[542].

This procedural scheme of 'subsequent control' is the one provided for under article 53 of the Statute for the judicial review of the OTP's decision not to proceed with an investigation or to start a prosecution. A closer look to the legal nature and limits of this judicial review is warranted, bearing in mind that the OTP's negative decisions under article 53 are among the most notable manifestations of prosecutorial discretion at the pre-trial stage in the ICC procedural system. The judicial review of *nolle prosequi* decisions is build around a 'double-track' mechanism that distinguishes the procedure—in particular its triggering—and the legal consequences of judicial supervision based on the criteria and reasons adduced by the OTP for justifying its decision not to open an investigation or prosecution. Such differentiation can be schematised as follows:

a) If the decision not to open an investigation or start a prosecution is based on one of the factors listed under article 53(1)(a)-(b) and 53(2)(a)-(b) of the Statute—or in any case not *solely* on letter c) regarding the interests of justice—the judicial review can only be triggered by a request of the referring entity. The PTC, upon review, "may request the Prosecutor to reconsider [his or her] decision"[543].

b) If the decision not to open an investigation or start a prosecution is based *solely* on the interests of justice pursuant to article 53, par. 1 and 2, letter c), the PTC

[542] See articles 53(3)(a) and (b) of the Statute.
[543] See article 53(3)(a) of the Statute.

may on its motion review such decision, which "shall be effective only if confirmed"[544] by the PTC.

In the first place it must be noted that the PTC's power of judicial review of the OTP's negative decisions is framed in discretionary terms, as the expression "*may* review" clearly suggests[545]. Therefore the PTC is not under an obligation to conduct such review, at least in the case of *ex parte* proceedings[546]. Nevertheless, it can be argued that as regards the *ex officio* review, the PTC's discretion is (implicitly) excluded because of the need to avoid the "potential paralysis of the Court"[547], provided that the Prosecutor's decision can only become effective if confirmed by the Chamber. In any event, the PTC's discretion in entertaining these requests extends to the concrete individuation of the criteria to be considered for the purposes of the review—which are not clearly established in the Statute and RPE[548]—and involves the possibility to request additional information to the OTP or the applicant according to rule 107 of the RPE and Regulation 48 of the Regulations of the Court[549].

In the second place, the legal nature and scope of this judicial review deserves to be more closely scrutinised. It could be asked whether the judicial control

[544] See article 53(3)(b) of the Statute.
[545] In this sense see M. BERGSMO, P. KRUGER, O. BEKOU, *Article 53, Initiation of an Investigation*, in O. TRIFFTERER, K. AMBOS (eds.), *op. cit.*, 1377.
[546] *Ibidem*. In the case of review pursuant to article 53(3)(a) of the Statute, failing an initiative from the referring entity the PTC has no autonomous authority in reviewing the OTP's decision. See, *infra*, footnote 551.
[547] *Ibidem*, 1379. The Authors correctly point out that, notwithstanding the fact that the PTC's power to review is framed in discretional terms ("*may* on its own initiative", emphasis added), "were the Pre-Trial Chamber to refrain from reviewing such decision" the result would be a complete procedural deadlock. The OTP's decision not to proceed would remain without effects in the absence of any other remedy to push forward the procedure, either by closing it or forcing the Prosecutor to open an investigation or start a prosecution.
[548] *Ibidem*, 1378-1379. Nevertheless, at a first approximation it can be concluded that the PTC shall first and foremost apply, in reviewing the OTP' decision, the same criteria that the Prosecutor must take into consideration in reaching the decision under review (listed in article 53(1)(a)-(c) and 53(2)(a)-(c) of the Statute).
[549] See Rule 107(2) of the PRE, which enables the PTC to request the OTP the presentation of information and documents, or summaries thereof, that it considers necessary for the purposes of the review, as well as Regulation 48(1) of the Regulations of the Court, which establishes the same power with specific reference to the *ex officio* review. It must be recalled that such power to require additional information or documents stems from the fact that, especially at the pre-investigation stage, the PTC has had no access to the OTP's 'situation file' containing the information on the basis of which the OTP reached its negative decision, except for the limited information referred to in the OTP's decision not to open an investigation or start a prosecution. Since no judicial review can be carried out in a legal and factual vacuum, the exercise of this power may prove necessary to allow a meaningful supervision of prosecutorial choices, irrespective of the correct stance on the legal character of the review and the scope of the PTC's powers to that effect.

exercised by the PTC is one of merit—i.e. an autonomous *de novo* legal and factual (re)assessment of the reasons adduced by the OTP for a *nolle prosequi* decision—or a formal/procedural one—i.e. limited to an external control on the legality, and to a certain extent the reasonableness, of the inferences and conclusions reached by the OTP in its negative decision[550]. It could also be asked whether the PTC's review should be exclusively confined to the arguments raised by the parties to the procedure or if judges can introduce additional grounds of review, even beyond the parties' allegations[551]. The already examined bipartite nature of the review procedure carries important consequences on both issues. It can reasonably be argued that in the *ex parte* procedure pursuant to article 53(3)(a) of the Statute the scope of judicial review is limited to an external control on the legality and overall reasonableness of the decision not to proceed or prosecute, limitedly to the grounds for review raised by the applicants (referring state or UNSC)[552]. In particular, the PTC's should be allowed to verify whether the OTP's conclusions are affected by error with regard to the application of the criteria that must be considered in order to reach a decision under article 53 of the Statute, based on the information available at the relevant stage of proceedings[553]. Nevertheless, it is not entirely clear against which evidentiary standard the PTC is required to conduct such review, also considering that the OTP

[550] See M. BERGSMO, P. KRUGER, O. BEKOU, *op. cit.*, 1378.

[551] *Ibidem*, in the sense that, at least in the context of *ex parte* review, the Court must confine its analysis to the arguments raised by the parties. In its first and only decision pursuant to article 53(3)(a) of the Statute the PTC confirmed that the review must respect the *ne ultra petita* principle (see ICC, Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation, *Situation on the Registered Vessels of the Comoros*, *Greece and Cambodia*, ICC-01/13-34, PTC I, 16 July 2015, par. 10: "the scope of review is limited to the issues that are raised in the request for review and have a bearing on the Prosecutor's conclusion not to investigate"). This approach has been later confirmed by the Appeals Chamber, see ICC, 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", *Situation on the Registered Vessels of the Comoros*, *Greece and Cambodia*, ICC-01/13-51, AC, 6 November 2015, par. 56: "In the absence of such a request [for judicial review], the Pre-Trial Chamber has no power to enter into a review of the Prosecutor's decision not to proceed with an investigation on its own motion, *irrespective of how erroneous* it may consider the Prosecutor's admissibility determination to be" (emphasis added).

[552] This approach to judicial review in *ex parte* procedures has been, at least in the abstract, shared by the PTC. See, ICC, Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation, *Situation on the Registered Vessels of the Comoros*, *Greece and Cambodia*, ICC-01/13-34, PTC I, 16 July 2015, par. 9-10 and 12: "Upon review, the Chamber must request the Prosecutor to reconsider her decision not to investigate if it concludes that the validity of the decision is materially affected by an error, whether it is an error of procedure, an error of law, or an error of fact".

[553] *Ibidem*.

is not under an obligation—unless otherwise requested to do so—to provide the Chamber with all the information on which the article 53 decision to be reviewed is based[554]. Therefore, in the absence of further indications in the legal texts, the distinction between a *de novo* review and an *error-based* review is not—in practice—clear-cut[555]. To the contrary, when the review is triggered *ex officio* pursuant to article 53(3)(b) of the Statute—as regards a *nolle prosequi* decision based solely on the interests of justice—it seems fair to conclude that both the language and scope of the provision allow for a more penetrant review of the Chamber. Considering the legally evanescent character of the interests of justice clause—which can at least in theory translate into a highly discretional assessment by the OTP—the PTC's review would necessarily enter into a substantive analysis of the opportunity of the Prosecutor's negative decision, as well as on the very normative content of the interests of justice clause[556].

In the third and last place, the legal consequences of judicial review pursuant to article 53 significantly differ in the cases of *ex parte* and *ex officio* review. In the

[554] See M. BERGSMO, P. KRUGER, O. BEKOU, *op. cit.*, 1378.

[555] In the *Comoros* review decision the PTC, while stating that it was not tasked to carry out a *de novo* assessment of the criteria for reaching a decision not to investigate, has in practice conducted an in-depth substantive control of certain logical inferences contained in the Decision not to Open an Investigation (as pointed out by one dissenting judge, see Partly Dissenting Opinion of Judge Péter Kovács, *Situation on the Registered Vessels of the Comoros*, *Greece and Cambodia*, ICC-01/13-34-Anx-Corr, par. 2, 7-8). In this regard the OTP, in its final decision upon reconsideration, emphasised the distinction between the two types of judicial review and manifested its adamant disagreement on the methodology and standard of review applied by the PTC (see, ICC-OTP, Final decision of the Prosecution concerning the "Article 53(1) Report" (ICC-01/13-6-AnxA), dated 6 November 2014, *Situation on the Registered Vessels of the Comoros*, *Greece and Cambodia*, ICC-01/13-57-Anx1, 30 November 2017, par. 41-44, 48-51, 57). The OTP lamented the PTC had applied in practice a *de novo* review, despite apparently subscribing to an error-based review (*ibidem*, par. 52). In so doing, the PTC would have acted beyond the statutory scope of the judicial review procedure, failing to accord the required deference to the primary fact-finder (*ibidem*, par. 58-65).

[556] This is precisely the reason why although the interests of justice clause potentially provides the OTP with a great deal of discretionary power, the recourse to such criterion to justify a negative decision is not particularly appealing. On the distinction between the two forms of review and the correlative standards for its conduct see ICC, 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", *Situation on the Registered Vessels of the Comoros*, *Greece and Cambodia*, ICC-01/13-51, AC, 6 November 2015, par. 58-59 and ICC-OTP, Final decision of the Prosecution concerning the "Article 53(1) Report" (ICC-01/13-6-AnxA), dated 6 November 2014, *Situation on the Registered Vessels of the Comoros*, *Greece and Cambodia*, ICC-01/13-57-Anx1, 30 November 2017, par. 48. The OTP seems to imply that even the review based on article 53(3)(b) of the Statute is not necessarily based on a *de novo* assessment of the PTC. More generally, the main issue with the interests of justice clause is certainly the difficulty to objectify its content, something that both the OTP and the Chambers have carefully avoided to do so far. As colourfully written by F. FOKA TAFFO, *op. cit.*, 135, the issue of the interests of justice is a "patate chaude juridique", that neither the Office nor the PTC seem particularly keen on holding.

first case, if the PTC disagrees with the OTP's legal assessment or finds it affected by errors, it can merely ask the Prosecutor to reconsider his or her previous decision[557]. The OTP is surely under a legal duty to reconsider that decision, taking into account the PTC's reasoning, but it is by no means required to modify or reverse it as per the Chamber's request[558]. This is clearly an obligation of means (or process), not of result[559]. In other words, only the Prosecutor has the final say on whether to open or not an investigation or start a prosecution. Therefore, the PTC's role in this kind of review procedure is of 'persuasive' character[560]. To the contrary, in case of *ex officio* review, if the PTC disagrees with the Prosecutor's reasoning on the interests of justice, the decision not to proceed with an investigation or prosecution shall remain without effects and, more importantly, the preliminary judges will have the

[557] See article 53(3)(a) of the Statute and Rule 108(2)-(3) of the RPE. This feature of the *ex parte* review is uncontroversial. See ICC, Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation, *Situation on the Registered Vessels of the Comoros*, *Greece and Cambodia*, ICC-01/13-34, PTC I, 16 July 2015, par. 50; ICC, 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", *Situation on the Registered Vessels of the Comoros*, *Greece and Cambodia*, ICC-01/13-51, AC, 6 November 2015, par. 56; ICC-OTP, Final decision of the Prosecution concerning the "Article 53(1) Report" (ICC-01/13-6-AnxA), dated 6 November 2014, *Situation on the Registered Vessels of the Comoros*, *Greece and Cambodia*, ICC-01/13-57-Anx1, 30 November 2017, par. 48, 50.

[558] *Ibidem*.

[559] ICC-OTP, Final decision of the Prosecution concerning the "Article 53(1) Report" (ICC-01/13-6-AnxA), dated 6 November 2014, *Situation on the Registered Vessels of the Comoros*, *Greece and Cambodia*, ICC-01/13-57-Anx1, 30 November 2017, par. 3.

[560] Obviously, one needs to look at the concrete content of the PTC's review decision in order to determine what are the margins for an autonomous reconsideration on the part of the OTP. In the *Comoros* situation the conclusions reached and the assertive language used by the Chamber seemed to leave very narrow margins to the OTP in reconsidering its previous decision. The PTC pushed for a reconsideration whose outcomes were largely predetermined by the review decision itself. See, ICC, Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation, *Situation on the Registered Vessels of the Comoros*, *Greece and Cambodia*, ICC-01/13-34, PTC I, 16 July 2015, par. 49 and 51: "the Chamber cannot overlook the discrepancy between, on the one hand, the Prosecutor's conclusion that the identified crimes were so evidently not grave enough to justify action by the Court … and, on the other hand, the attention and concern that these events attracted from the parties involved, also leading to several fact-finding efforts on behalf of States and the United Nations in order to shed light on the events. *The Chamber is confident that, when reconsidering her decision, the Prosecutor will fully uphold her mandate under the Statute*" (emphasis added). In other words the PTC has at a minimum 'strongly suggested' the OTP to reverse its previous decision not to open an investigation, implying that the original conclusion may have been the result of the OTP's failure to uphold its mandate. Nevertheless, in the situation at hand this persuasive stance of the PTC did not succeed, since the OTP confirmed its previous decision, refusing to reverse or modify it.

power to force the OTP to open an investigation or start a prosecution. This kind of review may therefore be described as having a 'corrective/confirmative' character[561].

In any event, as it will be seen in greater detail in the following part of this work, since the Court's practice of judicial review pursuant to article 53 of the Statute is limited to just one instance, any generalisation or conclusive argument should be carefully avoided at the present stage of the evolution of the OTP-PTC relations in this field.

2.4 'Confirmative' powers

Another scheme of interaction between the OTP and PTC concerns the judicial oversight of discretionary decisions made as a result of an investigation and leading to the selection of individual defendants and the formulation of the charges. The ICC's institutional and procedural architecture envisages at this crucial stage—which marks the transition from the pre-trial to the trial phase—the indispensable intervention of the PTC in order to perform a filtering of the charges, for the purposes of "[protecting] the rights of the Defence against wrongful and wholly unfounded charges"[562]—in the interest of fairness and judicial economy[563]—and of "[delineating] the factual scope of the case to be discussed at trial"[564]. The drafters of the Rome Statute summarised this crucial supervisory role and procedural passage through the expression "confirmation of charges", which takes place at a dedicated hearing according to article 61 of the Statute. It has been correctly pointed out that this power of preliminary judges in the ICC's legal regime "is an important example

[561] See M. BERGSMO, P. KRUGER, O. BEKOU, *op. cit.*, 1379. For the position of the Court see, *supra*, the references in footnote 557. On the confirmative structure of the judicial review and legal consequences of the *ex officio* procedure pursuant to article 53(3)(b) of the Statute, see also ICC-OTP, Final decision of the Prosecution concerning the "Article 53(1) Report" (ICC-01/13-6-AnxA), dated 6 November 2014, *Situation on the Registered Vessels of the Comoros*, *Greece and Cambodia*, ICC-01/13-57-Anx1, 30 November 2017, par. 45-48.

[562] For the first enunciation of this fair trial function of the confirmation of charges procedure see ICC, Decision on the Confirmation of Charges, *Prosecutor v. Lubanga*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-803-tEN, PTC I, 29 January 2007, par. 37. This position was subsequently confirmed in virtually all confirmation decisions.

[563] As regards judicial economy, the function of the confirmation procedure is that of filtering the cases and charges brought by the OTP, sending to trial exclusively the ones that—based on the "sufficient evidence to establish substantial grounds to believe" evidentiary standard—"deserve to be discussed at trial", as written by W. A. SCHABAS, E. CHAITIDOU, M. EL-ZEIDY, *Article 61*, *Confirmation of the charges before trial*, in O. TRIFFTERER, K. AMBOS (eds.), *op. cit.*, 1488.

[564] *Ibidem*, 1488-1489.

of the increased judicial control by the judiciary over the Prosecutor that sets the ICC apart from other international criminal justice institutions"[565].

It could be asked whether the power to scrutinise the OTP's charging decision—contained in the so-called "Document Containing the Charges"[566]—by confirming in whole or in part (or non confirming the totality of) the charges, structurally differs from the already examined power to authorise the opening of an investigation pursuant to article 15 of the Statute or to review *ex officio* the OTP's decision pursuant to article 53(1)(c) and (2)(c) of the Statute[567] . Despite the different contexts, all the three situations have in common the fact that the procedure can move on if and only the OTP and the PTC *substantially agree* on the legal and factual assessment that forms the basis for the action or decision concerned[568]. Nevertheless, the procedural scheme of the confirmation of charges differs from the other two examples on the one hand for the intensity of judicial oversight (which is based on a significantly more demanding evidentiary standard)[569] and, on the other hand, because of the PTC's incisive power to determine with binding effects the material scope of the subsequent (trial) proceedings (including by persuading the OTP to amend the charges and/or or to modify the legal characterisation of the facts or modes of responsibility)[570]. In other words both the quantity and the quality of this form of judicial supervision, as well as its multifunctional legal character, set this procedure apart from other similar schemes of OTP-PTC interaction.

As regards the intensity of judicial oversight of—or interference with—prosecutorial charging choices at the stage of confirmation, it must be recalled that the PTC has on some occasions took a proactive stance by persuading the OTP to

[565] *Ibidem*, 1487.
[566] See article 61(3)(a) of the Rome Statute and, for the required content of this document, Regulation 52 of the Regulations of the Court. The Document Containing the Charges (DCC), despite the different *nomen juris*, is the functional equivalent of the indictment in the procedural nomenclature of the *ad hoc* tribunals.
[567] An analogy between these procedures is suggested by the OTP in ICC-OTP, Final decision of the Prosecution concerning the "Article 53(1) Report" (ICC-01/13-6-AnxA), dated 6 November 2014, *Situation on the Registered Vessels of the Comoros*, *Greece and Cambodia*, ICC-01/13-57-Anx1, 30 November 2017, par. 45-46.
[568] *Ibidem*.
[569] See article 61(7) of the Statute.
[570] For instance, in *Bemba* and *Laurent Gbagbo* the PTC has adjourned the hearing for the confirmation of charges requesting the OTP, respectively, to consider an amendment to the charges as originally formulated in the DCC with particular regard to the possible re-characterisation of the mode of liability, and to provide additional evidence to substantiate the charges for the purposes of confirmation. See, *infra*, next footnote.

amend the charges in order to fix a case theory that might have led to non-confirmation of part or the totality of the original charges. The procedural instrument used by the PTC for these purposes has been the power to adjourn the hearing, thereby requesting the OTP to consider the possibility to provide additional evidence or conduct further investigations, and/or of amending the original charges in order to accommodate a (potentially) different legal characterisation of the facts (including the modes of liability)[571]. In these circumstances the contribution of the PTC in shaping the factual scope of the trial becomes particularly evident. Preliminary judges in these occasions have not been the passive recipients of the OTP's requests but have somehow contributed to the formulation of a viable case theory for trial, effectively 'nudging' the OTP towards certain investigative and charging decisions among a range of possibilities, under the potential threat of non-confirmation of the charges[572].

With regard to the request to consider an amendment of the charges pursuant to article 61(7)(c)(ii) the PTC has clarified that it is the "Prosecutor's responsibility to build and shape the case"[573] and that by adjourning the hearing "it does not purport to impinge upon the Prosecutor's functions as regards the formulation of the appropriate charges or to advise the Prosecutor on how best to prepare the [DCC]"[574]. The language used by the PTC in its request to the OTP to consider providing additional evidence has been more forceful, also based on a severe critique

[571] The two possible grounds for the adjournment of the hearing are contemplated by article 61(7)(c)(i)-(ii) of the Statute. See also Rule 127 of the RPE. The power to adjourn the hearing has been used by the PTC on both grounds, see ICC, Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute, *Prosecutor v. Bemba*, *Situation in the Central African Republic*, ICC-01/05-01/08-388, PTC III, 3 March 2009, par. 17-20, 26, 38-39, 42, 46, 48-49 where the PTC considered that the evidence presented at the hearing appeared to establish a "different crime", *sub specie* mode of liability; and ICC, Decision Adjourning the Hearing pursuant to Article 61(7)(c)(i) of the Rome Statute, *Prosecutor v. Laurent Gbagbo*, *Situation in the Republic of Côte d'Ivoire*, ICC-02/11-01/11-432, PTC I, 3 June 2013, par. 14-15, 18, 28-29, 35, 37, 44-47 where the PTC requested the OTP to consider carrying out further investigations and providing additional evidence to sustain the charges.

[572] Reference can be made to the 'nudge theory' as it emerged in recent behavioural studies, particularly the field of economics. On the subject see the seminal book of R. H. THALER, C. R. SUNSTEIN, *Nudge: Improving Decisions About Health, Wealth, and Happiness*, New Haven, 2008.

[573] ICC, Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute, *Prosecutor v. Bemba*, *Situation in the Central African Republic*, ICC-01/05-01/08-388, PTC III, 3 March 2009, par. 39.

[574] *Ibidem*.

concerning the quality of certain pieces of evidence presented at the hearing[575]. In any event, in both cases the PTC seemed inclined to give the OTP an additional opportunity to 'set matters right' with the evidence and DCC—either by integrating the originally insufficient evidence or by correcting the legal characterisation of the facts (including the modes of liability)—instead of plainly refusing to confirm the charges[576]. From the point of view of the OTP-PTC relations and institutional balance of power, the PTC's ability to intervene on the OTP's (defective) case-theory and evidentiary materials through the adjournment of the confirmation hearing combines its corrective-persuasive and confirmation powers, and involves a degree of judicial scrutiny no less than the one contained in a decision not to confirm, in whole or in part, the charges.

2.5 'Protective' powers relating to evidence and persons participating at trial

One last category of supervisory powers of the PTC vis-à-vis the OTP at the pre-trial stage deals with a set of heterogeneous situations in which the intervention of the Chamber may become necessary in order to protect the integrity of the proceedings or of the evidence as well as the safety of certain parties or participants to the proceedings.

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[575] ICC, Decision Adjourning the Hearing pursuant to Article 61(7)(c)(i) of the Rome Statute, *Prosecutor v. Laurent Gbagbo*, *Situation in the Republic of Côte d'Ivoire*, ICC-02/11-01/11-432, PTC I, 3 June 2013, par. 29-30, 34-35, 44-45. The PTC criticised the OTP's excessive reliance on NGOs' reports and press articles, pieces of evidence that according to preliminary judges "cannot in any way be presented as the fruits of a full and proper investigation by the Prosecutor in accordance with article 54(l)(a) of the Statute" (*ibidem*, par. 35).

[576] In both cases the OTP has accepted the 'suggestions' of the PTC and as a result the charges were later confirmed after the adjournment and the additional activities performed by the OTP. See, ICC-OTP, Public Redacted Version of the Amended Document containing the charges filed on 30 March 2009, *Prosecutor v. Bemba*, *Situation in the Central African Republic*, ICC-01/05-01/08-395-Anx3, OTP, 30 March 2009 and ICC, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, *Prosecutor v. Bemba*, *Situation in the Central African Republic*, ICC-01/05-01/08-424, PTC II, 15 June 2009. It should be noted that in this last case the PTC declined to confirm all charges of crimes against humanity and war crimes based on the mode liability originally envisaged by the OTP under article 25(3)(a) of the Statute and only confirmed the charges of war crimes based on superior responsibility pursuant to article 28(a) of the Statute, a mode of liability that wasn't originally included in the DCC and that was only added by the OTP in its amended version as a result of the PTC's decision to adjourn the hearing. In other words, the PTC wouldn't have sent Bemba to trial based on the original charges. See also ICC, Decision on the confirmation of charges against Laurent Gbagbo, *Prosecutor v. Laurent Gbagbo*, *Situation in the Republic of Côte d'Ivoire*, ICC-02/11-01/11-656-Red, PTC I, 12 June 2014, par. 11 making reference to the confidential documents submitted by the OTP in compliance with the PTC's request to provide additional evidence for the purposes of confirmation.

With regard to the preservation of the integrity of proceedings and of evidence, examples of this kind of protective powers are the PTC's involvement in relation to a "unique investigative opportunity" (either based on a request of the OTP or *ex officio*)[577] and the PTC's ability to adopt "protective measures for the purposes of forfeiture"[578]. The first situation is particularly interesting from the point of view of the OTP-PTC relations, since the PTC can adopt protective measures to ensure the availability and preservation of evidence ahead of trial either upon the request of the OTP or on its own initiative—after consultation with the OTP[579]—if the preliminary judges consider that the OTP's failure to act is "unjustified" and may be detrimental to the defence[580]. This power to indicate measures for the preservation of evidence without a specific request from the Prosecutor reveals the drafters' intention to provide a residual avenue for the protection of the integrity of proceedings and, as far as exonerating evidence is concerned, the rights of the defence[581]. The consultation between the OTP and PTC—a prerequisite for the adoption of *ex officio* protective measures—is an example of a procedural mechanism designed to avoid any direct confrontation between the two organs and to promote a dialogue that may incentivise the OTP to act, instead of accepting to be trumped by preliminary judges with regard to measures pertaining to the preservation of evidence. In any event, being the judges' *ex officio* intervention an exception to the overall control enjoyed by the OTP on the conduct of investigations, such power is not only subject to the procedural condition of consultations, but also to the substantive condition of the "unjustified" nature of the OTP's failure to request a protective measure. Additionally, in order to protect the OTP's discretionary attributions against unwarranted interventionism

[577] See article 56 of the Statute.
[578] See article 57(3)(e) of the Statute.
[579] Paragraph 1, letters (a)-(c) of article 56 of the Statute deal with the procedure for securing a unique investigative opportunity based on a request of the OTP. Paragraph 2 of the same article contains a non-exhaustive list of measures that the PTC may adopt to this end. Paragraph 3, on the other hand, deals with the PTC's authority to adopt such measures even in the absence of a request from the OTP, following a consultation between the Prosecutor and the Chamber.
[580] *Ibidem*, par. 3, letter (a).
[581] See F. GUARIGLIA, G. HOCHMAYR, *Article 56, Role of the Pre-Trial Chamber in relation to a unique investigative opportunity*, in O. TRIFFTERER, K. AMBOS (eds.), *op. cit.*, 1418-1419.

from the PTC, the measures adopted *ex officio* by the PTC can be appealed by the Prosecutor and the appeal heard on expedited basis[582].

In other words, the mechanism under consideration allows preliminary judges—under the strict parameters set out in the relevant provisions—to exercise *ex officio* an active role in the investigative process, although limited to measures necessary to preserve the evidence. While this can be considered a concession to a more inquisitorial approach to the role of judges at the pre-trial stage of proceedings, the degree of judicial intervention allowed by the Statute has nothing to do with the idea of a judicial investigation[583].

The PTC's protective powers, in particular with regard to the rights of persons participating at the pre-trial stage can also be traced back to the residual clause of article 57(3)(c) of the Statute, which enables the preliminary judges to "provide for the protection and privacy of victims and witnesses, the preservation of evidence, the protection of persons who have been arrested or appeared in response to a summons, and the protection of national security information"[584]. The last part of this provision adds an additional dimension to the protective powers of the PTC, one that does not relate to evidence or persons participating at trial but to the preservation of states' interests, in order to ensure the confidentiality of information that may have a bearing on their national security[585].

The attitude of these protective powers to interfere with the prosecutor-centred conduct of investigations and pre-trial procedures is obviously dependent on

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[582] See article 56(3)(b) of the Statute. On the reasons behind this legislative choice see F. GUARIGLIA, G. HOCHMAYR, *Article 56, Role of the Pre-Trial Chamber in relation to a unique investigative opportunity*, cit., 1419-1420.

[583] *Ibidem*, 1419. According to the Authors the provision allows the Chamber to "impose conditions on the modalities of taking evidence" but does not "empower the PTC to take evidence itself". However, in practice such distinction might not be clear-cut and other authors are of the view that article 56 "entrusts the Pre-Trial Chamber with a subsidiary *proprio motu* role as an investigative body" (see, e.g., C. KRESS, *The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise*, cit., 607).

[584] On the functions of this provision see, *supra*, par. 2 and 2.1 of this chapter. It is clear that this provision refers to other specific provisions concerning the protection of victims and witnesses (article 68 of the Statute), the preservation of evidence (in particular article 56 of the Statute) and the protection of information related to national security (article 72 of the Statute). It is debated whether it also introduces a "sub-provision broadening the scope of Pre-Trial Chambers' supervisory powers" (see F. GUARIGLIA, G. HOCHMAYR, *Article 57, Functions and Powers of the Pre-Trial Chamber*, cit., 1424).

[585] Further normative references on this issue are article 72 of the Statute and Regulation 21(8) of the Regulations of the Court (concerning the exception to publicity and broadcasting of information "likely to be prejudicial to national security interests").

the OTP's approach towards the collection of evidence, the specific circumstances of each situation and the corresponding need to protect the involved actors.

3. Preliminary conclusions

At the end of this review on the institutional role of preliminary judges vis-à-vis the OTP in the exercise of prosecutorial discretion at the pre-trial stage, the following summary preliminary observations can be made.

a) The institutional role of the PTC in the judicial supervision over prosecutorial discretionary choices is not premised on a 'monolithic' general power of judicial review of the OTP's decisions. To the contrary, the Chamber is endowed with supervisory powers that are *procedure-specific* in relation to the different kinds of prosecutorial actions or decisions considered, and *objective-driven* with regard to the potentially countervailing interests that judicial review is called upon to protect. In the context of these 'variable geometry' in the OTP-PTC relationships, the judges' institutional role may therefore consist, according to the circumstances, in the power to adopt pre-trial management measures; the power to authorise or not certain prosecutorial requests; the power to review negative decisions with 'persuasive' or 'confirmative/corrective' effects; the power to confirm, not to confirm or in other ways orient OTP's (charging) decisions; and the power to issue measures designed to protect evidence, persons, national interests, and goods that may form the object of forfeiture.

b) The PTC's supervisory powers are generally of a *reactive* nature. In other words, the PTC's ability to exercise them is predominantly premised on a request of the subjects interested to a certain procedural outcome (e.g. the OTP's desire to proceed or not to proceed with an investigation; the referring entity's desire to have a *nolle prosequi* decision reviewed; etc.) and confined to the specific grounds of review presented by the applicant. Nevertheless, on certain enumerated circumstances and under strict procedural and substantive conditions, the PTC can exercise supervisory powers *ex officio*, thereby influencing in a more direct and substantial manner the direction or the potential outcomes of specific prosecutorial activities at the pre-trial stage.

c) The possibility to activate the different powers of judicial oversight is strictly limited, both subjectively and objectively, by the statutory and regulatory framework governing the ICC legal regime. Only qualified actors can invoke the PTC's intervention, with the complete exclusion of entire categories of participants, such as victims, from the ability to challenge—at least directly—some of the most relevant prosecutorial discretionary choices.

d) The 'balance of powers' among the relevant actors at the pre-trial stage of the proceedings clearly leans towards the OTP, consistent with a normative and regulatory framework that entrusts the Office with the task of adopting and carrying out the most relevant pre-investigation and investigation decisions (including the framing of the overall strategy and theme-specific policies relevant to its activity). Nevertheless, the judges' role is not always confined to a merely external and formal control over prosecutorial choices. The PTC may indirectly—and substantially—influence prosecutorial choices even when its powers and supervisory decisions are devoid of direct and binding effects. The 'legal suasion'—which goes well beyond a formalistic and legalistic understanding of the OTP-PTC relationships—connected to certain PTC's decisions must be carefully considered with a view to determine the concrete effects of pre-trial decisions on the formulation of prosecutorial case-hypotheses and other discretionary decisions.

e) As it will be seen in greater detail in the next part of this work, the legal consequences of this complex and multifaceted procedural and institutional framework may alternatively reveal prosecutorial and judicial patterns of *conflict* or *agreement* between the OTP and PTC with regard to the nature and limits of specific discretionary acts, powers, decisions. In some cases, also considering the relative paucity of pertinent practice, there will be no identifiable pattern of behaviour or trend in the OTP-PTC relations, but only individual cases that do not allow for excessive or unwarranted generalisations. It will be necessary to assess the reasons for the existence of areas of interpretive agreement or disagreement between the involved actors, in order to appreciate their consequences on the overall effectiveness and legitimacy of the work of the Court.

PART THREE

THE *DYNAMIC* DIMENSION OF PROSECUTORIAL DISCRETION AND ITS JUDICIAL SUPERVISION: A PRACTICE-BASED ANALYSIS

CHAPTER ONE

CONCEPTUAL TOOLS FOR THE ANALYSIS OF PROSECUTORIAL AND JUDICIAL PRACTICE AT THE PRE-TRIAL STAGE OF THE ICC PROCEDURE

1. Introduction

The theoretical foundations and the *static* legal dimension of prosecutorial discretion and its judicial oversight at the pre-investigation and pre-trial phase of the ICC have been the object of extensive analysis in the first two parts of the present work. This preliminary normative assessment needs now to be tested against the actual prosecutorial and judicial practice at the current stage of development of the work of the Court, with a view to *compare* the law in the books and the law in action.

The main reason for carrying out the proposed practice-based analysis is to provide a more realistic and empirically supported understanding of the *dynamics* of prosecutorial discretion and judicial review at the ICC and, consequently, of the current trends in the OTP-PTC institutional relationships. To that end, the present chapter introduces the conceptual tools that have guided the selection, analysis and systematisation of the relevant prosecutorial and judicial practice. In the first place the concept of 'prosecutorial practice' is more clearly defined for the purposes of justifying the choices concerning the selection, analysis and systematisation of the cases (par. 2). Then, the concept of 'proportionality' between the degree of discretion and the depth of judicial review is illustrated as the general principle that forms the basis of the ICC's system of checks and balances for the exercise of prosecutorial

discretion and its supervision (par. 3). Moreover, a model based on the binary opposition 'open clash v. smooth relationship' is introduced as a tool for the schematisation of the relevant instances of practice and *leitmotiv* in the description of the OTP-PTC underlying institutional relationships (par. 4). Finally, we shall formulate the hypothesis that there is at the current stage of development of the Court's work a certain degree of 'dissociation of formants' (i.e. discrepancy between the statutory/regulatory framework and the actual practice of the relevant actors) with regard to the overall outcomes of the exercise of prosecutorial discretion and judicial review thereof (par. 5). Such hypotheses will then be tested against the concrete patterns of behaviour and prosecutorial/judicial trends at the pre-investigation and investigation junctures as recollected in Chapter Two of this Part, in order to validate (or disprove) these propositions, and to attempt to measure by appropriate standards—qualitative and to a lesser extent quantitative—said phenomena, as well as their potential explanations and institutional consequences.

2. The concept of 'prosecutorial practice' in the context of the present study

References to the concept of prosecutorial and/or judicial *practice* have been frequent throughout this study, included in the context of the static analysis carried out in the first two parts. As the work approaches the institutional dynamics of the OTP-PTC relations with regard to the practical outcomes of the exercise of prosecutorial discretion and judicial review thereof, a more precise definition—and delimitation—of the concept of practice for the purposes of the case-based analysis is warranted. In particular, this seems necessary due to the normative specificity of ICL, an institutional project based on an inevitable—and potentially creative—semantic and normative tension between the legal domains of the 'international' and the 'criminal'[586]. More specifically, it should always be borne in mind that this study focuses its attention on the principles and rules—and most importantly on the concrete acts and decisions based on such principles and rules—that concern the organs of an independent international judicial organisation. In other words, the

[586] On the complex and amphibious normative structure of international criminal law and the inherent dialectical—sometimes contradictory—relation between its 'international' and 'criminal' components, see M. COSTI, E. FRONZA, *Il diritto penale internazionale: nascita ed evoluzione*, in E. AMATI, M. COSTI, E. FRONZA, P. LOBBA, E. MACULAN, A. VALLINI, *op. cit.*, 19.

practice under consideration does not generally flow from the behaviour of states—as a purely internationalist understanding of the term would imply—but from that of the OTP (through its internal hierarchical structure and the people endowed with the power to express the position of the Office) and of the Chambers (through the various articulations in which ICC judges can exercise their judicial functions). Nevertheless, the actual manifestations of states' behaviour are not irrelevant, since they may indirectly play a role in determining the outcomes of the OTP-PTC institutional interplay with regard to the exercise of discretion and its judicial oversight[587].

Having cleared the field from any potential confusion or conflation between the traditional concept of state practice in international law on the one hand and, on the other, the concept of prosecutorial/judicial practice for the purposes of the present work, it is necessary to provide a more precise definition of what counts as practice, with a view to establish which behaviours of the relevant actors pertain to its domain, subject to the delimitations of the field of analysis of the present study.

With regard to the *prosecutorial side* of the concept, 'practice' means any identifiable act, decision, motion, request—irrespective of its formal legal denomination—through which the OTP exercises the discretionary powers entrusted to that organ for the purposes of carrying out its mandate at the pre-investigation and pre-trial phase of the proceedings, in accordance with the Statute, RPE and other regulatory texts (strictly legal dimension of prosecutorial practice). The term also encompasses any document or public statement relating to the strategies, policies, and positions of the OTP—both general and situation or case-specific—with regard to the discharge of its discretionary mandate (policy dimension of prosecutorial practice).

With regard to the *judicial side* of the concept, 'practice' refers to any judicial decision or part of decision—irrespective of its formal legal denomination—adopted in particular by the PTC (and in case of appeal by the AC) in the exercise of the different supervisory powers entrusted to the judges at the pre-investigation and pre-

[587] For instance, states that have referred a situation to the Prosecutor pursuant to article 13(a) of the Statute have the power to challenge the OTP's decision not to proceed with an investigation or prosecution pursuant to article 53 of the Statute, thereby triggering the *ex parte* procedure for the judicial review of that decision.

trial phase, according to both the *ex parte* and *ex officio* review procedures provided for under the applicable statutory and regulatory texts. The term encompasses not only those decisions that grant or reject—in whole or in part—the requests of the OTP and of the other parties and participants in relation to the exercise of prosecutorial discretionary powers, but also those that may otherwise indirectly influence the outcomes of the OTP's discretionary decision-making.

As already articulated elsewhere, in particular in formulating the research questions that form the basis of this study, the analysis of 'practice' in the aforementioned sense is limited to the preliminary examination and pre-trial phases of the proceedings at the ICC[588]. The rationale behind this delimitation of the study—and therefore of the pertinent practice under consideration—is at the same time logical-chronological and normative. In order to carry out an up-to-date review of prosecutorial practice and judicial supervision thereof it seems convenient to start from the earliest forms of involvement of the relevant actors (at the preliminary examination and pre-trial phase). The decisions taken at these procedural junctures contribute in a decisive way to shape the subsequent development of proceedings, determining *inter alia* the (factual) scope of investigation and trial. It should also be borne in mind that these fundamental choices take place in a context of 'normative rarefaction'—i.e. in the absence of a clear set of principles and rules to guide the exercise of discretion—and in which the opportunities for judicial review, when available, are subjectively and objectively limited. These considerations make it appropriate to assess in the first place the concrete outcomes of the OTP-PTC institutional interplay at the pre-trial stage, without denying that the dynamics of prosecutorial discretion and its judicial supervision have important manifestations also at other procedural stages[589].

Based on this understanding of the concept of practice—and subject to the delimitation of its application—what can be expected from the case-based analysis

[588] See, *supra*, Introduction.

[589] It is obvious that highly discretionary choices and judicial supervision thereof also take place at the trial stage, in the context of appeal proceedings (including the interlocutory ones), in cooperation proceedings or later on, in proceedings pertaining to the execution of sentences and their monitoring, or in the hypothesis of revision procedures. All these subsequent potential manifestations of prosecutorial discretion and judicial supervision, that take place in a more 'normatively dense' environment, are nevertheless influenced—and somehow predetermined—by decisions adopted at the earlier stages of proceedings, which are the focus of the present work. See, *infra*, Chapter Two, par. 4 of this Part.

and systematisation of said practice? What role does practice play in concrete terms? It is alleged that the empirical manifestations of practice perform a twofold function in the context of the ICC legal framework: on the one hand a *descriptive function*, and on the other hand a *creative function*.

As to the *descriptive function*, it is submitted that through the lens of the definitional parameters provided above, the concept of practice and its concrete determinations enable the observer to keep track of the behaviours of the relevant actors and to fit them within the underlying scheme(s) of interplay defined by the normative texts. By looking at how concretely the relevant actors interpret their institutional role it is possible to provide a clearer description of the system of checks and balances that governs the exercise of prosecutorial discretion at the ICC.

As to the *creative function*, it is submitted that the concept of practice allows the observer to recognise and assess the transformative potential of the concrete behaviours adopted by the relevant actors, i.e. their real capacity to *confirm, complement, and/or contradict* the static legal framework, giving substance to the abstract boundaries of prosecutorial discretion and judicial oversight. The inherent creativity of these choices, made possible—and sometimes necessary—by the peculiar normative environment of the ICC, is a distinctive feature of various other substantive and procedural aspects of international criminal justice[590].

A concluding methodological consideration seems appropriate with regard to the approach towards the analysis of practice and, in particular, to the role of scholars in relation to the empirical manifestations of said practice. It should be made clear that the systematic work of analysis of the relevant practice carried out in this study is in no way premised on a purely descriptive approach and on a passive understanding of the role of scholars vis-à-vis the decisions adopted by the relevant organs of the ICC. To consider ICL scholars and commentators as the mere passive recipients of this practice, only called to record the outcomes of the OTP-Judges interactions, would utterly negate the very purpose of a critical case-based analysis of prosecutorial discretion and judicial review at the ICC. Such purpose is to

[590] For an in-depth analysis of the creative contribution of international criminal tribunals on the development of international criminal law and of some of its foundational categories see the contributions in S. DARCY, J. POWDERLY (eds.), *Judicial Creativity at the International Criminal Tribunals*, Oxford, 2010.

encourage a more *realistic* understanding of the institutional dynamics of prosecutorial discretion, through the critical assessment of their concrete *law in action* outcomes, and consequently of the overall performances of the ICC in terms of distributive criminal and procedural justice.

3. The principle of proportionality between the degree of discretion and the degree of judicial oversight

The static analysis carried out in the previous parts has already shown that in the legal framework of the ICC there is no single model of exercise of prosecutorial discretion and of its judicial review or supervision. To the contrary, both the latitude of prosecutorial discretion and of judicial supervision follow different 'modal' procedural and institutional paths, depending—*inter alia*—on the stage of proceedings; the evidentiary standards required for the adoption of a certain act, request or decision; and the necessity to strike a balance between competing subjective interests at stake the context of the OTP-PTC relations[591]. It could be asked whether these different legal configurations of discretion-and-control mechanisms—and consequently of the OTP-PTC relations—can be traced back to a common normative principle, or if they are merely the result of context-specific legislative choices devoid of a coherent institutional and normative design. It is alleged that such a common normative principle does exist in the statutory and regulatory framework of the ICC, and that it can be synthetically described as the principle of *(relative) direct proportionality between the degree of discretion of prosecutorial choices and the degree of judicial oversight of said choices*. In other words, the greater the 'discretionary potential' of the prosecutorial decision under consideration, the greater the 'supervisory potential' entrusted to the judges with regard to such decisions. The relative discretionary and supervisory potential of specific categories of prosecutorial and judicial decisions can be estimated according to qualitative standards and indicators, such as the concrete consequences of the decision on the continuation (or discontinuance) of proceedings at a given procedural stage; their impact on the rights of the suspect/accused person, victims and/or the

[591] See, *supra*, Part Two, Chapter Three, par. 2.1 to 2.5 for an in-depth analysis of the different schemes of interplay between the OTP and PTC.

involved states; their impact on the determination of the material, personal and territorial scope of investigations, prosecutions and the eventual trial; etc.

The existence of this proportionality principle can be illustrated through various examples. For instance, in the context of prosecutorial negative decisions under article 53 of the Statute, the PTC's power of review—both as regards the modes of its triggering and its consequences—increases proportionally to the degree of discretion exercised by the OTP in reaching the concerned decision. More precisely, when such decisions are based on purportedly "exacting legal requirements"[592] (namely those integrating jurisdiction and admissibility, including gravity) the PTC's supervisory powers are limited to an *ex parte* review, which can only lead to a request for reconsideration[593]. To the contrary, if the negative decision is premised *solely* on the largely discretional parameter of the interests of justice, the PTC's supervisory powers include the possibility of an *ex officio* review, and the OTP's decision only takes effect if confirmed by the competent PTC[594]. Another example is the request and authorisation procedure in case of *proprio motu*, whereby the OTP's discretion to single out a situation for investigation—in the absence of a state or UNSC referral—is counterbalanced by the necessary judicial authorisation of the PTC. Lastly, reference can be made to the procedure for the issuance of a warrant of arrest or summons to appear or the procedure for the confirmation of charges. In both circumstances, given that the OTP is requesting either a restriction of the suspect's right to liberty or freedom of movement, or that the accused be sent to trial for the specific crimes charged—based on a discretional assessment and selection of the information and evidence acquired during investigations—the PTC's role is not limited to a superficial supervision on the formalities of OTP's request, but is framed in terms of request-and-confirmation on the basis of the "sufficient evidence to establish substantial grounds to believe" evidentiary standard[595].

[592] These are the words used by the preliminary judges to describe the nature of the criteria listed under article 53(1)(a)-(b) of the Statute. See ICC, Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation, *Situation on the Registered Vessels of the Comoros*, *Greece and Cambodia*, ICC-01/13-34, PTC I, 16 July 2015, par. 14. That no discretion whatsoever is exercised by the OTP in assessing the admissibility of potential cases, especially *sub specie* gravity, is nevertheless highly questionable.
[593] See article 53(3)(a) of the Statute.
[594] See article 53(3)(b) of the Statute.
[595] See article 61(7) of the Statute.

Notwithstanding the general validity—and the textual and empirical substance—of the above considerations, it must be clarified that this *principle* of proportionality does not generally take the form of a rigid *rule* governing all aspects of the exercise of discretion and control in the context of the OTP-PTC relations[596]. For instance, it can be argued that at the very early stage of proceedings (i.e. at the stage of pre-preliminary screening and preliminary examinations), while the Prosecutor's discretion on the course of action to adopt and the elements to consider is relatively wide, the judges' ability to interfere with or supervise such discretion is relatively limited (if not excluded). It could also be observed that the degree of supervision exercised at the stage of authorisation in case of *proprio motu* has been—in practice—relatively limited. In other words, while the proportionality-based model seems to faithfully describe the choices of legal and institutional design of the Statute, there may be *variations on*—or *deviations from*—such general principle, introducing a degree of asymmetry between the scope of discretion and the scope of judicial supervision[597].

4. 'Open clash' v. 'Smooth relationship': The explicative power of oppositions

The concrete outcomes of the interpretation of principles and rules governing the exercise of prosecutorial discretion and its judicial oversight at the ICC—whose symmetrical institutional projection are the OTP-PTC relations—may give rise, depending on the circumstances, to patterns of *interpretive agreement* or *interpretive disagreement* among the relevant actors[598]. Such agreements or disagreements may concern—*inter alia*—the interpretation of the legal clauses that enable and delimit the exercise of prosecutorial discretionary powers (as well as the latitude and degree of judicial supervision thereof); the legal character and intensity of the evidentiary

[596] On the conceptual and operational distinction between principles and rules see R. DWORKIN, *op. cit.*, 24, 26 and R. ALEXY, *op. cit.*, 57.
[597] One example of such asymmetry is the fact that certain procedural subjects—such as victims—cannot challenge the OTP's negative decisions or that the OTP's decision not to open a preliminary examination cannot be challenged.
[598] The problem of disagreements among lawyers has become a *locus classicus* of contemporary philosophy of law. On the subject in general see J. WALDRON, *Law and Disagreement*, Oxford, 2009 and L. S. PAU, G. B. RATTI (eds.), *Acordes y desacuerdos. Cómo y por qué los juristas discrepan*, Madrid, 2012. On the concept of interpretive disagreements in particular, see V. VILLA, *Deep Interpretive Disagreements and Theory of Legal Interpretation*, in A. CAPONE, F. POGGI (eds.), *Pragmatics and Law. Perspectives in Pragmatics*, Cham, 2016, 89-119.

standards that must be satisfied in order to adopt certain acts or decisions; the consequences of the failure to comply with the required principles or rules, in particular when ascertained upon judicial review of prosecutorial action; the necessity to strike a balance between the needs of prosecutorial efficiency, judicial economy and the protection of the rights of other procedural actors (such as the Accused and victims); etc.

From a methodological point of view, it should not be assumed that areas of agreement among the OTP and judges on specific issues do necessarily reflect a situation of physiologic functioning of the checks and balances mechanism, whereas areas of (sometimes deep) disagreement necessarily reflect a situation of pathologic functioning of such institutional machinery. To the contrary, a well-functioning mechanism of checks and balances must contemplate—and sometimes even require –a certain degree of interpretive conflict and prosecutors-judges dialectic[599]. Nevertheless, when such conflicts become systemic they may reflect shortcomings of the underlying normative standards as well as an increasing discrepancy between the 'legislative formant' and the 'judicial formant' (including prosecutorial action subject to judicial review) as it results from the practice of the relevant actors. An excessive level of this discrepancy may result in the reduced coherence and effectiveness of the legal system under consideration[600]. In this sense, the analysis of practice as defined in the previous paragraphs will make it possible to assess the existence and degree of this potential dissociation of formants at the ICC.

While a precise quantitative estimate of the relative degree of agreement or disagreement on specific issues pertaining to the exercise of prosecutorial discretion seems particularly hard to produce, carrying out a qualitative analysis of the main areas of agreement/disagreement—and of the reasons that may explain them—is certainly feasible, but requires the elaboration of an appropriate explanatory model.

[599] For instance, an excessive judicial deference towards prosecutorial requests—such as in the issuance of warrants of arrest or other restrictive measures or an excessively liberal practice in the confirmation of charges—may be the sign of an unbalanced system of checks and balances, one where judges act as a mere rubber stamp to unfettered discretionary choices, possibly to the detriment of the fairness of proceedings and the rights of the accused.

[600] On the concept of 'dissociation' and the potential consequences of a significant level of discrepancy between the static normative framework and the concrete practice of the relevant actors see, *infra*, next paragraph.

The explanatory model adopted in the present work—both to categorise and evaluate the relevant practice—is built around the contrastive dichotomy 'open clash' v. 'smooth relationship' between the OTP and judges. The expression *open clash* denotes those situations in which the Prosecutor and judges adopt clearly conflicting interpretations of the principles and rules applicable to a certain procedural choice involving the exercise of discretion and/or judicial supervision thereof. These disagreements, as they result from the relevant acts, documents and decisions, may or may not lead to the lack of cooperation between the OTP and judges, or to the incomplete compliance with the judges' decisions, as a result of the OTP's assertion of its discretionary prerogatives. The expression *smooth relationship*, to the contrary, denotes those situations where there is a clear agreement between the OTP and judges, resulting in the substantial conformity of the interpretation of the pertinent principles and rules applicable to specific prosecutorial choices and to their judicial supervision. These patterns of agreement may be—but are not necessarily—the consequence of a judicial approach inspired by a substantial deference towards the Prosecutor's discretionary powers.

It is alleged that the proposed dichotomy allows for an efficient screening of the relevant practice and serves as an effective tool to schematise the results of the enquiry into the OTP-PTC institutional relationships. Nevertheless, it must be observed that the model of analysis proposed here, like any explanation based on binary oppositions, presents inevitable epistemological limits and risks of oversimplification of the phenomena under consideration. In particular, it may prove hard to fit into the proposed binary opposition those situations or instances of practice that do not present a clear-cut character, such as those where elements of interpretive agreement and disagreement are entangled in the same choice or decision of the relevant actors. In any event, a careful distinction—even within the same act or decision—between profiles of agreement and disagreement, together with a phase-based and thematic approach towards the analysis of prosecutorial and judicial practice is deemed sufficient to minimise the risk of exaggerating the importance (or over interpreting) the current trends in the OTP-judges relations.

5. The 'dissociation of formants hypothesis': Attempting to measure the discrepancy between the law in the books and the law in action

In the previous paragraph the proposition has been made that prosecutorial and judicial practices may give rise to interpretive disagreements and even to harsh institutional dialectics among the relevant actors. These instances or patterns of institutional and interpretive subjective *discrepancy*—i.e. conflicting interpretations or positions put forward by the OTP and/or judges—may be the sign of a deeper phenomenon of *dissociation of formants* of the ICC legal system. With the expression "dissociation of formants"—borrowed from the language of comparative law[601]—we hereby indicate a noticeable and to a certain extent measurable divergence or disharmony between the various normative mechanisms (the legal formants) that give rise to the *operational rules* applicable in the legal system under consideration, as they result from an empirical analysis of the practice of the relevant actors[602].

In particular, it is alleged that with regard to the exercise of prosecutorial discretion and judicial review thereof, in the context of the ICC and of the OTP-judges relations, there are areas in which it is possible to identify a variable degree of discrepancy between the statutory and regulatory formant on the one hand, and on the other, the prosecutorial/judicial formant. It will be necessary to put to test this hypothesis through a closer analysis of the dynamic dimension of prosecutorial and judicial practice and its *comparison* with the static framework studied in the previous parts of this work.

From a methodological point of view it must be clarified that the 'dissociation hypothesis' is not premised on the simplistic idea that every discernible discrepancy or disharmony among formants—and/or among the relevant institutional actors—is necessarily the consequence of a failure to abide by the obligations stemming from written statutory or regulatory texts. To the contrary, such discrepancy or dissociation may be the result of legitimate competing normative

[601] See, *supra*, Introduction. The reference is to the works of R. SACCO, *Legal Formants: A Dynamic Approach to Comparative Law (Instalment I of II)*, cit., 24, 26-27, 30-34 and *Legal Formants: A Dynamic Approach to Comparative Law (Instalment II of II)*, cit., 343-344. As already explained in the Introduction, reference to this concept is made exclusively for explicative purposes and not in order to uncritically transpose comparative law analysis to the realm of ICL.
[602] On the concept of 'operational rule' and its relations with general formulas see, *ibidem*, 378-379.

claims and interpretations put forward by the concerned subjects, or the product of their transformative/integrative practices, especially when the indeterminacy of the applicable principles and rules leaves a significant leeway to the creative force of such practices. In other cases this dissociation may present itself in the form of a discrepancy between the externally manifested *justification* (i.e. the reasons) for the adoption of a certain interpretive solution, and the *substantive content* (and consequences) of the concrete operational rule applied[603].

The recognition that any legal system, even the most internally coherent, can show—at an empirical and historical review—a certain degree of dissociation among its formants may seem unacceptable under the principle of non-contradiction, "the fetish of municipal lawyers"[604], but should not come as a surprise to international criminal lawyers, used as they are to deal with the multi-layered, normatively open, culturally fuzzy and plural system that is ICL[605]. Starting from the assumption that a certain degree of dissociation or discrepancy may be considered physiologic, a more practically relevant endeavour would be to evaluate the concrete extent and degree of this dissociation, by developing criteria that may help assessing its root causes and its potential consequences on the overall functioning of the legal system considered. In other words, is it possible to 'measure'—according to qualitative and quantitative standards—this inevitable dissociation, and to determine whether it is within acceptable physiologic limits or, to the contrary, it pushes the coherence of the legal system to its breaking point? The question must be answered in the affirmative, with a few *caveats*.

As far as *quantitative analysis* is concerned, it is alleged that a careful evaluation of the number of cases where a discernible degree of dissociation and/or interpretive disagreement exist can be carried out through an appropriate screening of the relevant practice. Given the inevitable limitations of such a quantitative approach, it is necessary to complement it with an appropriate *qualitative analysis*.

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[603] For instance, as already noted *supra* (see particularly footnote 555), the *Comoros* reviewing Pre-Trial Chamber, while declaring its intention to carry out an error-based review of the OTP's decision not to open an investigation, has in practice conducted an in-depth substantive review of that decision more akin to a *de novo* review, showing a clear example of disharmony between the *stated* standard of review and the *operational rule* concretely applied by the judges.

[604] See, R. SACCO, *Legal Formants: A Dynamic Approach to Comparative Law (Instalment I of II)*, cit., 24.

[605] In this sense see M. COSTI, E. FRONZA, *op. cit.*, 18-23.

To that end, it has been useful to collect and categorise these instances of practice according to a context-specific and phase-based scheme of interpretation, in order to reflect the potentially greater or lesser prevalence of harmony or disharmony among formants in relation to specific acts, decisions, and procedures. Obviously, due consideration has been given to the fact that the practice of the OTP and judges in certain fields is very limited—and sometimes confined to a few or even a single instance—in order to avoid excessive or unwarranted generalisations.

CHAPTER TWO

THE OTP'S DISCRETIONARY PRACTICE AND ITS JUDICIAL REVIEW: A CASE-BASED ANALYSIS

1. Introduction

In this chapter, building on the conceptual framework introduced in the previous one and bearing in mind the static analysis carried out in the first two Parts of the work, we shall conduct a case-based analysis of the relevant discretionary practice of the OTP and—when available—of the corresponding supervisory practice of judges. The aim of this enquiry is first and foremost that of identifying and describing the trends in the OTP-judges relations as regards the use of discretionary powers and control thereof in the conduct of preliminary examinations and pre-trial activities. Provided that an analysis of the totality of such practice would be virtually impossible, the chapter proceeds to the selection of patterns of relevant practice, based on predetermined criteria, in order to minimise the risk of arbitrary or non-representative choices.

In particular, the relevant practice has been selected, analysed and organised according to a phase-based and thematic approach. In other words, we shall proceed logically and chronologically following the 'flow' of the ICC procedural schemes of the pre-investigation and pre-trial phases, starting from the early manifestations of the exercise prosecutorial discretion (i.e. the opening and the conduct of preliminary examinations), to proceed with the decision to open or not to open an investigation (or, in case of *proprio motu*, to seek the judges' authorisation to investigate) and the potential involvement of judicial supervision at those later stages. It is alleged that proceeding in this way allows for a more realistic representation of the different schemes of interplay between the Prosecutor and judges (and the potential interpretive disagreements thereof), and will make it possible to better discern—if any—the degree of dissociation of formants across the different procedural stages, having regard to the typical acts or decisions adopted in each of these phases.

With regard to the selection of the practice under review, the following criteria have guided the process: a) The type of act, decision or choice in relation to

the procedural phase in which it is adopted, and the subject adopting it; b) The *frequency* of interpretive agreement/disagreement at the considered procedural stages; c) The *creative/innovative character* of the practice (act, decision, etc.) considered, compared to a static analysis of the relevant statutory and regulatory provisions; d) The *intensity* of the disagreement between the relevant actors and/or of the discrepancy among formants; e) The *institutional consequences* of the interpretive agreements/disagreements, in particular whether a certain choice or decision generates a subsequent 'adaptive' or 'reactive' practice[606].

This work of screening and categorisation of prosecutorial practice will then form the object of the overall normative and institutional assessment to be carried out in Part Four, with a view to identify the possible explanations for the current trends of prosecutorial discretion and judicial review at the ICC, and more generally in the OTP-PTC relationships.

2. Prosecutorial (and judicial) practice as to preliminary examinations

In this paragraph the most relevant lines of development as regards the conduct of preliminary examination on the part of the OTP—as well as the practice resulting from the very limited judicial intervention at this stage—are analysed. In particular, attention has been focused on the creative role of the OTP in the 'proceduralisation' of preliminary examinations (par. 2.1), and the practice relating to the decision to open (or not to open) a preliminary examination, pursuant to the assessment of the information received by the Office (par. 2.2). The issues of timing in the conduct of preliminary examinations and the OTP's use of time as a procedural tool to foster complementarity have been considered (par. 2.3), as well as the OTP's established reporting practice on the preliminary examination activities (par. 2.4).

Considering the fact that at the preliminary examination stage there is still no judicial procedure proper and the involvement of judges is extremely limited, most of the practice considered concerns the activity of the OTP. Nevertheless, instances

[606] See, *infra*, Part Four for a systematisation of the data collected based on these criteria.

of judicial intervention are discussed when available and significant in relation to the concrete functioning of the OTP-judges institutional relations.

2.1 The 'proceduralisation' of preliminary examinations

The concrete articulation of the conduct of preliminary examinations—in the absence of a detailed statutory framework to that effect—has been largely a creation of the OTP's institutional, administrative and self-regulatory practices, through a process of gradual refinement. In particular, while the Statute and the RPE envisage preliminary examinations as a prerequisite for subsequent determinations on the opening of an investigation[607], nothing is said as to their conduct and logistical deployment, which is therefore left for determination to the OTP in the exercise of its administrative and organisational independence and discretion[608].

As seen in the analysis of the so-called policy papers, the OTP has put forward a document detailing its approach toward the conduct of preliminary examinations, which largely builds on the already established practice elaborated by the Office in the early years of the work of the Court[609]. This document and the consequent practice of the Office have contributed to a decisive 'proceduralisation' of the conduct of preliminary examinations, providing a more structured approach towards the exercise of discretion at this stage. The most distinctive features of this proceduralisation must be more closely analysed with a view to assessing the creative function performed by the OTP's practice in this area.

The first feature to consider is the quadripartite structure of the conduct of preliminary examinations established by the practice of the OTP[610]. The Office articulates its activities at the preliminary examinations stage in four consecutive phases or procedural steps, namely:

- Phase 1, which "consists of an initial assessment of all information on alleged crimes received under article 15", whose "purpose is to analyse and verify the seriousness of information received, filter out information on crimes that are

[607] See article 15(6) of the Statute (referring to paragraphs 1 and 2 of the same article), as well as article 53(1) of the Statute. See also Rule 104 of the RPE.
[608] See article 42(1) and (2) of the Statute.
[609] See, *supra*, Part Two, Chapter Two, par. 3.
[610] See ICC-OTP, Policy Paper on Preliminary Examinations, November 2013, par. 77-84.

outside the jurisdiction of the Court and identify those that appear to fall within the jurisdiction of the Court"[611]. This first phase aims at screening the sheer number of communications, coming from multiple sources, that the OTP receives every year, in order to gradually select those deserving further analysis, in which case the communication shall form the object of a "dedicated analytical report", for the purposes of deciding whether or not to proceed to the subsequent phases of the preliminary examination[612].

- Phase 2, "represents the formal commencement of a preliminary examination of a given situation, [and] focuses on whether the preconditions to the exercise of jurisdiction . . . are satisfied and whether there is a reasonable basis to believe that the alleged crimes fall within the subject-matter jurisdiction of the Court"[613]. The OTP further clarifies that "Phase 2 analysis entails a thorough factual and legal assessment of the crimes allegedly committed in the situation at hand with a view to identifying the potential cases falling within the jurisdiction of the Court … The Office may further gather information on relevant national proceedings if such information is available at this stage"[614]. In addition, "Phase 2 leads to the submission of an 'Article 5 report' to the Prosecutor, in reference to the material jurisdiction of the Court as defined in article 5 of the Statute"[615].

- Phase 3, which "focusses on the admissibility of potential cases in terms of complementarity and gravity pursuant to article 17. In this phase, the Office will also continue to collect information on subject-matter jurisdiction, in particular when new or ongoing crimes are alleged to have been committed within the situation. Phase 3 leads to the submission of an 'Article 17 report' to the Prosecutor, in reference to the admissibility issues as defined in article 17 of the Statute"[616].

- Phase 4, which "examines the interests of justice. It results in the production of an 'Article 53(1) report,' which provides the basis for the Prosecutor to determine whether to initiate an investigation in accordance with article 53(1)"[617]. With regard to this report, the OTP states that "On the basis of the available information, and

[611] *Ibidem*, par. 78. This is reflected in Regulation 27 of the Regulations of the OTP.
[612] *Ibidem*, par. 79.
[613] *Ibidem*, par. 80.
[614] *Ibidem*, par. 81.
[615] *Ibidem*.
[616] *Ibidem*, par. 82.
[617] *Ibidem*, par. 83.

without prejudice to other possible crimes which may be identified in the course of an investigation, the 'Article 53(1) report' will indicate an initial legal characterisation of the alleged crimes within the jurisdiction of the Court. It will also contain a statement of facts indicating, at a minimum, the places of the alleged commission of the crimes; the time or time period of the alleged commission of the crimes, and the persons involved (if identified), or a description of the persons or groups of persons involved. This identification of facts is preliminary in nature, bearing in mind the specific purpose of the procedure at this stage. It is not binding for the purpose of future investigations, and may change at a later stage, depending on the development of the evidentiary trail and future case hypotheses"[618].

In the intentions of the OTP, this quadripartite structure is designed to mimic the logical and chronological sequence of procedural steps envisaged by the Rome Statute for the purposes of determining jurisdiction on and admissibility of situations and cases at the ICC[619]. Nevertheless, within each phase—and in particular with regard to the crucial Phase 3—the OTP's considerations might not always follow the order of priority stated in the Policy Paper (and the Statute)[620]. A clear example of the flexibility of the OTP's approach, is the 'Article 53 Report' on the *Comoros* situation, where the Prosecutor considered the matter first under the heading of gravity, only to declare that any assessment of the complementarity prong of the admissibility test was unnecessary, given the negative conclusion reached on gravity[621].

The second feature of this mechanism for the conduct of preliminary examinations, which flows from its structure, is the *incremental* (or sequential) character of the examination. The mechanism is designed as a sort of 'procedural lock', where it is only possible to proceed to the subsequent phase when the legal and factual conclusions—based on the analysis of the information available to the Office—satisfy the statutory requisites of the preceding one, whose closure is

[618] *Ibidem*, par. 84.
[619] *Ibidem*, par. 34-71, 77.
[620] The OTP, following the Statute's enumeration in article 53, seems to establish that, for instance, the complementarity assessment should precede the gravity assessment, see *ibidem*, par. 46-58 and 59-66. As mentioned, the OTP's practice did not follow this order in the preliminary examination of the *Comoros* situation.
[621] See ICC-OTP, Article 53(1) Report, *Situation on the Registered Vessels of the Comoros*, *Greece and Cambodia*, ICC-01/13-6-AnxA, 6 November 2014, par. 133-134, 148.

generally marked by the issuance of a public report containing the OTP's intermediate conclusions relative to that phase[622]. Nevertheless, the OTP declares in the policy paper that the consideration of the available information—which is in principle directed to the assessment of requisites that are specific to each of the four phases—should not be based on a rigidly compartmentalised approach, but should instead follow a "holistic approach throughout the preliminary examination process"[623]. This means that notwithstanding the overall phase-based approach the analysis of the relevant legal criteria is carried out jointly and in an integrated manner, also considering that much of the work at this stage is carried out by the same internal structure, namely the OTP's Jurisdiction Complementarity and Cooperation Division (JCCD).

The third feature consists in that the conclusions reached by the OTP as regards each of the four phases—even when negative and preclusive of the transition to the following phase—are *not final* in character, i.e. they are open to a subsequent review based on new information or facts that may contribute to change the initial OTP's determination. In other words, the negative decisions of the Office (in particular in the transition from Phase 3 to Phase 4 and from Phase 4 to the opening of an investigation), in no way preclude the possibility for the OTP's to reconsider its decision and to reopen or 'revitalise' a closed preliminary examination, based on a significant change of the factual or legal circumstances present at the time of the original decision[624]. For instance, if the OTP decides not to open an investigation based on complementarity (because there is the appearance of genuine national proceedings), it could always decide to reopen the preliminary examination and reach a different conclusion on admissibility for the purposes of opening an investigation, when national proceedings eventually fail to satisfy the willingness/ability to genuinely prosecute test[625]. The same holds true for a decision based on the assessment of (insufficient) gravity. Therefore, an effect of estoppel in

[622] See ICC-OTP, Policy Paper on Preliminary Examinations, November 2013, par. 77-84.
[623] *Ibidem*, par. 77.
[624] *Ibidem*, par. 91 according to which a negative conclusion "does not preclude the Office from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence".
[625] See article 17(1), (2)(a)-(c) and (3) of the Statute. For an extensive analysis of the different components of the admissibility test, with ample reference to the most relevant case law of the Court see the commentary by W. A. SCHABAS, M. EL-ZEIDY, *Article 17, Issues of Admissibility*, in O. TRIFFTERER, K. AMBOS (eds.), *op. cit.*, 781-831.

connection to such (negative) determinations cannot be derived from the Statute or the regulatory texts, which to the contrary—and consistent with the non-judicial character of the procedure under consideration—provide for the reviewability of these decisions based on new circumstances or facts[626].

A fourth distinctive feature of the proceduralised preliminary examination is the fact that during its conduct the OTP—while lacking actual investigative powers[627]—collects information and knowledge from diverse sources, not limited to the original providers or senders, and may engage in contacts and dialogue with states, including the one(s) that might have jurisdiction on the facts under preliminary examination[628]. In this sense, the attitude of the OTP vis-à-vis states during this phase, whose duration may be significant, puts to test the possibility to virtuously promote complementarity. This can be done by appropriately modulating the preliminary examination activities and by monitoring (and if necessary encouraging) the unfolding of genuine national proceedings[629]. A clear example of this attitude is the OTP's handling of the preliminary examination activities in Colombia, a situation that has been under examination since 2004, without yet giving rise to an investigation[630]. Despite the absence of truly investigative powers at the preliminary stage, the OTP has put forward a broad interpretation of Rule 104(2) of the RPE to the effect of including the possibility "to undertake field missions to the territory

[626] See article 15(6) and 53(4) of the Statute.
[627] See ICC-OTP, Policy Paper on Preliminary Examinations, November 2013, par. 85. This does not mean that the OTP lacks *any* power to ascertain the facts or gather additional information on the matter under preliminary examination. See, *infra*, next footnote.
[628] See Rule 104(2) of the RPE, establishing that the OTP "may seek additional information from States, organs of the United Nations, intergovernmental and non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court".
[629] The reporting activity of the OTP, which shall be more closely analysed in a dedicated paragraph, is replete of references to the activities performed by the OTP in order to engage in a constructive dialogue with national authorities and foster genuine national investigations and prosecutions in line with the principle of complementarity.
[630] The OTP's annual reports on preliminary examination activities provide details on the continued dialogue and cooperation between the OTP and the Colombian authorities, against the background of the tortuous path towards pacification and stabilisation of the country. See, e.g., ICC-OTP, Report on Preliminary Examination activities 2017, 4 December 2017, par. 121-155. In 2012 the OTP produced an intermediate report on the Colombian situation, see ICC-OTP, Interim Report on the Situation in Colombia, November 2012. In this sense, M. AKSENOVA, *The ICC Involvement in Colombia: Walking the Fine Line Between Peace and Justice*, in M. BERGSMO, C. STAHN (eds.), *Quality Control in Preliminary Examinations: Vol. 1*, Brussels, 2018, 263-270 aptly speaks of a "dialogical model of the ICC involvement in Colombia". See also, *ibidem*, 270-273 for a helpful timeline concerning the OTP's engagement with regard to the Colombian situation.

concerned in order to consult with the competent national authorities, the affected communities and other relevant stakeholders, such as civil society organisations"[631]. The Office, especially in recent years, conducted a number of these 'preliminary missions' to various states whose situation was undergoing preliminary examination, or to other states that might otherwise have a connection with facts forming the object of such examination[632]. This OTP's proactive attitude is much less evident in case of UNSC referrals, where practice has shown a very limited possibility to engage in constructive cooperation between the Court and the concerned state, resulting in extremely short preliminary examinations[633]. Nevertheless, the fluidity of the political—and not infrequently military—situations on the field may result in a changing approach both in the conduct of preliminary examinations and, subsequently, of investigations, which may be justified by the need to promote complementarity[634].

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[631] ICC-OTP, Policy Paper on Preliminary Examinations, November 2013, par. 85.

[632] A reference to the various on-site mission carried out by the OTP at the preliminary examination stage is made both in the annual reports on preliminary examinations of the OTP and the annual Report of the International Criminal Court to the UN General Assembly, based on article 6 of Relationship Agreement between the UN and the ICC. To date the OTP has visited the following states, in some instances multiple times, during preliminary examinations: Georgia (see the ICC Reports to the UNGA A/65/313, par. 75-76; A/68/314, par. 91; A/69/321, par. 8; A/70/350, par. 12; A/71/342, par. 12); Russian Federation in relation to the situation in Georgia (see the ICC Reports to the UNGA A/65/313, par. 75-76; A/66/309, par. 75; A/69/321, par. 8); Guinea (see ICC Reports to the UNGA A/65/313, par. 80; A/66/309, par. 78; A/67/308, par. 79; A/68/314, par. 92; A/69/321, par. 8; A/70/350, par. 14; A/71/342, par. 16; A/72/349*, par. 13); Colombia (see ICC Reports to the UNGA A/68/314, par. 90; A/69/321, par. 7; A/70/350, par. 9); Honduras (see ICC Reports to the UNGA A/69/321, par. 10; A/71/342, par. 18); Central African Republic with the regard to the situation in CAR II (see ICC Report to the UNGA A/69/321, par. 14); State of Palestine and Israel in relation to the situation in Palestine (see ICC Report to the UNGA A/72/349*, par. 19); United Kingdom in relation to the situation in Iraq (see ICC Reports to the UNGA A/69/321, par. 15; A/72/349*, par. 15); Ukraine (see ICC Reports to the UNGA A/70/350, par. 26; A/72/349*, par. 20); Nigeria (see ICC Reports to the UNGA A/71/342, par. 22; A/72/349*, par. 17); Gabon (see ICC Report to the UNGA A/72/349*, par. 11).

[633] In the two cases of UNSC referrals, namely Sudan-Darfur and Libya, the OTP announced the opening of an investigation shortly after the referral, carrying out its preliminary examination activities in a very limited period of time. In particular, the investigation in the situation of Sudan-Darfur was announced on 6 June 2005, a couple of months after the UNSC's referral to the Court by means of UNSC Resolution 1593(2005), S/Res/1593, 31 March 2005, while the investigation in the Libyan situation was announced on 3 March 2011, just a few days after the Council's referral by means of UNSC's Resolution 1970(2011), S/Res/1970, 26 February 2011.

[634] In this sense the situation of Sudan-Darfur and Libya differ significantly. While in the former state cooperation has been close to zero from the early involvement of the Court, in the latter the appearance of stabilisation occurred after the violent deposition of Qaddafi in 2012 seemed to open the space for a functional division of labour between the ICC and the new Libyan authorities. This resulted, for instance, in the decisions of inadmissibility in *Al-Senussi*, premised on the Court's positive prognosis—shared by the OTP—on the ability and willingness of national judicial institutions to genuinely carry out the trial at the domestic level. Unfortunately, the subsequent instability in the

With regard to the involvement of judges, it should be noted that the OTP's self-imposed proceduralisation of preliminary examinations—in line with the statutory and regulatory framework—does not envisage any significant supervisory role of the PTC, with the exclusion of the PTC's potential intervention were the OTP to request the possibility of taking testimony at the seat of the Court, based on Rules 47(2) and 104(2) of the RPE. The PTC's supervisory role only becomes apparent at the end of preliminary examination activities, in case of *proprio motu* with regard to the power to authorise the OTP to open an investigation and in all other cases with regard to the power to review the OTP's negative decision pursuant to article 53 of the Statute.

To conclude on the topic of the proceduralisation of preliminary examinations, it could be observed that the OTP's activities in this field show a clear attitude to innovate, through both integrative and creative practices, the concrete procedural landscape of this preliminary phase. The development of the four-phased approach was the result of the pragmatic considerations of the Office and resulted in the introduction of an informal model of conduct of preliminary examinations. This model is certainly inspired by the normative indications found in the statutory and regulatory sources, but is characterised by a significant degree of flexibility both as to its general structure (which may be subject to revision in the future) and concrete application across the different situations. Therefore, this practice does not seem to give rise, strictly speaking, to normative effects. It nevertheless serves the purpose of rationalising the conduct of prosecutorial activities in the interest of 'prosecutorial economy' and in furtherance of the OTP's administrative discretion.

2.2 Opening (or not opening) a preliminary examination

In the previous paragraph we have seen how the proceduralisation of preliminary examinations—and particularly the four-phased approach adopted by the OTP—influences the decision-making process, helping the Office with the upward selection necessary under the complementarity regime. It is precisely in the transition

country made this early progress very insecure, to the point that the OTP considered the possibility to apply to the judges to 'reclaim' the case at the ICC, due to the fundamental change of circumstances at the national level. For a reference to the Court's decisions in this case see, *supra*, footnotes 326 and 329.

between Phase 1 and Phase 2 as construed by the OTP in its policy paper and practice, that preliminary prosecutorial selection powers are concretely exercised, predetermining and influencing the very possibility of subsequent procedural developments at the ICC. Having regard to the policies and the actual practice of the Office—as attested by the OTP's annual reports on preliminary activities—it immediately becomes evident that the rigorous initial screening of the communications and information received by the Office is an essential component of the early manifestations of the OTP's responsibilities in selecting the situations that deserve further analysis. The number of 'Article 15 communications'—i.e. the means through which individuals, groups or organizations may bring a *notitia criminis* to the attention of the OTP—has gradually increased in the early years of activity of the Court—with an 'explosion' connected to the situation in South Ossetia (Georgia)[635]—and is now relatively stable at around five hundred communications per year[636].

The screening process conducted in Phase 1 of the preliminary examination aims at immediately filtering out the communications that are either manifestly outside of the Court's jurisdiction, relate to a situation already under preliminary examination or to a situation already forming the object of an investigation or prosecution[637]. Only communications that do not fall in one of these categories are considered for further analysis. A quantitative analysis of the OTP's practice in relation to these screening procedures, based on the data provided by the Office in its

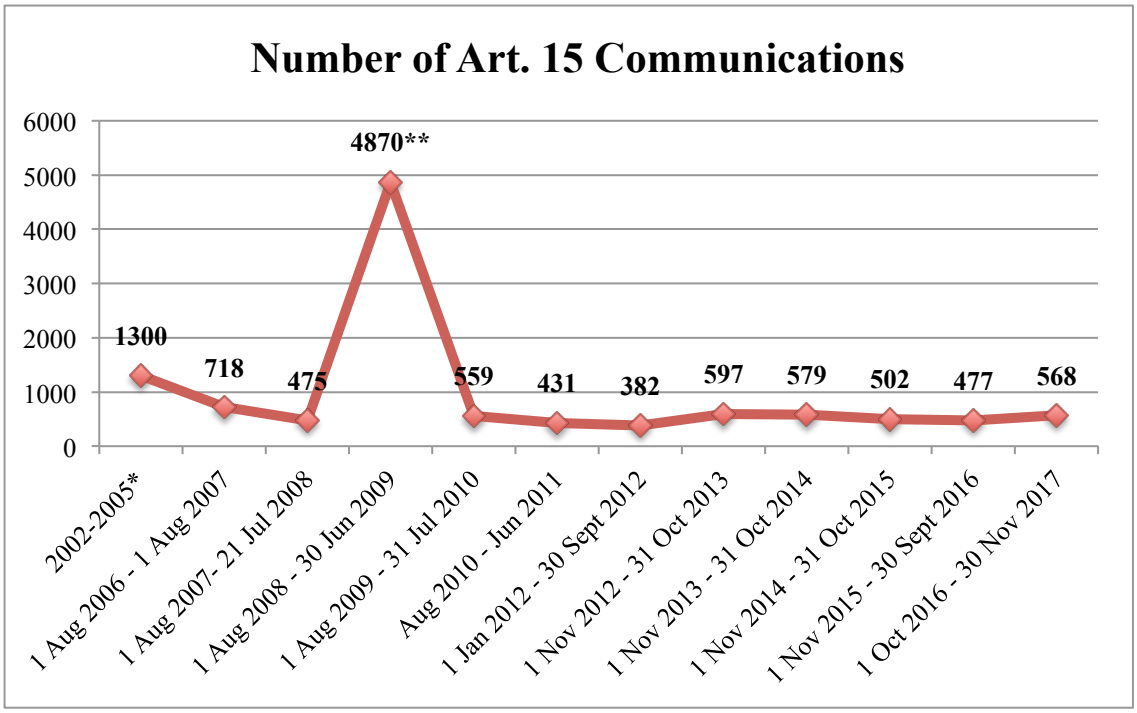
[635] The OTP started to regularly report on the preliminary examination activities only in 2011, after having issued a report on the activities performed in the first three years (2003-2006), data from the previous years can nevertheless be found in the Court's reports to the UNGA. In the first report issued in 2006 the OTP quantified in 1,918 the communications received between the establishment of the Court and the date of issuance of said report (see ICC-OTP, Report on the Activities performed during the first three years (June 2003 - June 2006), 12 September 2006, par. 6). For the huge spike in the number of communications in the period 2008-2009 (4,870 in just one year) see Report of the ICC to UNGA, A/64/356, par. 44. Most of these communications (3,823 out of the total) related to the situation in Georgia and the vast majority of them (3,817) had been transmitted by the Prosecutor General of Moscow (*ibidem*, par. 48). Thereafter, the number returned to the average of 500 communications per year.

[636] The OTP in its annual reports on preliminary examinations updates the data concerning the number of such communications. The ICC-OTP, Report on Preliminary Examination activities 2017, 4 December 2017, par. 18, certifies that since 2002 the Office has received 12,590 communications.

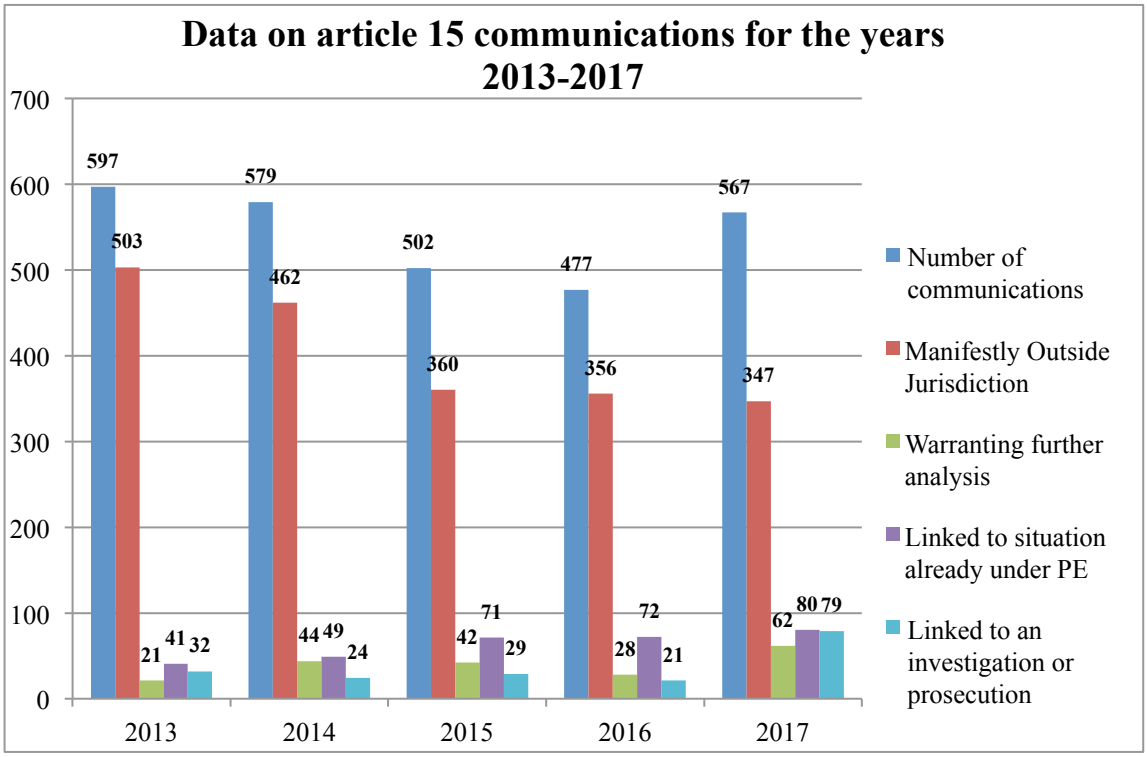
[637] ICC-OTP, Policy Paper on Preliminary Examinations, November 2013, par. 78. On the filtering function of Phase 1 in the overall economy of preliminary examinations and the various steps of "internal review" of the relevant information see A. KHOJASTEH, *The Pre-Preliminary Examination Stage: Theory and Practice of the OTP's Phase 1 Activities*, in M. BERGSMO, C. STAHN (eds.), *Quality Control in Preliminary Examinations: Vol. 1*, cit., 227-229.

annual reports, reveals that almost 90% of the communications are dismissed as manifestly falling outside the jurisdiction of the Court; 13.8% are linked to a situation already under preliminary examination and 8% are linked to a situation already forming the object of an investigation or prosecution. Only 8.7% of the total number of communications warrants further analysis. This data, and particularly the percentage of communications that are dismissed *prima facie* as manifestly outside the Court's jurisdiction, clearly show that there is an asymmetry between the national and international public perception of the ICC's role and the actual perimeter of its jurisdiction.

The following charts show the trends in the number of communications per year received by the Office and those relating to the screening procedure, showing the clear disproportion between the total number of communications and those that meet the requirements of the filtering test of Phase 1 of the preliminary examination.



Note: * Data for the period 2002-2005 are cumulative due to the lack of annual reporting practice in the early years of activity of the Court. Data up to 2011 are mainly based on the ICC annual Reports to the UNGA. Data after 2011 are based on the OTP annual report on preliminary examination activities (the reporting period varies slightly from year to year).
** Of the 4,870 communications in the reported period, 3,823 (78.5%) relate to the situation in South Ossetia (Georgia).



Note: elaboration based on the OTP reports on preliminary examinations for 2013, 2014, 2015, 2016, 2017.

Once the communications, or in case of state or UNSC referral the documents or information accompanying the act of referral[638], pass the early screening described above, thereby entering Phase 2 of the preliminary examination, the Office makes public the decision to open a preliminary examination, in line with the OTP's efforts to promote transparency[639]. From that moment on, the OTP will continue its assessment based on the other phases envisaged by the Policy Paper, and will regularly report on the activities performed with regard to the situation[640]. Up do date the OTP has opened a preliminary examination on 28 situations. On 11 occasions the preliminary examination activities resulted in the opening of an investigation, namely in the Democratic Republic of the Congo, Uganda, Darfur-Sudan, Central African Republic (I and II), Kenya, Libya, Côte d'Ivoire, Mali, Georgia, Burundi[641]. On 7 occasions the OTP concluded the preliminary examination with a decision not to open an investigation, namely in the situation of Venezuela, Iraq/UK, Palestine, Honduras, Republic of Korea, the Registered Vessels of the Comoros, Greece and the Kingdom of Cambodia, and lastly Gabon[642]. Other 10 situations are currently under preliminary examination (although at different stages) and may in the future result in the opening of investigations, namely Venezuela[643], Afghanistan[644],

[638] *Ibidem*, par. 80.
[639] *Ibidem*, par. 95. With regard to the risks connected to a premature publicity of preliminary examination activities during Phase 1 and the necessity to strike a balance between transparency and confidentiality, see KHOJASTEH A., *op. cit.*, 241-242.
[640] *Ibidem*, par. 95-97.
[641] In the situation of Burundi, the OTP had filed—for the first time under seal—a request for authorisation to open an investigation, shortly before the withdrawal from the Statute of Burundi became effective pursuant to article 127(1) of the Statute. The competent PTC went on to authorise the investigation just a few days before the expiry of the one-year term marking the state's departure from the ICC's founding document (see, ICC, Public Redacted version of the "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi", ICC-01/17-X-9-US-Exp, 25 October 2017, *Situation in the Republic of Burundi*, ICC-01/17-9-Red, PTC III, 9 November 2017).
[642] A preliminary examination on the situation in Venezuela was opened following a certain number of Article 15 communications relating to alleged episodes of violence against the political opponents of the Venezuelan Government, occurred since July 2002 (date of entry into force of the Statute). On 9 February 2006 the OTP made public its decision to close this preliminary examination with a decision not to open an investigation. See, ICC-OTP, Response to communications received concerning Venezuela, 9 February 2006. The preliminary examination of the situation in the Gabonese Republic was closed with a decision not to investigate on 21 September 2018, see ICC-OTP, Article 5 Report, *Situation in the Gabonese Republic*, 21 September 2018.
[643] A second preliminary examination—unrelated to the one previously closed—was opened with regard to Venezuela on 8 February 2018, in relation to the crimes allegedly committed since at least April 2017 in the context of demonstrations and political unrest in the country.

Colombia, Guinea, Iraq/UK[645], Nigeria, Palestine[646], Philippines[647], Ukraine[648] and the one relating to the alleged deportation of Rohingya people from Myanmar to Bangladesh.

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[644] In this situation, stemming from a *proprio motu* of the OTP, the Office has completed the preliminary examination and has forwarded a request of authorisation to open an investigation to the competent PTC, which is currently under consideration.

[645] The preliminary examination relating to the conduct of British military personnel in Iraq during the occupation of that country between 2003 and 2008 had originally been terminated on 9 February 2006 (see ICC-OTP, Response to communications received concerning Iraq, 9 February 2006) but has subsequently been reopened based on new information on 13 May 2014. It should be noted that in recent years various fact-finding activities have been carried out in the United Kingdom with regard to conducts that may form the object of an investigation at the ICC and that might be relevant for the purposes of complementarity, as recalled by A. T. CAYLEY, *Constraints and Quality Control in Preliminary Examination: Critical Lessons Learned from the ICTY, the ICC, the ECCC and the United Kingdom*, in M. BERGSMO, C. STAHN (eds.), *Quality Control in Preliminary Examinations: Vol. 1*, cit. 50-61.

[646] It should be noted that the State of Palestine, notwithstanding the *proprio motu* preliminary examination on the situation that has been on-going since 16 January 2015, has formally referred the situation in Palestine since 13 June 2014 onwards to the OTP on 15 May 2018. See Referral by the State of Palestine Pursuant to Articles 13(a) and 14 of the Rome Statute, Ref: PAL-180515-Ref, 15 May 2018. This decision has probably been prompted, on the one hand, by the perception on the Palestinian side that the OTP's preliminary examination is proceeding at a slow pace, and on the other, by the upsurge of violence occurred in connection to the Gaza border protests since the end of March 2018, which resulted in the death and wounding of hundreds as a consequence of the use of force by the Israeli Defence Forces. The OTP took notice of the referral in a dedicated statement (see ICC-OTP, Statement by ICC Prosecutor, Mrs Fatou Bensouda, on the referral submitted by Palestine, 22 May 2018, available at: https://www.icc-cpi.int/Pages/item.aspx?name=180522-otp-stat, last accessed 6 November 2018). The OTP had earlier issued another statement where it reminded that the situation at the Gaza border did fall under the temporal and material scope of the preliminary examination of the overall Palestinian situation, and that conducts contrary to the Statute in connection with the border protests are eligible for investigation and prosecution at the ICC (see, ICC-OTP, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, regarding the worsening situation in Gaza, 8 April 2018, available at: https://www.icc-cpi.int/Pages/item.aspx?name=180408-otp-stat, last accessed 6 November 2018).

[647] The Philippines, similarly to Burundi, have exercised their right to withdraw from the Statute on 17 March 2018 (see the Depositary Notification C.N.138.2018.TREATIES-XVIII.10), which shall take effect, if not revoked, after a period of one year. Nevertheless, the OTP had already opened a preliminary examination on the situation in the country on 8 February 2018 and, based on the PTC's decision regarding the situation in Burundi, the Prosecutor made clear that the act of withdrawal does not impair the Office's ability to carry on the preliminary examination activities nor deprive the Court of its jurisdiction over crimes that have been committed during the time in which the withdrawing state was party to the Statute, even if such jurisdiction is exercised after the withdrawal takes effect (see ICC-OTP, Statement on the Philippines' withdrawal: State participation in Rome Statute system essential to international rule of law, 20 March 2018, available at: https://www.icc-cpi.int/Pages/item.aspx?name=pr1371, last accessed 6 November 2018). It remains to be seen whether the OTP, following the Burundian precedent, will ask for authorisation to investigate before the withdrawal takes effect, given the fact that the preliminary examination is at a very early stage.

[648] In this situation the OTP had originally opened its preliminary examination on 24 April 2014, based on Ukraine's first declaration of acceptance of the Court's jurisdiction pursuant to article 12(3) of the Statute made on 17 April 2014. This declaration limited the temporal framework of the acceptance to crimes allegedly committed between 21 November 2013 and 22 February 2014. Ukraine subsequently lodged a second declaration of acceptance on 8 September 2015, this time indicating as *dies a quo* the date of 20 February 2014 with no end date. The OTP, accordingly, announced that the temporal scope of preliminary examination on the situation was extended so to

With regard to the OTP's decision to open (or not to open) a preliminary examination—*rectius* to consider a situation for further analysis and the formal starting of Phase 2 of the preliminary examination or to dismiss *in limine* the communications—it must be noted that there is no legal avenue to challenge such decision either for those who have sent the communication or provided the information, or for the state(s) whose territory or nationals are subject to the preliminary examination activities. The same holds true for the decisions that mark the transition to the subsequent phases of the preliminary examination. This is the plain consequence of the non-jurisdictional and non-investigative character of the procedure, but on the one side it makes it more difficult to correct any mistakes in the screening procedure and, on the other, it introduces a clear—but probably justified—asymmetry between the legal position of individuals or groups who made a communication and the states interested by preliminary examination activities. The former, in case of early dismissal of their communication (or, later on, in case of decision not to open an investigation at the conclusion of preliminary examination), have no formal possibility to persuade the Office of the necessity or opportunity of further analysis of their communication and can only rely on the non-preclusive character of the OTP's determination, which leaves the possibility open for the Office to change its mind based on new facts or information[649]. States, to the contrary, in case of opening of a preliminary examination have the opportunity to engage in a dialogue with the OTP during its conduct, with a view to convincing the Office that they are willing and able to investigate and prosecute the alleged crimes domestically, or that the situation is otherwise inadmissible based, for instance, on the insufficient gravity of the potential cases that might arise from an investigation. In other words, even if they enjoy no power to challenge *per se* the OTP's determination to open a preliminary examination, whose function is also to assess the existence and adequacy of national proceedings, they are still in the position to influence its conduct and outcomes.

include any crime allegedly committed in the territory of Ukraine from 20 February 2014 onwards (see ICC-OTP, Press release, ICC Prosecutor extends preliminary examination of the situation in Ukraine following second article 12(3) declaration, ICC-OTP-20150929-PR1156, 29 September 2015).

[649] See, *supra*, footnote 626.

From the point of view of the supervision of prosecutorial decisions, the abovementioned framework results in the general exclusion of an explicit involvement of the Court for the solution of controversies at the preliminary examination stage. Nevertheless, in the practice of the Court there has been at least one occasion in which the senders of a communication have tried—without success—to challenge the OTP's decision not to open a preliminary examination on the basis of their 'private' communication. The rather peculiar situation, which took place in 2014, relates to the attempt of former Egyptian President Morsi and his political supporters to submit a declaration of acceptance of the Court's jurisdiction under article 12(3) of the Statute[650]. In that regard, the Prosecutor issued a decision on the request on 23 April 2014[651] and a subsequent press release on 8 May 2014[652] alleging, *inter alia*, that the senders of the declaration did not possess "full powers" and as a consequence they could not act on behalf of the Egyptian state. For this reason the Office decided that the submission (together with the accompanying documents) had to be treated as a 'private' communication pursuant to article 15 of the Statute, and went on to conclude that no further action could be taken because the allegations fell outside the territorial and personal jurisdiction of the Court[653]. The lawyers for the senders then sought to challenge such decision first resorting to Regulation 46(2) and later to Regulation 46(3) of the Regulations of the Court[654]. The matter was assigned to PTC II and the judges dismissed *in limine* the application confirming that only a referring entity—state or UNSC—can challenge the

[650] On this case see the critical analysis of H. ELDEEB, *An Attempt to Prosecute: The Muslim Brotherhood's Communication to the International Criminal Court Relating to the Alleged Crimes in Egypt*, in *International Criminal Law Review*, vol. 15, issue 4, 2015, 733-762. The Author underlines, in particular, the politically motivated character of the initiative of Morsi and his supporters and that it was the right path for the Court to avoid embarking itself in these domestic political skirmishes.
[651] See ICC-OTP, Prosecutor's Decision on the 'Declaration under Article 12(3) and Complaint regarding International Crimes Committed in Egypt', OTP-CR-460/13, 23 April 2014.
[652] ICC-OTP, Press release, The determination of the Office of the Prosecutor on the communication received in relation to Egypt, ICC-OTP-20140508-PR1003, 8 May 2014.
[653] *Ibidem*.
[654] These provisions relate, respectively, to the administrative functions of the President of the Court with regard to the formation of, and the assignment of situations to, the Pre-Trial Chambers (sub-rule 2), and to those of the President of the Pre-Trial Division, with regard to situations not yet assigned to a Pre-Trial Chamber (sub-rule 3). For the submissions on behalf of President Morsi see the document addressed to the President of the Pre-Trial Division, Re-filing before the President of the Pre-Trial Division of the 'Request for review of the Prosecutor's decision of 23 April 2014 not to open a Preliminary Examination concerning alleged crimes committed in the Arab Republic of Egypt, and the Registrar's Decision of 25 April 2014', *Request under Regulation 46(3) of the Regulations of the Court*, ICC-RoC46(3)-01/14-2, 1 September 2014, par. 1, 16, 18, 20.

Prosecutor's decision not to proceed with an investigation under article 53(1)(a) and (b). Similarly, in the case of *proprio motu*, the failure to open a preliminary examination and/or to seek an authorization under article 15 of the Statute cannot be challenged by those who had provided the information to the OTP, given the fact that Rule 48 of the RPE directs the OTP to consider for that purpose the same elements set out in article 53(1)(a)-(c) of the Statute[655]. The same PTC II did not grant a request for reconsideration or leave to appeal against its previous decision[656], thereby leaving no doubts on the exclusion of any judicial remedy for 'private' communication senders in order to have the decision not to open a preliminary examination reviewed by the judges, after the OTP's dismissal as a result of the initial screening that takes place in Phase 1.

To conclude the analysis on the OTP's discretion on the opening (or not opening) of preliminary examinations, reference must be made to a recent instance of practice in which the Prosecutor, faced with an exceptional situation of legal uncertainty on the prospective exercise of the Court's jurisdiction, has approached the President of the Pre-Trial Division pursuant to Regulation 46(3) of the Regulations of the Court, in order to ask the formation of a PTC and seek from it a 'preliminary ruling' on jurisdiction pursuant to article 19(3) of the Statute, *prior* to the formal opening of a preliminary examination[657]. The situation originates from the substantiated allegations concerning the deportation of Rohingya people from Myanmar (a state which is not a party to the Rome Statute) to Bangladesh (a state

[655] See, ICC, Decision on the 'Request for review of the Prosecutor's decision of 23 April 2014 not to open a Preliminary Examination concerning alleged crimes committed in the Arab Republic of Egypt, and the Registrar's Decision of 25 April 2014', *Request under Regulation 46(3) of the Regulation of the Court*, ICC-RoC46(3)-01/14, PTC II, 12 September 2014, par. 6-7, 9.

[656] See ICC, Decision on a Request for Reconsideration or Leave to Appeal the "Decision on the 'Request for review of the Prosecutor's decision of 23 April 2014 not to open a Preliminary Examination concerning alleged crimes committed in the Arab Republic of Egypt, and the Registrar's Decision of 25 April 2014'", *Request under Regulation 46(3) of the Regulation of the Court*, ICC-RoC46(3)-01/14-5, PTC II, 22 September 2014, par. 5-8.

[657] See ICC-OTP, Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, *Application under Regulation 46(3) of the Regulations of the Court*, ICC-RoC46(3)-01/18-1, 9 April 2018. It should be reminded that article 19(3) of the Statute refers to the Prosecutor's power to seek a ruling "regarding a question of jurisdiction or admissibility". In this particular case, since the OTP was asking a ruling *before* even opening a preliminary examination, it is not inappropriate to describe the request and the eventual ruling as preliminary or even 'pre-preliminary' in nature. Nevertheless, it is necessary to avoid any confusion with the entirely different procedure envisaged by article 18, which concerns "preliminary rulings regarding admissibility".

which is a party to the Statute)[658]. The OTP in its request maintained that the Court is permitted to exercise jurisdiction on the alleged crime of deportation, arguing that an essential legal element of the crime, namely the crossing of an international border, occurred on the territory of a State Party (Bangladesh)[659]. Besides the interesting issues of substantive criminal law that concern the elements of the crime of deportation[660], the OTP's request is extremely relevant from the procedural and institutional point of view, because the Prosecutor was in essence seeking—based on the assertion of its discretionary power[661]—a preliminary clarification on the Court's future possibility to exercise jurisdiction, in order "to assist [her in] further deliberations concerning any preliminary examination she may independently undertake, including in the event an ICC State Party decides to refer the matter to the Court under articles 13(a) and 14"[662]. In her judgement, such clarification would "[promote] judicial economy—and, particularly, the apt use of the limited resources allocated to the Prosecutor—by allowing judicial consideration of certain fundamental questions, if the Prosecutor thinks appropriate, *before* embarking on a course of action which might be contentious"[663]. The main issue is whether it is in the Prosecutor's discretion to ask the PTC's intervention based on article 19(3) of the Statue even before a preliminary examination—let alone an investigation or prosecution—has been opened, and whether the President of the Pre-Trial Division is required to assign the matter to a PTC[664]. On the first of these two contentious points, the OTP's reasoning—rooted in a thorough textual, contextual and purposive

[658] *Ibidem*, par. 7-11, particularly footnotes 5-23. The OTP makes extensive reference to the reliable sources of information on the alleged crimes against the Rohingya coming from both UN or UN-related bodies and NGOs.
[659] *Ibidem*, par. 2, 4.
[660] *Ibidem*, par. 13-14, 15-27, 28-42, 45-49 where issues of substantive law are discussed.
[661] *Ibidem*, par. 3, 6, 55, 56. The OTP emphasises that: "This course of action is justified by the exceptional circumstances at hand and it has been decided by the Prosecutor *based on the discretion and independence* vested in her by article 42 of the Statute. Indeed, when reading articles 19(3) and 42 together, it is clear that there is no mechanism by which the Prosecution can be obliged to bring an article 19(3) request, nor can any other person or body bring such a request, with a view to influencing the conduct of a preliminary examination or investigation. The Prosecutor will exercise her discretion concerning the use of article 19(3) guided only by the particular circumstances and the nature of the issue in question" (par. 55, emphasis added).
[662] *Ibidem*, par. 3.
[663] *Ibidem*, par. 54 (emphasis in the original text).
[664] *Ibidem*, par. 52-56, 57-60. The second issue has been positively resolved and the request has been assigned by the President of the Pre-Trial Division to PTC I for decision. See ICC, Decision assigning the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute" to Pre-Trial Chamber I, *Application under Regulation 46(3) of the Regulations of the Court*, ICC-RoC46(3)-01/18-2, President of the Pre-Trial Division, 11 April 2018.

interpretation of the provision at hand—seems convincing[665]. In particular, the OTP's argument on the promotion of judicial economy and her reliance on the well-established flexible approach adopted by the Court on the contextual meaning of the word "case" provide solid ground for the request[666]. The PTC held a status conference on the matter at the presence of the Prosecutor only, but later considered the views of various subjects based either on article 19(3), 68(3) or Rule 103 of the RPE, including a public statement made by the Government of Myanmar, which had already refused to formally take part in the proceedings[667]. On 6 September 2018,

[665] ICC-OTP, Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, *Application under Regulation 46(3) of the Regulations of the Court*, ICC-RoC46(3)-01/18-1, 9 April 2018, par. 52-56.

[666] *Ibidem*, par. 53. On this point, see the commentary by C. K. HALL, D. D. NTANDA NSEREKO, M. J. VENTURA, *Article 19, Challenges to the jurisdiction of the Court or the admissibility of a case*, in O. TRIFFTERER, K. AMBOS (eds.), *op. cit.*, 874-877. The Authors argue that it would be possible for the OTP to seek a ruling on jurisdiction or admissibility "at any stage" and also with regard to "an entire situation", but do not clarify whether it is allowed to do so even before the opening of, at least, a preliminary examination. Nevertheless, the emphasis put on arguments of judicial economy seems to militate in favour of this solution. *Contra*, see C. SAFFERLING, *International Criminal Procedure*, Oxford, 2012, 209, who denies that a ruling under article 19(3) of the Statute might be requested by the OTP and rendered by the PTC before the existence of an individual case.

[667] PTC I issued an order to convene a status conference to discuss the OTP's request (ICC, Order Convening a Status Conference, *Application under Regulation 46(3) of the Court*, ICC-RoC46(3)-01/18-4, PTC I, 11 May 2018). Strangely, the preliminary judges have ordered that the status conference be held in closed session and only at the presence of the Prosecutor (*ibidem*, par. 4). While it may be argued that because there is still no formal situation in place in the procedure at hand and consequently other qualified (potential) participants such as states or groups of victims do not have a statutory right to be heard, the OTP itself had envisaged in its submissions this possibility based on the principle *audiatur et altera pars* (see ICC-OTP, Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, *Application under Regulation 46(3) of the Regulations of the Court*, ICC-RoC46(3)-01/18-1, 9 April 2018, par. 61). More importantly, while it is in the Chamber's discretion to order that a hearing be held in closed session, Regulation 20(2) of the Regulations of the Court stipulates that the Chamber "shall make public the reason for such an order". Unfortunately, the PTC I's order does not contain any justification for this choice, or at least one that is *publicly* available (the order comes with a confidential annex which is exclusively available to the OTP). Nevertheless, both alleged victims and interested states were given the opportunity to present their views, and various organisations participated as *amicus curiae*. See, e.g., Global Rights Compliance, Submission on Behalf of the Victims Pursuant to Article 19(3) of the Statute, *Application under Regulation 46(3) of the Regulations of the Court*, ICC-RoC46(3)-01/18-9, 31 May 2018; Observations of the People's Republic of Bangladesh Pursuant to Rule 103(1) of the Rules of Procedure and Evidence on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", *Application under Regulation 46(3) of the Regulations of the Court*, ICC-RoC46(3)-01/18-14-Conf, 11 June 2018; ICC, Decision on the "Request for leave to submit an Amicus Curiae brief pursuant to Rule 103(1) of the Rules of Procedure and Evidence on the 'Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute'", *Application under Regulation 46(3) of the Regulations of the Court*, ICC-RoC46(3)-01/18-8, PTC I, 29 May 2018. The Government of Myanmar was invited to submit observations pursuant to Rule 103(1) of the RPE, but the competent diplomatic authorities in Belgium refused to accept the delivery of these requests (see ICC-Registry, Report on the Implementation of the Decision Inviting the Competent Authorities of the Republic of the Union of Myanmar to Submit Observations pursuant to Rule 103(1) of the Rules of Procedure and Evidence on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the

PTC I acting by majority—Judge de Brichambaut dissenting—accepted to rule on the request and affirmed that the Court could potentially exercise jurisdiction on the alleged crimes of deportation (as well as on other related conducts), largely sharing the OTP's interpretive approach on the constituent elements of the crime of deportation[668].

The decision at hand deserves a few additional remarks concerning the relations between the OTP and the PTC. In the first place it should be noted that the Majority—completely disregarding the submissions of the OTP—avoided any discussion on the applicability of article 19(3) of the Statute at this early stage of the proceedings, and based its decision on article 119(1) of the Statute, which gives the ICC the power to settle "Any dispute concerning the judicial functions of the Court", and on the general principle of *Kompetenz-Kompetenz*[669]. In the second place, the Chamber shared the OTP's view that the main contentious issue to decide was a "pure question of law"[670]. Therefore, leaving aside any further factual determination, the Chamber confined its decision to an assessment of whether the Court would be permitted to exercise its territorial jurisdiction when only certain elements of an alleged crime are committed on the territory of a State Party. The Court concluded in the affirmative, holding that it may assert jurisdiction "*if at least one element of a crime* within the jurisdiction of the Court *or part of such a crime* is committed on the territory of a State Party to the Statute"[671]. The Majority went on to generalise the

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Statute", *Application under Regulation 46(3) of the Regulations of the Court*, ICC-RoC46(3)-01/18-31, 5 July 2018). They nevertheless put forward a public statement on the matter, of which the OTP gave notice on 17 August 2018 (see ICC-OTP, Notice of the Public Statement Issued by the Government of Myanmar, *Application under Regulation 46(3) of the Regulations of the Court*, ICC-RoC46(3)-01/18-36, 17 August 2018, 3-4).

[668] See ICC, Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", *Application under Regulation 46(3) of the Regulations of the Court*, ICC-RoC46(3)-01/18-37, PTC I, 6 September 2018. See also the Partially Dissenting Opinion of Judge's Marc Perrin de Brichambaut, *Application under Regulation 46(3) of the Regulations of the Court*, ICC-RoC46(3)-01/18-37-Anx, 6 September 2018.

[669] *Ibidem*, par. 26-33. Both legal bases for the decision were introduced *proprio motu* by the Majority as aptly recalled by the dissenting judge (see Partially Dissenting Opinion of Judge's Marc Perrin de Brichambaut, *Application under Regulation 46(3) of the Regulations of the Court*, ICC-RoC46(3)-01/18-37-Anx, 6 September 2018, par. 14). It is interesting to note the Chamber's extensive recourse to judicial citations of other international tribunals with regard to the principle of *compétence de la compétence* (see ICC, Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", *Application under Regulation 46(3) of the Regulations of the Court*, ICC-RoC46(3)-01/18-37, PTC I, 6 September 2018, par. 30-31).

[670] *Ibidem*, par. 50.

[671] *Ibidem*, par. 72-73 (emphasis added). It should be noted that the Chamber limited the effects of its decision, in particular excluding any effect of *res judicata*, holding that its conclusion "is without

scope of the principle, holding that it may apply to crimes other than deportation (or as in the situation at hand, allegedly committed in connection with deportation), citing as examples the crime of persecution and of other inhumane acts[672]. In this manner the Chamber has informally 'suggested' to the OTP the possibility to expand the scope of a prospective examination or request for authorisation to investigate, so as to include other alleged crimes. In addition, the Court disagreed with the Office on the pre-preliminary nature of the procedure, stressing the fact that the OTP—irrespective of the lack of its formal opening—had already carried out activities that should normally form the object of a full-fledged PE[673]. In that connection, the Chamber took the occasion to remind the Office that any future decision should be made "without delay" and in full compliance with internationally recognised standards, in particular with a view to safeguard the right of victims to truth, justice and reparation[674]. It remains to be seen whether the proceedings relating to this situation will now move forward, on the basis of a *proprio motu* formal opening of a preliminary examination (announced by the OTP shortly after the issuance of the Chamber's decision) and of a request for authorisation under article 15(3) of the Statute or, alternatively, based on a state referral.

2.3 The length and 'tempo' of preliminary examinations

The crucial importance of the time factor with regard to the initiation and conduct of preliminary examination has already been the object of *static* analysis elsewhere in the present work, particularly in connection with the OTP's firm stance on the purported inexistence of time limits for the conduct of preliminary

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prejudice to subsequent findings on jurisdiction at a later stage of the proceedings". In this sense the Court's decision is in line with the views expressed by some commentators. See, e.g., J. P. PIERINI, *Le contestazioni della giurisdizione della Corte e dell'ammissibilità del caso*, in G. LATTANZI, V. MONETTI (eds.), *La Corte Penale Internazionale. Organi, competenza, reati, processo*, Milano, 2006, 165-166.

[672] ICC, Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", *Application under Regulation 46(3) of the Regulations of the Court*, ICC-RoC46(3)-01/18-37, PTC I, 6 September 2018, par. 75-77, 79.

[673] *Ibidem*, par. 82.

[674] *Ibidem*, par. 84-88. The Chamber recalled some of its own precedents on the reasonable duration of preliminary examinations and investigations, as well as decisions of international human rights courts, in particular with regard to victims' rights.

examination activities[675] and the extremely narrow leverage enjoyed by preliminary judges in order to influence the timing of the examination[676]. In the context of the practice-based analysis carried out in this part of the work, the time factor is empirically approached in relation to the following aspects: a) The trends in the length of preliminary examinations and, if any, the correlation between its duration and the different triggering mechanisms; b) The trends regarding the length of the different phases of preliminary examinations; c) The degree of temporal proximity of preliminary examination to the facts and circumstances forming the object of such activities, and the importance of this factor for the unfolding of subsequent proceedings.

With regard to the first of these aspects, namely the trends in the overall duration of preliminary examinations, the practice of the OTP reveals significant differences across the situations, which might depend on factors such as the different complexity of the situations at hand; the availability of documents and information on the crimes allegedly committed; the degree of cooperation of the state(s) concerned and, last but not least, the triggering mechanism used in each circumstance. Obviously, in order to measure the length of preliminary examinations it is necessary to define a starting and an ending point. Unfortunately, sometimes the exact starting point is not easily identifiable, due to the practice of the OTP to make the opening of a preliminary examination public *after*—sometimes long after—the actual beginning of the Office's examination or not to reveal the exact date of its formal opening[677]. In addition to that, a distinction must be made between preliminary examinations based on their final outcome. For PE that are closed with a decision to open an investigation (or to seek authorisation to open one) the length spans from the date of commencement (or the date in which the OTP has publicly announced the opening of PE) and the date of the decision to open an investigation (in case of UNSC or state referral), or the date of the request of a judicial

[675] See, *supra*, Part Two, Chapter One, par. 3.2 (particularly footnotes 275-277).
[676] *Ibidem*. See also, *supra*, Part Two, Chapter Three, par. 2.1 (particularly footnotes 518-523).
[677] For instance, with regard to the preliminary examination of the situations in Iraq/UK and Venezuela, both closed on 9 February 2006, there is no indication on the exact point in time in which the OTP opened the PE. With regard to the situation in Afghanistan, the OTP made public the opening of a PE in 2007, but declared that the situation had been under preliminary examination since 2006. See ICC-OTP, Report on Preliminary Examination activities 2001, 13 December 2011, par. 20. Based on this paragraph it can be estimated that the PE was opened around June 2006, given that the OTP reports the receipt of 56 communication in the period spanning from 1 June 2006 to 1 June 2011.

authorisation to the PTC (in case of *proprio motu*). For PEs that are closed with a decision not to open an investigation, the length spans from the commencement date to the date in which the OTP announces the closing of the preliminary examination.

The following four tables summarise the available data on the length of preliminary examinations as per the above indicators, distinguishing for the sake of clarity between those that ended with the opening of an investigation in the hypotheses of referral (state or UNSC) and *proprio motu*; preliminary examinations that were closed with a decision not to open an investigation; and those that are currently on-going. All data are retrieved from the OTP annual reports or other public statements made by the Prosecutor.

Preliminary Examinations resulting in an investigation (state and UNSC Referral)

Situation	Referral	Period Covered	Opening of Investigation	Duration of PE (days)*
Democratic Republic of the Congo	3 March 2004 (State self-ref.)	1 July 2002 onwards	21 June 2004	111
Uganda	16 December 2003 (State self-ref. made public 29 January 2004)	1 July 2002 onwards	28 July 2004	226
Central African Republic I	22 December 2004 (State self-ref.)	1 July 2002 onwards	22 May 2007	882
Mali	18 July 2012 (State self-ref.)	January 2012 onwards	16 January 2013	183
Central African Republic II	30 May 2014 (State self-ref.)	1 August 2012 onwards	24 September 2014	118
Sudan-Darfur	31 March 2005 (UNSC ref.)	1 July 2002 onwards	6 June 2005	68
Libya	26 February 2011 (UNSC ref.)	15 February 2011 onwards	3 March 2011	6

Note: * The calculation, in the absence of more precise information, assumes the date of referral as the starting date and the date of announcement of the opening of the investigation as end date of PE.

Preliminary Examinations resulting in an investigation (*Proprio motu*)

Situation	Beginning of PE	Request of authorisation	PTC Authorisation	Time to obtain authorisation	Duration of PE (days)
Kenya	5 February 2008	26 November 2009	31 March 2010	126 days	661
Côte d'Ivoire	1 October 2003	23 June 2011	3 October 2011	103 days	2,823
Georgia	14 August 2008	13 October 2015	27 January 2016	107 days	2,617
Burundi	25 April 2016	5 September 2017 (filed *ex parte*)	25 October 2017 (public 9 November 2017)	51 days	499
Afghanistan	Exact date unknown (June 2006)	20 November 2017	pending	pending	≃ 4,191

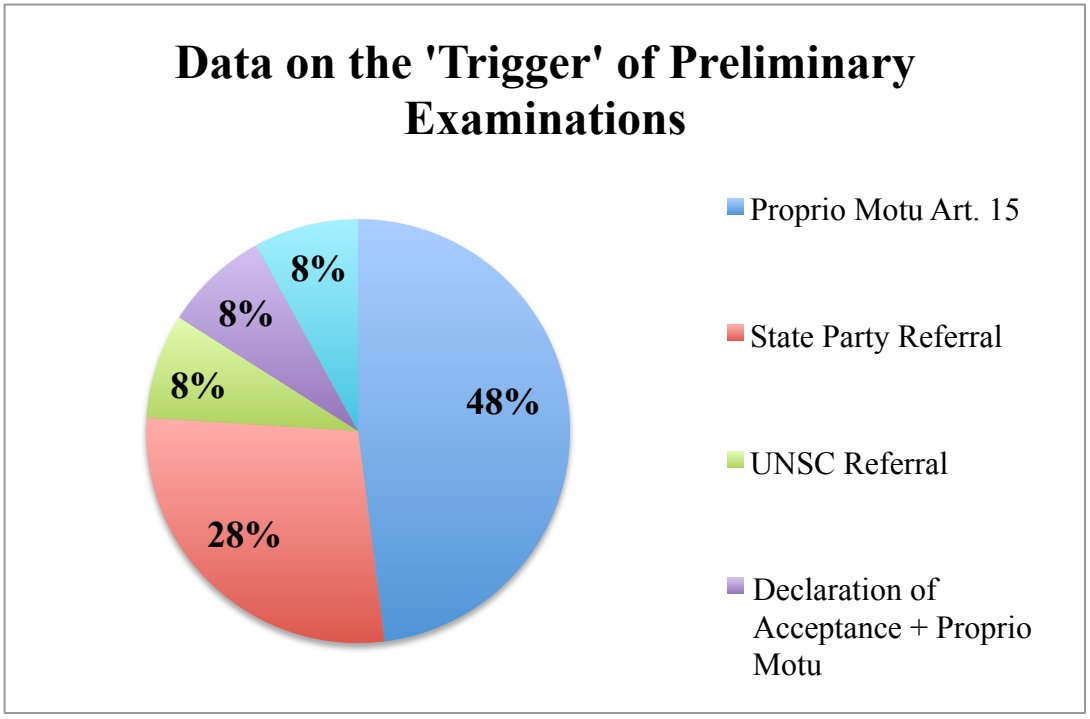
Preliminary Examinations closed with a decision not to open an investigation

Situation	Triggering Mechanism	Commencement of PE	Closing of PE	Duration of PE (days)	Reason and Phase of PE
Honduras	*Proprio motu*	18 November 2010	28 October 2015 (Art. 5 Report)	1806	No jurisdiction *ratione materiae* (Phase 2)
Republic of Korea	*Proprio motu*	6 December 2010	23 June 2014 (Art. 5 Report)	1296	No jurisdiction *ratione materiae* (Phase 2)
Iraq/UK	*Proprio motu*	Unknown	9 February 2006 (Response to senders)	-	No jurisdiction *ratione materiae*, partly insufficient gravity (Phase 2-3)
Palestine	*Proprio motu* (pursuant to decl. of acceptance)	22 January 2009	3 April 2012	1168	Preconditions for jurisdiction not satisfied (statehood of Palestine)
Venezuela	*Proprio motu*	Unknown	9 February 2006 (Response to senders)	-	No jurisdiction *ratione materiae* (Phase 2)
Registered Vessels of	State referral (Union of the	14 May 2013	6 November	542	Inadmissibility for lack of

the Comoros, Greece and Cambodia	Comoros)		2014 (Art. 53(1) Report)		sufficient gravity (Phase 3)
Gabon	State self-referral (21 September 2016)	29 September 2016	21 September 2018 (Art. 53(1) Report)	723	No jurisdiction *ratione materiae* (Phase 2)

On-going Preliminary Examinations

Situation	Triggering Mechanism	Beginning of PE	Current Phase of PE
Colombia	*Proprio motu*	June 2004	Phase 3
Guinea	*Proprio motu*	14 October 2009	Phase 3
Iraq/UK	*Proprio motu*	13 May 2014 (reopened)	Phase 3
Nigeria	*Proprio motu*	18 November 2010	Phase 3
Palestine	*Proprio motu* (+ state referral by Palestine)	16 January 2015 (state referral 15 May 2018)	Phase 3
Philippines	*Proprio motu*	8 February 2018	Phase 2
Situation Relating to the Deportation of Rohingya people from Myanmar to Bangladesh	*Proprio motu*	Formally announced on 18 September 2018 (after PTC I decision on jurisdiction)	Phase 2
Ukraine	*Proprio motu* (based on declarations of acceptance of 2014 and 2015)	24 April 2014 (temporal scope broadened 29 September 2015)	Phase 2
Venezuela	*Proprio motu* (+ joint state referral by Argentina, Canada, Chile, Colombia, Paraguay, Peru)	8 February 2018 (joint state referral 25 September 2018)	Phase 2



A few observations on the above data seem necessary in order to underline the current trends in the opening and conduct of PE on the part of the OTP.

In the fist place, the data show the significant variability in the length of PE across the situations that have to date formed the object of the OTP's assessment activities, ranging from the mere six days of the Libyan situation to the fourteen years (and counting) of the Colombian situation. Having regard to the PE that led to the opening of an investigation, the trend seems to show that a correlation exists between the triggering mechanism used and the length of PE[678]. In particular, UNSC's referral correlates to a significantly shorter length of PE when compared to instances of state referral and *proprio motu*. This might be explained on grounds of the high degree of authoritativeness of the UNSC's decision to refer a situation to the Court and, having regard to the two situations at hand, to the overwhelming amount of credible information on the commission of the alleged crimes[679], making the

[678] The same conclusion is reached by A. PUES, *op. cit.*, 437.
[679] For instance, in the situation of Sudan-Darfur the OTP could rely on the extensive work carried out by the Commission of Inquiry on Darfur presided over by Professor Antonio Cassese and established pursuant to the UNSC Resolution 1564 (2004), S/Res/1564, 18 September 2004. See, Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, 25 January 2005.

OTP's inferences on the opening of an investigation relatively unproblematic[680]. Nevertheless, given the UNSC's self-restraint in activating the Court's jurisdiction and the consequently limited practice thereof, it might be excessive to draw definitive conclusions on the correlation between the Council's intervention and the OTP's incentive to proceed with extreme urgency with a decision on the opening of an investigation. State (self-)referrals and *proprio motu* procedures, to the contrary, seem to correlate to sometimes significantly longer PE. In most cases and with few notable exceptions, the PE in case of state referral lasted less than a year[681]. On the average, *proprio motu* procedures last significantly longer compared to other triggering mechanism, but there are instances in which the OTP completed the examination and forwarded to the PTC a request for authorisation to investigate in a relatively short period of time. Sometimes, as it will be seen in greater detail in the next paragraphs, the necessity to proceed swiftly may have been based on the need to circumvent potential procedural complications, such as in the situation of Burundi, where the OTP accelerated the PE activities in order to file a request of authorisation *before* the taking of effects of the state's act of withdrawal from the Statute. To the contrary, the record-setting length of the Colombian PE can be explained on grounds of the very complex domestic situation in the framework of pacification efforts in the country and the necessity for the OTP to closely monitor the process, including by scrutinising the judicial application of the various transitional mechanisms created in recent years[682]. In any event, this extreme variability makes a calculation of the average length of preliminary examinations unnecessary and possibly misleading. Such a statistical elaboration wouldn't appropriately take into account the

[680] See, e.g., ICC-OTP, Report on Preliminary Examination activities 2011, 13 December 2011, par. 118.

[681] For instance in the situation of Central African Republic I the preliminary examination lasted 882 days and in the situation of the Gabonese Republic lasted approximately two years. For the exact figures see, *supra*, the tables of page 193-195.

[682] On the legal aspects of the Colombian peace process and its relations with the complementarity regime of the ICC see the in-depth study of K. AMBOS, *The Colombian Peace Process and the Principle of Complementarity of the International Criminal Court: An Inductive, Situation-based Approach*, Berlin/Heidelberg, 2010. On the most recent developments concerning the peace deal and with regard to the recently instituted Special Jurisdiction for Peace, see H. OLÁSOLO, J. M. F. RAMIREZ MENDOZA, *The Colombian Integrated System of Truth, Justice, Reparation and Non-Repetition*, in *Journal of International Criminal Justice*, vol. 15, issue 5, 2017, 1011-1047 and R. URUEÑA, *Prosecutorial Politics: The ICC's Influence in Colombian Peace Processes, 2003–2017*, in *American Journal of International Law*, vol. 111, issue 1, 2017, 104-125.

specificities of each situation and the circumstances that may have influenced the choices of the OTP.

In the second place, with regard to PEs concluded with a decision not to proceed with an investigation (or to ask the authorisation to open one) it can be observed that—on the average and with the possible exclusion of the *Comoros* situation—the time needed to reach a negative conclusion has in general been quite extended, notwithstanding the fact that most of these PEs did not pass the jurisdictional test of Phase 2, particularly due to the OTP's negative conclusions on jurisdiction *ratione materiae*. In some of these occasions it is debatable whether to reach these conclusions such an extended period of time was at all justified, also taking into account the early practice—under the tenure of Prosecutor Moreno Ocampo—to provide very thin publicly available reasoning for the decision not to proceed[683]. In this sense, the three years and two months it took the Office to conclude that the uncertainty on the statehood of Palestine made it impossible to proceed on the basis of the declaration of acceptance of 2009 seem hardly justified, and some have even argued that such conclusion was legally untenable[684]. The same holds true for the closing of PE in the situations of Honduras and Korea.

[683] The letters to the information senders through which the OTP decided to close the PE in the Iraq/UK, Venezuelan and Palestinian situations are extremely succinct and lack any detailed reasoning. See ICC-OTP, Response to communications received concerning Iraq, 9 February 2006; ICC-OTP, Response to communications received concerning Venezuela, 9 February 2006; ICC-OTP, Update on the Situation in Palestine, 3 April 2012. To the contrary, the OTP's Article 53 Report on the *Comoros* situation is extensive and contains a very detailed analysis of the reasons for reaching the conclusion not to open an investigation.

[684] The OTP had received the submissions of prominent international law scholars for the purposes of a determination on the consequences of Palestine's 2009 declaration of acceptance. One of such opinions, pointing to the conclusion that the declaration was valid and could effectively form the basis for the OTP's examination and was capable of engaging the Court's jurisdiction, had been submitted to the Court by Alain Pellet on 8 May 2010, and was co-signed by many authorities (such as, among the others, M. C. Bassiouni, L. Condorelli, B. Conforti, J. Dugard, W. A. Schabas). The opinion has been later published as part of a volume dedicated to Palestine's access to international jurisdictions. See A. PELLET, *The Effects of Palestine's Recognition of the International Criminal Court's Jurisdiction*, in C. MELONI, G. TOGNONI (eds), *Is There a Court for Gaza?—A Test Bench for International Justice,* The Hague, 2012, 409-428. In this sense see also J. DUGARD, *Palestine and the International Criminal Court: Institutional Failure or Bias?*, in *Journal of International Criminal Justice*, vol. 11, issue 3, 2013, 563-570 and the punctual critique of the OTP's reasoning by M. M. EL ZEIDY, *Ad Hoc Declarations of Acceptance of Jurisdiction: The Palestinian Situation Under Scrutiny*, in C. STAHN (ed.), *The Law and Practice of the International Criminal Court*, cit., 184-190. *Contra*, critically on the retroactive effects of Palestine's declaration of acceptance pursuant to article 12(3) of the Statute, see C. ZIMMERMANN, *Palestine and the International Criminal Court Quo Vadis? Reach and Limits of Declarations under Article 12(3)*, in *Journal of International Criminal Justice*, vol. 11, issue 3, 2013, 309-320.

In the third place, it is interesting to note that the practice of the OTP shows at least one example of application of the rules concerning the possibility to reopen a preliminary examination that had previously been closed, based on new facts or information. This situation must nevertheless be distinguished from those in which a PE in a certain country was closed and a new one, having a different temporal and material scope, was later opened with regard to different crimes allegedly committed in the same country[685]. With regard to time, the situation in Iraq/UK, originally closed in 2006 after at least two or three years of PE[686], was reopened roughly eight years later in 2014 based on new information[687].

The second aspect worth elaborating is the length of the different phases of PE across the situations, with a view to determine whether there is any identifiable trend in the practice of the Office pointing to the conclusion that the different parameters to be considered at each phase (jurisdiction in Phase 2; admissibility in Phase 3; interests of justice in Phase 4) correlate to a different duration. This might shed some light on the comparative complexity of these assessments[688]. This analysis is made relatively straightforward by the fact that the OTP, consistently with its 'minimalistic' approach towards the interests of justice[689], has never gone through an in-depth assessment of this criterion, an ascertainment that is carried out in Phase 4

[685] Such are the two 'new' situations in Venezuela and Palestine. In both circumstances the temporal framework and the material scope of the preliminary examination are entirely different from those forming the object of the two earlier decisions not to proceed.

[686] The exact date of commencement of the Iraq/UK preliminary examination is not known (see, *supra*, footnote 677). It should nevertheless be considered that the Statute entered into force for the UK on 1 July 2002, based on the state's instrument of ratification deposited on 4 October 2001.

[687] See ICC-OTP, Statement, Prosecutor of the International Criminal Court, Fatou Bensouda, re-opens the preliminary examination of the situation in Iraq, 13 May 2014 (available at https://www.icc-cpi.int/Pages/item.aspx?name=otp-statement-iraq-13-05-2014, last accessed 6 November 2018).

[688] With regard to Phase 1 of the PE, where communications undergo the first screening and where those manifestly falling outside the Court's jurisdiction are dismissed, the OTP estimates that its average duration should be anything in the range between 6 months and a full year, based on the approximately 500 communications per year received by the Office (see ICC-ASP/14/21*, Report of the Court on the Basic Size of the Office of the Prosecution, 17 September 2015, 37). Concerning the amount of work required to perform these activities the Office estimates that the initial screening should ideally take 5 days of work per month by the dedicated team (approximately 60 days of work per year in total), whereas the analytical reports on the communications deserving further analysis should take 30 days of work per report (270 days in total based on the prospect of 9 communications per year passing the initial screening). *Ibidem*, 42.

[689] See ICC-OTP, Policy Paper on the Interests of Justice, September 2007, 3-4. In particular the OTP maintains that there is a *relative* presumption that the opening an investigation is, generally, in the interest of justice. Therefore, an in-depth assessment of the interests of justice would only play a role as the basis for a decision not to proceed with an investigation (or to request the authorisation to do so). So far the Office has never made recourse to the interests of justice for the purpose of closing a PE.

of the preliminary examination[690]. Therefore, most of the time is spent in the analysis of jurisdiction and admissibility. On this point it should be noted that the OTP, through the Report on the Basic Size of the Office, has estimated that the average duration of Phase 2 should be contained in a one-year period, while it considered impossible to predetermine a definite average length of Phase 3 activities, due to the complexity of this assessment and its variability across the different situations[691]. By comparing the OTP's performance goals with the concrete data extrapolated from the annual reports on preliminary examinations it is possible to formulate the following observations.

Firstly, with the general exclusion of the situations referred by the UNSC and of most of those referred by State Parties[692], data show that the length of Phase 2, dedicated to the assessment of subject-matter jurisdiction, has almost always exceeded the period of two years, with peaks of five and seven years on some occasions[693]. Only in few circumstances has the Office complied with the goal to contain such activities within one year, although this goal was only formalised in 2015 through the Report on the Basic Size and may not be used retroactively as a benchmark to judge the OTP's performances. In any event, the significant differences in the time needed to reach a conclusion on subject-matter jurisdiction cannot be explained exclusively on grounds of the different degree of complexity of the legal and factual circumstances of each situation. The OTP's formal and informal policies, as well as other pragmatic considerations, seem to play a decisive role in

[690] The OTP estimates that the activities to carry out in Phase 4 should generally be completed over a period of approximately six months (see ICC-ASP/14/21*, Report of the Court on the Basic Size of the Office of the Prosecution, 17 September 2015, 37).
[691] *Ibidem*.
[692] The tables of pages 193-195 show that the overall duration of the preliminary examination activities in these situations, with the exclusion of those concerning CAR I and the Gabonese Republic, has been contained in a relatively short period of time (on the average between four and six months). Consequently, as regards the majority of referred situations, the length of Phase 2 of PE has been well within the one-year period envisaged by the OTP Report on the Basic Size.
[693] Based on the OTP annual reports, the length of Phase 2 analysis across the situations for which sufficiently precise dates are available is as follows. Guinea: ≃ 2 years; Gabon: ≃ 2 years; Iraq/UK: 3 years; Nigeria: 2 years; Palestine (situation relative to the PE opened in 2015): 3 years; Ukraine: more than 4 years, on-going; Georgia: ≃ 2 years; Afghanistan: 7 years; Honduras: ≃ 4 years; Republic of Korea: 5 years. Besides those referred by State Parties and the UNSC, the only other situations in which Phase 2 lasted less than two years are those concerning the Comoros (less than one year); Kenya (less than 2 years for the completion of the whole PE) and Burundi (6-7 months). Exact dates regarding the duration of Phase 2 are not available for the situations of Côte d'Ivoire and Colombia, due to the lack of precise reporting in the early years of the Court's activity, particularly between 2006 and 2011.

prioritising the pace of certain preliminary examination over others that seem less promising in terms of investigation and prospective trial developments[694].

Secondly, notwithstanding the variability across the spectrum of the various situations, the trend suggests that the assessment of admissibility carried out in Phase 3—on average and with few exceptions—generally requires more time than the assessment of jurisdiction. In particular, situations in which the PE was maintained in Phase 3 for an extended period of time were characterised by a complex analysis of complementarity issues, whereby the OTP engaged in a prolonged dialogue with national authorities with a view to monitor the existence, adequacy, credibility and genuineness of national proceedings in order to reach a decision on the opening of an investigation[695].

The third and last relevant dimension of the timing of preliminary examinations deals with the temporal proximity between the commencement of PE and the facts forming the object of the OTP's examination and, potentially, of investigation and prosecution. It is common knowledge, corroborated by both national and international practice, that the passing of time makes every aspect of investigation and prosecution more challenging, impractical and uncertain, for instance diminishing the availability and 'freshness' of the evidence, or making it difficult or impossible to secure the presence at trial of the alleged perpetrators[696]. In the case of the ICC, this proximity is dependent on additional contingent factors that do not generally hamper the prosecution of crimes at the national level. Such are, for instance, the variable geometry of the territorial and temporal scope of the Court's

[694] In this sense see A. PUES, *op. cit.*, 436-437, 449-450. The Author criticises the current practice of the Office as regards the extreme variability in the length of preliminary examinations, which in her view is not linked to principled and transparent policy considerations, resulting in a practice that "may overstep the boundary of prosecutorial discretion at the preliminary examination stage".

[695] Again, excluding the situations in which the whole PE was completed in a short period of time, an analysis of the practice shows that the length of Phase 3 generally surpasses—sometimes significantly—that of Phase 2. Data extrapolated from the annual reports the duration of Phase 3 across the different situations are as follows. Guinea: over 7 years, on-going; Nigeria: over 6 years, on-going; Georgia: ≃ 4 years; Afghanistan: 4 years; Colombia: exact dates uncertain, but already on Phase 3 as per the 2011 annual Report, at least 7 years. The situations of Iraq/UK (1 year); the Comoros (less than a year); Kenya and Burundi (10 months) are examples of shorter lengths of Phase 3 analysis. On the complexities of the complementarity assessment as a possible explanation of the length of certain PE see A. PUES, *op. cit.*, 440-442.

[696] As far as international(ised) practice is concerned, a clear example of the sometimes insurmountable difficulties of investigating and trying crimes many years after their commission is the experience of the ECCC, whose institutional goal is to ascertain criminal responsibility for crimes committed between 1975 and 1979, more than thirty five years after the facts.

jurisdiction (depending on the status of ratifications, acceptance of jurisdiction or UNSC referral); the almost complete dependency of the OTP on state cooperation for the conduct of the most relevant PE, investigations and prosecution activities; and the practical difficulties in collecting information and securing evidence with regard to episodes of massive criminality that frequently involve a high number of perpetrators and victims. A closer look to the reports and statements of the OTP has provided useful insights on the 'responsiveness' of the Office to the alleged commission of international crimes and in activating the procedural machinery of the ICC through preliminary examinations.

In the practice of the OTP the commencement of preliminary examinations has been, in general, relatively close to the alleged episodes of criminality, with timeframes ranging from a few days or weeks to a few months[697]. It should be noted that this proximity, especially in the case of state or UNSC's referral, does not depend exclusively on the OTP's responsiveness but is also heavily influenced by the readiness of the referring entity to trigger the Court's jurisdiction. In the case of *proprio motu*, the Office mostly relies on private communications regarding the commission of alleged crimes that come from multiple sources, but mainly from private senders (individuals, groups of victims, NGOs, etc.) that are on the ground and have a direct knowledge of the factual context in which the alleged crimes took place. The fact that these communications are forwarded directly to the Court, without the need for a determination by a political body such as the state or UNSC in the event of referral, can positively contribute to their timeliness. The following table shows the available data concerning the lapse of time between the initiation of OTP's PE activities (pursuant to referral or *motu proprio*) and the facts covered by the Court's jurisdiction *ratione temporis*[698].

[697] It should be noted that with regard to various situations the temporal jurisdiction of the Court extends from the date of the entry into force of the Statute (1 July 2002) onwards, particularly for the states that joined the Court before that date and by virtue of referrals that consider that date as *dies a quo* for the exercise of jurisdiction. Nevertheless, in order to understand the degree of responsiveness of the OTP in opening a preliminary examination, the focus must always be on the timeframe of the specific incidents and alleged crimes that come under the Office's consideration or form the basis of a referral or of a declaration of acceptance of jurisdiction.

[698] It should be noted that the structures of the Court were only materially created between 2003 and 2004, therefore no activities could in any way have been carried out before the institution of the OTP, Registry and Chambers.

Situation	Referral and/or initiation of PE	Jurisdiction *ratione temporis* and focus of PE/investigation
Côte d'Ivoire	1 October 2003 (after 1st declaration of acceptance)	19 September 2002 onwards*, main focus on facts between 2010 and 2011
Uganda	16 December 2003	1 July 2002 onwards
Democratic Republic of the Congo	3 March 2004	1 July 2002 onwards
Colombia	June 2004	1 July 2002 onwards (for crimes against humanity); 1 July 2009 (for war crimes)
Central African Republic I	22 December 2004	1 July 2002 onwards (focus on crimes between 2002-2003)
Sudan-Darfur	31 March 2005	1 July 2002 onwards
Afghanistan	June 2006	1 May 2003 onwards (exact end date subject to PTC approval)
Kenya	5 February 2008	1 June 2005—26 November 2008
Georgia	14 August 2008	1 July 2008—10 October 2008
Guinea	14 October 2009	1 October 2003, focus on facts of 28 September 2009 onwards
Honduras (closed)	18 November 2010	1 September 2002 onwards, focus on facts between 28 June 2009—27 January 2010
Nigeria	18 November 2010	1 July 2002 onwards, focus on facts from July 2009 onwards and April 2011 onwards.
Republic of Korea (closed)	6 December 2010	1 July 2002, focus on facts of 26 March and 23 November 2010
Libya	26 February 2011	15 February 2011 onwards
Mali	18 July 2012	1 July 2002 onwards, focus on facts since January 2012
Comoros, Greece and Cambodia (closed)	14 May 2013	1 November 2006, focus on facts of 31 May 2010
Ukraine	24 April 2014	21 November 2013 onwards**
Iraq/UK	14 May 2014	1 July 2002, focus on facts between 2003—2008
Central African Republic II	30 May 2014	1 July 2002, focus on facts from 1 August 2012 onwards
Palestine	16 January 2015	13 June 2014 onwards (based on

	(additional referral by Palestine on 15 May 2018)	declaration of acceptance), 1 April 2015 based on accession
Burundi	25 April 2016	1 December 2003, focus on facts between 26 April 2015—26 October 2017***
Gabon	27 September 2016	1 July 2002, focus on facts since May 2016 onwards
Philippines	8 February 2018	11 November 2011, focus on facts since 1 July 2016****
Venezuela	8 February 2018 (additional referral by Argentina, Canada, Chile, Colombia, Paraguay, Peru on 25 September 2018)	1 July 2002, focus on facts since at least April 2017 (referral asks for extension to facts since 12 February 2014)
Rohingya/Myanmar	18 September 2018	1 June 2010, focus on facts since August 2017

Notes: * Based on declaration of acceptance of 18 April 2003, confirmed on 14 December 2010 and 3 May 2011. PTC III originally authorised the investigation for facts since 28 November 2010, and later extended temporal jurisdiction to include facts from 19 September 2002 onwards.
** Originally from 21 November 2013 to 22 February 2014 (based on the first declaration of acceptance). A second declaration of acceptance modified the temporal scope, conferring jurisdiction also on facts since 20 February 2014 onwards.
*** The end date for the exercise of temporal jurisdiction depends on the taking of effects of Burundi's withdrawal on 27 October 2017.
**** The act of withdrawal of the Philippines has not yet taken effects, but may limit the temporal scope of a prospective PE and/or investigation.

In any event, the timely opening of preliminary examinations does not guarantee, as the data on the overall duration of PE clearly show, that the future unfolding of the procedure will lead to investigation and prosecution in a short period of time. Nevertheless, there are significant advantages in fostering proximity between PE and the facts under consideration. In particular, this vicinity is helpful from the point of view of the collection of information, the gradual refinement of the OTP's understanding of the factual, temporal and material scope of a potential investigation and the formulation of a prognosis on crucial issues of admissibility.

Lastly, it should be borne in mind that in some situations the temporal scope of a preliminary examination is open-ended (i.e. it has a starting date but no specified end date), while in other instances it is limited to a precise segment of time. The

OTP's activities in the first of these scenarios are more complicated, due to the potential extension of the examination to on-going crimes that might significantly extend the complexity and length of PE activities. In the second scenario, the OTP's assessment is limited to a closed temporal framework without the necessity to focus on prospective crimes, although a subsequent extension of the temporal scope cannot be completely ruled out, for instance based on a modification of the terms of a declaration of acceptance of the Court's jurisdiction.

In conclusion, the practice shows that the OTP has certainly made use of the time factor as a discretional tool in the conduct of preliminary examination. The Office has developed the practice of 'graduating' the quantity and quality of its activities across the various situations in a manner that it considered compatible with the appropriate allocation of the human and financial resources of the Office and/or necessary in order to promote (positive) complementarity vis-à-vis the interested states. The use of time as a flexible discretionary tool at the preliminary examination phase might come under severe public scrutiny and even come in conflict with the requirements of efficacy, impartiality and reasonable duration of proceedings at the ICC[699]. Nevertheless, a solution *de lege lata* to the lack of any provision on the maximum duration of PE could only come from the OTP's voluntary commitment to contain these activities within a reasonable and predetermined period of time, something which at present seems at odds with the Office's position on the issue[700].

2.4 The importance of the reporting activity of the OTP and of its public statements

Before entering an in-depth discussion of the OTP's practice on the closing of preliminary examinations and their possible outcomes, a few observations on the reporting activity of the OTP seem warranted. The case-based elaboration of the present part of the work is made possible by the existence of a well-established reporting practice of the Office, which has acquired increasing importance in recent years in the context of the OTP's efforts for the promotion of transparency.

[699] In this vein see A. PUES, *op. cit.*, 442-449.
[700] *Ibidem*, 450-453. The Author suggests, as a policy objective, that the OTP commits to a maximum length of three years for preliminary examinations, arguing that "Such policy commitment still provides the Prosecutor with flexibility, if the circumstances so demand. But it would require explicit justifications when the defined limit is exceeded, explaining why the different treatment of situations is justified".

In the early years of the Court's activity the OTP, under the tenure of the first Prosecutor, had not yet adopted a policy of reporting periodically on the preliminary examination activities. The Office published a first cumulative report covering the period 2003-2006 that not only made known to the public the activities performed in that period, but also anticipated some of the prosecutorial policies which were later formalised in the various policy papers and strategies. Additional insights on the OTP's activities of that period can be retrieved via the ICC reports to the UN General Assembly. Overall, the information available on the early years of activity of the Office is relatively incomplete and does not live up to a reasonable standard of transparency and publicity as regards the commencement, conduct and progress of PE, and did not provide solid reasoning for certain prosecutorial choices, especially those not to proceed with an investigation.

The Office inaugurated its policy of annual reports on PE activities only in 2011 and has since then consistently delivered these reports, which are of paramount importance to follow the progress (or lack of progress) of preliminary examinations, and a useful tool to monitor the OTP's performances and degree of adherence to its own policy and strategy objectives. Besides the annual reports, the OTP—consistently with the Policy Paper on preliminary examinations—has made known to the public its decisions on specific situations by means of dedicated country reports[701]. The reporting activity is therefore an aspect of the already examined proceduralisation of PE, given that the transition between the different phases of the examination—as well as its positive or negative conclusion—is generally marked by the adoption of a report dealing with the corresponding factual and legal assessment (jurisdiction, admissibility, etc.). The importance of this practice is not limited to the promotion of transparency but can also be appreciated in connection with the OTP's willingness to limit the judges' attempts to interfere with the conduct of preliminary examinations[702]. Although no statutory provision requires the OTP to publicly report

[701] A country-specific report can be adopted either in the form of an intermediate or final conclusion—positive or negative—on issues of jurisdiction ('Art. 5 Report') or at the end of PE in the form of an 'Art. 53(1) Report' containing the OTP's decision to proceed or not to proceed with an investigation. On one occasion the OTP has put forward an interim report, with regard to a preliminary examinations that had been going on for a prolonged period of time (see, ICC-OTP, Interim Report, *Situation in Colombia*, November 2012).

[702] By making the status of each preliminary examination public and updating periodically on the progress and the activities performed the OTP can at least indirectly reply to criticism coming from

on these activities, the practice under consideration plays a significant role in the on-going *dialogue* between the Office and stakeholders on one hand, and judges on the other.

The trend in the reporting activity of the Office is towards progressively more complete, in-depth and analytical reports, although the degree of specificity and detail of these documents varies across the different situations, with a view to balancing the need for transparency and the need for the protection of confidentiality[703]. The increasingly more detailed character of the reports—especially those formalising decisions not to proceed—may have the consequence of exposing the OTP to sharp criticism for its early selection choices, as well as of providing increased opportunities for judicial review[704].

Besides the reports, another relevant aspect of the OTP's practice at the preliminary stage has to do with the Prosecutor's public statements. It is a well-established practice of the Office to publicly take a stance with regard to episodes of violence that might come under consideration of the OTP in the context of a preliminary examination. Sometimes the Office makes 'preventive' statements, for instance warning that a certain situation might lead to the future involvement of the Court[705]. On other occasions the statements relate to situations already under PE

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states, victims or NGOs on issues such as the length of preliminary examinations. It should also be noted that since the institutional conflict with the PTC in the CAR I situation with regard to the Chamber's power to ask information on the status of PE at the request of the interested state, the OTP has dealt with subsequent referred situations in a relatively shorter period of time (although the Gabonese situation has been on PE for approximately 2 years before a final determination).

[703] To give an idea of this trend towards more precise and in-depth reports, a simple comparison between the 2011 and 2017 reports shows that the length of the document has almost tripled during the past six years. This is not only due to the increased number of situations to report on, but also to the more analytical style of more recent reports. On the limits to transparency that may be imposed based on the need to protect confidentiality and safety of the information providers, see Regulation 28(2) of the Regulations of the OTP.

[704] The case of the Article 53(1) Report on the Comoros situation is an example of the more detailed and reasoned approach in adopting decisions at this stage. It is the very analytical character of this document that provided the leeway for the Comoros' request for judicial review of the *nolle prosequi* decision, leading to the PTC's request to reconsider the OTP's previous decision. It has also been underlined by A. LUBIN, *Politics, Power Dynamics, and the Limits of Existing Self-Regulation and Oversight in ICC Preliminary Examinations*, in M. BERGSMO, C. STAHN (eds.), *Quality Control in Preliminary Examinations: Vol. 2*, cit., 106, that the reporting activity might serve as "a pressure relief valve, providing critics with proof that the OTP remains active. This is done by voluntarily providing information regarding both the factual and legal narratives as they emerge from the assessment, while keeping the situations parked at the preliminary examination stage".

[705] See, e.g., ICC-OTP, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, regarding the worsening situation in Gaza, 8 April 2018 (available at: https://www.icc-cpi.int/Pages/item.aspx?name=180408-otp-stat, last accessed 6 November 2018); ICC-OTP,

where the commission of crimes is on-going, and are designed to warn the parties on the potential legal consequences of any escalation of violence[706]. In some cases the OTP, commenting on specific episodes of violence, has taken a stance on general issues such as the possibility to deal with acts of terrorism or with crimes committed by or against peacekeepers[707]. An empirical analysis of the concrete effects of these statements on the conduct of the actors of a conflict and on the attitude of national jurisdiction towards investigation and prosecution of the alleged perpetrators is beyond the scope of this work, but would be particularly relevant in connection with the more general debate on the deterrent capacity of the ICC as a permanent criminal justice institution.

3. The conclusion of preliminary examinations: The OTP's decision on the opening or not opening of an investigation

The preliminary examination activities must at some point be concluded by means of a discretional decision of the OTP to open an investigation (or to ask judicial authorisation to do so) or, if the conditions to proceed are not met in the OTP's judgement, to close the PE without opening the investigation or requesting an authorisation to the competent PTC. In the first hypothesis the Office must have positively completed the assessment of all four phases of the preliminary examination and be satisfied that the criteria to proceed with an investigation (or request to open one) are met. In the second hypothesis, the Prosecutor—in light of the incremental and sequential order of the four phases—may terminate the

Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda concerning the situation in the Republic of the Philippines, 13 October 2016 (available at: https://www.icc-cpi.int/Pages/item.aspx?name=161013-otp-stat-php, last accessed 6 November 2018).

[706] See, e.g., ICC-OTP, Statement of the Prosecutor of the International Criminal Court, Mrs Fatou Bensouda, regarding increased violence in CAR: "Crimes must stop!", 23 May 2017 (available at: https://www.icc-cpi.int/Pages/item.aspx?name=170523-otp-stat, last accessed 6 November 2018); ICC-OTP, Statement of the Prosecutor of the International Criminal Court, Mrs Fatou Bensouda, regarding the situation in the Kasaï provinces, Democratic Republic of the Congo, 31 March 2017 (available at: https://www.icc-cpi.int/Pages/item.aspx?name=170331-otp-stat, last accessed 6 November 2018).

[707] See ICC-OTP, Statement, Attacks against peacekeepers may constitute war crimes, 19 July 2013 (available at: https://www.icc-cpi.int/Pages/item.aspx?name=otp-statement-19-07-2013, last accessed 6 November 2018); ICC-OTP, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the alleged crimes committed by ISIS, 8 April 2015 (available at: https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-08-04-2015-1, last accessed 6 November 2018).

examination at the end of any of these phases, without the need to proceed to the subsequent ones, when the legal criteria of the previous are not met. The following paragraphs delve into the analysis of the OTP's practice regarding both scenarios, starting from prosecutorial decisions not to proceed (par. 3.1), and concluding with decisions to proceed with an investigation or request authorisation to do so (par. 3.2). This overview of the OTP's practice is based on the one hand on the reports (or communications) containing the Office's reasoned decision to proceed or not to proceed and, on the other, particularly in instances of *proprio motu*, on the OTP's requests of authorisation and the corresponding PTC's decisions.

3.1 Decisions not to proceed with an investigation pursuant to article 53(1) of the Statute

So far the OTP has concluded the PE of a situation with a decision not to proceed with an investigation on seven occasions, at different stages of the examination and based on different reasons[708]. Up to date the Office has never relied on arguments of complementarity or on the interests of justice to justify a decision not to proceed. On some occasions the OTP's decision was based on a negative conclusion regarding the existence of Court's jurisdiction as regards the facts under examination (contained in an 'Article 5 Report' or communication to the senders); in other circumstances the decision was based on a negative conclusion regarding the admissibility of the potential cases likely to arise from an investigation, in particular on grounds of the alleged insufficient gravity of the crimes. On one occasion, the OTP considered that the preconditions for the exercise of the Court's jurisdiction were not met and declined to continue with the PE activities, without entering into a more detailed analysis of the other relevant criteria[709]. Some of the most relevant legal issues pertaining to each of these situations are considered in the following paragraphs, breaking up the analysis based on the stage and reasons for closing the examination.

[708] The situations closed during preliminary examination are those regarding Palestine (based on the declaration of acceptance of 2009), Iraq/UK (closed in 2006 and later reopened in 2014), Venezuela, Honduras, Republic of Korea, the Registered Vessels of the Comoros, Greece and Cambodia, and Gabon.
[709] This is the case of the situation in Palestine based on the declaration of 2009.

3.1.1 Lack of the preconditions for the exercise of jurisdiction

Preliminary examinations are mostly concerned with the assessment of the reasonable basis to proceed standard based on a positive conclusion on the three fundamental requirements of jurisdiction, admissibility (gravity and complementarity), and non contrariety to the interests of justice. Nevertheless, a logical prerequisite to any such determination is that the Court's jurisdiction had been properly triggered and/or validly accepted by a state that is not a Party to the Rome Statute[710]. If the situation is referred by a State Party, the OTP only needs to verify that the referral comes from the competent authority of a State Party and that it has been duly communicated to the Court as per the applicable rules[711]. With regard to a UNSC's referral, the onus on the OTP to verify the precondition for the exercise of jurisdiction is even less demanding, given that the Security Council can only refer a situation based on a Chapter VII resolution, and that it is very unlikely that doubts may arise as regards its validity. A more uncertain situation may arise in the case of acceptance of jurisdiction by a third state based on article 12(3) of the Statute, in which case the OTP must be cumulatively satisfied that the entity accepting jurisdiction qualifies as a state for the purposes of accepting such jurisdiction and that the declaration comes form the authority competent to express the state's consent to that end[712]. It should be reminded that a declaration of acceptance does not *per se* trigger the Court's jurisdiction[713], but the lack of one of the abovementioned

[710] See article 12 of the Statute, whose title is "Preconditions to the exercise of jurisdiction".
[711] See article 13(a), 14(1)-(2) of the Statute and Rule 45 of the RPE, requiring that the referral be made in writing.
[712] See ICC, Corrigendum to "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire", *Situation in the Republic of Côte d'Ivoire*, ICC-02/11-14-Corr, PTC III, 15 November 2011, par. 14.
[713] See W. A. SCHABAS, G. PECORELLA, *Article 12, Preconditions to the exercise of jurisdiction*, in O. TRIFFTERER, K. AMBOS (eds.), *op. cit.*, 686. This position is shared by the Court. See ICC, Decision on the "Corrigendum of the challenge to the jurisdiction of the International Criminal Court on the basis of articles 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute filed by the Defence for President Gbagbo (ICC- 02/11-01/11-129)", *Prosecutor v. Laurent Gbagbo*, *Situation in the Republic of Côte d'Ivoire*, ICC-02/11-01/11-212, PTC I, 15 August 2012, par. 57; confirmed by ICC, Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I on jurisdiction and stay of the proceedings, *Prosecutor v. Laurent Gbagbo*, *Situation in the Republic of Côte d'Ivoire*, ICC-02/11-01/11-321, AC, 12 December 2012, par. 58. Also the OTP subscribes to this position, see ICC-OTP, Policy Paper on Preliminary Examinations, November 2013, footnote 25: "It should be noted that article 12(3) is a jurisdictional provision, not a trigger mechanism. As such, declarations of the sort should not be equated with referrals, but will require a separate triggering by the Prosecutor *proprio motu* or by a State Party".

requirements may prevent the OTP from entering a preliminary examination on the merits of the situation.

The Office has closed a preliminary examination *in limine* for the alleged lack of the preconditions for the exercise of jurisdiction in only one circumstance, with regard to the situation linked to the Palestinian declaration of acceptance of 2009. The case is well known and has attracted the OTP much criticism both for the time needed to reach a decision and the reasons provided by the Office for closing the PE[714]. It is beyond the scope of this work to enter an in-depth discussion on the formal and substantive conditions of the validity of an article 12(3) declaration of acceptance or on the statehood of Palestine; suffices here to analyse the OTP's behaviour in examining these issues as part of the PE activities and the reasons for the decision to terminate it without any examination on the merits of the incidents temporally covered by the declaration of acceptance.

The declaration of acceptance was lodged on behalf of Palestinian National Authority (PNA) by Mr Ali Khashan, acting as Minister of Justice, on 21 January 2009 to the effect of recognising the Court's jurisdiction for crimes committed since 1 July 2002[715], although the facts prompting this act mainly related to Operation Cast Lead, conducted on Gaza by the IDF between December 2008 and January 2009. Upon receipt of said declaration the OTP begun its legal consideration and invited the representatives of the PNA, NGOs and various experts to file submissions, *inter alia*, on the validity and temporal scope of the declaration[716]. Consideration continued, based on this information, in 2011[717]. On 3 April 2012 the OTP made known to the public its decision to close the preliminary examination, considering that the preconditions to the exercise of jurisdiction had not been met[718].

The argument of the OTP revolved around the uncertainty—at least at the time of the assessment—on the statehood of Palestine and on whether the entity

[714] See, e.g., the critical assessment of the OTP's reasoning by M. M. EL ZEIDY, *Ad Hoc Declarations of Acceptance of Jurisdiction: The Palestinian Situation Under Scrutiny*, cit., 184-190.
[715] See Palestinian National Authority, Declaration recognizing the Jurisdiction of the International Criminal Court, 21 January 2009.
[716] For a summary of these submissions see ICC-OTP, Summary of submissions on whether the declaration lodged by the Palestinian National Authority meets statutory requirements, 3 May 2010 (available at https://www.icc-cpi.int/NR/rdonlyres/553F5F08-2A84-43E9-8197-6211B5636FEA/282852/PALESTINEFINAL201010272.pdf, last accessed 6 November 2018).
[717] ICC-OTP, Report on Preliminary Examination activities 2011, 13 December 2011, par. 16-19.
[718] ICC-OTP, Update on the Situation in Palestine, 3 April 2012.

accepting the Court's jurisdiction could qualify as a "State" for the purposes of article 12(3) of the Statute. The OTP, in its succinct three-page document, somehow decided not to decide on the issue. The Office recognised itself incompetent to make a determination on whether the declaration could be considered valid and effective, deferring to UN bodies in order to eliminate the uncertainties on the statehood of Palestine and its qualification as a "State" for the purposes of the Statute[719]. This line of reasoning has been aptly criticised, among the others, by EL ZEIDY, as "suffer[ing] from inconsistencies and a number of legal errors"[720]. From the point of view of timing, considering that the OTP had already acquired all the relevant information and submissions by May 2010, it is difficult to justify the two additional years that it took the Office to reach its laconic conclusion. With regard to the merits of the decision, it has been correctly pointed out that both the Statute and case law of the Court make it clear that the OTP, when acting *proprio motu*, is always required to reach a final determination pursuant to article 15(3) or 15(6) of the Statute based on the criteria listed in article 53(1)[721]. In other words, the Office should not be allowed to avoid an explicit decision on the existence of a reasonable basis to proceed on grounds that the uncertainty on the preconditions to the exercise of jurisdiction—in this case on the validity of Palestine's declaration of acceptance—precludes in essence any such determination[722]. The OTP, as an organ of an international judicial institution premised on the *compétence de la compétence* principle[723], was certainly in the position to enter an autonomous legal and factual determination on the quality of "State" of the accepting entity, at least for the limited purposes of the applicability

[719] *Ibidem*, par. 4-6, 8.
[720] See M. M. EL ZEIDY, *Ad Hoc Declarations of Acceptance of Jurisdiction: The Palestinian Situation Under Scrutiny*, cit., 184.
[721] *Ibidem*, 186-190. See Rule 48 of the RPE, establishing that the assessment leading to a decision under article 15 shall be based on the criteria listed under article 53(1)(a)-(c) of the Statute.
[722] *Ibidem*.
[723] This general principle is clearly enshrined in article 19(1) of the Statute and reinforced by the provisions of article 119 of the Statute. As regards the origins and content of this principle in the more general framework of international adjudication, see C. TOMUSCHAT, *Article 36*, in A. ZIMMERMANN, K. OELLERS-FRHAM, C. TOMUSCHAT, C. J. TAMS (eds.), *The Statute of the International Court of Justice: A Commentary*, Oxford, 2012, 694, and R. KOLB, *The International Court of Justice*, Oxford/Portland, 2013, 601-606. Recently, on the scope of this principle in the context of the Rome Statute, see ICC, Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", *Application under Regulation 46(3) of the Regulations of the Court*, ICC-RoC46(3)-01/18-37, PTC I, 6 September 2018, 26-33.

of the Statute's jurisdictional regime and subject to an eventual judicial determination of the Court[724].

Besides the fragility of its legal reasoning and approaching it from the point of view of prosecutorial discretion, this decision manifests the OTP's intention not to embark the Office on a highly controversial and politically charged international issue, leaving it to political bodies (UN and states) to provide the clarifications necessary for a future reconsideration of the matter[725]. In any event, and leaving aside the allegations of political pressures on the OTP to reach a negative decision[726], the Prosecutor's restrictive stance may have played a role in prompting the Palestinian authorities to intensify their efforts to gain international recognition, which have led to the upgrade of Palestine's status at the UN and to its accession to a number of treaties and international organisations[727]. Based on these changed circumstances, Palestine lodged a second declaration of acceptance and subsequently acceded to the

[724] In this sense see M. M. EL ZEIDY, *Ad Hoc Declarations of Acceptance of Jurisdiction: The Palestinian Situation Under Scrutiny*, cit., 190.

[725] See ICC-OTP, Update on the Situation in Palestine, 3 April 2012, par. 8, where the OTP states: "The Office could in the future consider allegations of crimes committed in Palestine, should competent organs of the United Nations or eventually the Assembly of States Parties resolve the legal issue relevant to an assessment of article 12 or should the Security Council, in accordance with article 13(b), make a referral providing jurisdiction."

[726] The OTP came under severe criticism both for its decision of 2012 and its subsequent *nolle prosequi* decision regarding the situation referred by the Comoros. See, e.g., the very critical article by Julian Borger, *Hague Court under western pressure not to open Gaza war crimes inquiry*, The Guardian, 18 August 2014 (available at: https://www.theguardian.com/law/2014/aug/18/hague-court-western-pressure-gaza-inquiry, last accessed 6 November 2018), alleging political pressure from Israel and the US to refrain from opening an investigation. The OTP replied with a public statement, denying any allegation of political pressures and confirming that its decision was based exclusively on legal considerations (see ICC-OTP, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda: "The Public Deserves to know the Truth about the ICC's Jurisdiction over Palestine", 2 September 2014, available at: https://www.icc-cpi.int//Pages/item.aspx?name=otp-st-14-09-02, last accessed 6 November 2018). In the context of the political controversy on the OTP's decision, it should be noted that the Israeli Minister for Foreign Affairs Mr Avigdor Lieberman has claimed that Israel had been diplomatically active in order to avoid the opening of an investigation (see *PLO envoy: Palestine can join ICC*, Ma'an News Agency, 10 April 2012, available at: http://www.maannews.net/eng/ViewDetails.aspx?ID=475280, last accessed 6 November 2018). On the role played by the Israeli press and media with regard to Palestine's accession to the Statute and the OTP's preliminary examination, see S. WEILL, *The Situation of Palestine in Wonderland: An Investigation into the ICC's Impact in Israel*, in M. BERGSMO, C. STAHN (eds.), *Quality Control in Preliminary Examinations: Vol. 1*, cit., 504-507.

[727] See the UNGA resolution upgrading the status of Palestine from 'Observer' to 'Non-Member Observer State', A/Res/67/19, 29 November 2012. An up-to-date list of the rapidly increasing number of treaties that have been ratified or acceded to by the State of Palestine is available at: https://treaties.un.org/Pages/CNs.aspx?cnTab=tab2&clang=_en (last accessed 6 November 2018).

Rome Statute between December 2014 and January 2015[728]. The UN Secretary General—to whom the OTP's decision made reference for the purpose of determining Palestine's qualification as a "State"—accepted the instrument of accession in his quality of depositary of the treaty[729]. Consequently, the Rome Statute entered into force for Palestine on 1 April 2015[730]. A preliminary examination on the situation of Palestine was therefore launched by the OTP on 16 January 2015 and, based cumulatively on the second declaration of acceptance and the recent referral made by Palestine in 2018, is currently undergoing the analysis of admissibility (Phase 3)[731].

3.1.2 Failure to meet the jurisdictional criteria

A preliminary examination can be terminated by the OTP with a decision not to proceed on grounds that the facts under consideration do not appear to fall within the parameters delimiting the jurisdiction of the Court. The assessment of jurisdiction *ratione temporis*, *ratione loci* and *ratione personae* is relatively straightforward and does not in general involve a very complicated factual and legal analysis. Therefore, much of the jurisdictional analysis revolves around the OTP's assessment as to whether the facts under examination appear to fall *ratione materiae* under the jurisdiction of the Court, i.e. they constitute one of the crimes listed in article 5 of the Statute. In order to do so the Office must carry out, based on the information available at the preliminary examination stage, an analysis on both the statutorily required contextual elements for each category of crimes, and of the specific elements of the individual crimes allegedly committed. Such an analysis has sometimes required in practice a significant amount of time, in light of the scale of the incidents under examination and the specific circumstances of the situation that make a determination particularly difficult in "border-line" situations[732]. Up to date

[728] The new declaration of acceptance is dated 31 December 2014 (see the text available at: https://www.icc-cpi.int/iccdocs/PIDS/press/Palestine_A_12-3.pdf, last accessed 6 November 2018); the next day Palestine acceded to the Statute (see*, infra*, footnote 730).
[729] See the depositary notification at: https://treaties.un.org/doc/Publication/CN/2015/CN.13.2015-Eng.pdf (last accessed 6 November 2018).
[730] The act of accession to the Statute is dated 2 January 2015, and the day of entry into force for the State of Palestine is 1 April 2015 in conformity with the rule laid down in article 126(2) of the Statute.
[731] See ICC-OTP, Report on Preliminary Examination activities 2018, 5 December 2018, par. 276.
[732] See ICC-OTP, Art. 5 Report, *Situation in Honduras*, 28 October 2015, par. 30, 93.

the OTP has closed a preliminary examination based on the lack of subject-matter jurisdiction on five occasions, namely Venezuela, Iraq/UK, Honduras, the Republic of Korea and Gabon. The first two decisions were both made known to the public on 9 February 2006, while the Office was still headed by Mr Luis Moreno-Ocampo, before the OTP had inaugurated a systematic reporting practice, and share a very succinct style and reasoning[733]. The other decisions not to proceed, to the contrary, clearly demonstrate the new course towards a more principled and transparent reporting practice of the Office[734]. A brief analysis of these decisions will allow drawing some preliminary conclusions on the OTP's practice as regards the jurisdictional assessment during PE.

The 'twin decisions' on the situation of Venezuela and Iraq/UK largely share the same structure, methodology of analysis and conclusions, and only differ on the specific alleged crimes under examination and, partly, on the articulation of the reasoning leading to the conclusion not to proceed[735]. In both situations the OTP adopted its decision by means of a short letter to the senders of individual communications, although it declared that in both situations the Office had "produced a crime analysis of all the available information, in accordance with [its] standard methodology and rules of source evaluation and measurement. The analysis included preparation of tables of allegations, pattern analysis and examination of incidents. In addition, [it] conducted legal research and analysis on the main doctrinal issues" [736]. Regrettably, almost none of this information has been reproduced in detail in the letters or otherwise made public. In the Venezuelan situation the Prosecutor considered that the information at his disposal, also due to its inconsistency and unreliability, did not support the conclusion that the alleged crimes could amount to crimes against humanity, because the contextual elements had not been satisfied[737]. There was therefore no need to consider whether the discrete

[733] The Venezuelan and Iraqi decisions are, respectively, five and ten pages long.
[734] The two decision concerning the Republic of Korea and Honduras are, respectively, 24 and 49 pages long, and share a much more detailed and reasoned drafting approach compared to the two earlier decisions. Along the same lines, the most recent decision on the Gabonese situation totals 58 pages of legal and factual analysis.
[735] In particular, the Iraqi decision is partly based on the failure to meet the jurisdictional criteria and partly on the lack of sufficient gravity.
[736] See ICC-OTP, Response to communications received concerning Iraq, 9 February 2006, 2; ICC-OTP, Response to communications received concerning Venezuela, 9 February 2006, 2.
[737] ICC-OTP, Response to communications received concerning Venezuela, 9 February 2006, 3-4.

alleged crimes did satisfy the specific elements of the definitions provided by the Statute. In the Iraqi situation, to the contrary, the OTP went slightly more in detail in its analysis. It initially disposed of any allegations concerning the legality of war (based on the *de facto* lack of subject-matter jurisdiction on the crime of aggression at the time), genocide and crimes against humanity, and later focused its assessment on war crimes[738]. The Prosecutor went on to conclude that, based on the available information, for some of the allegations there was no reasonable basis to believe that the facts constituted war crimes under the Statute, while for others (namely wilful killing and inhumane treatment) this threshold was satisfied[739]. Nevertheless, as regards these last conducts the OTP concluded that the admissibility requirement of gravity was not met, both with regard to the specific gravity requirement stipulated under article 8(1) of the Statute for war crimes, and to the "general gravity requirement under Article 53(1)(b)"[740]. In other words, the Iraqi decision not to proceed is not a purely 'Phase 2' jurisdiction-based decision. It is premised on a composite reasoning and disposes of the matter partly under the jurisdictional analysis and partly under a—rather superficial—admissibility analysis.

The decisions not to proceed as regards the situation in the Republic of Korea and Honduras follow a clearly different, in-depth and analytical approach, resulting in concluding 'Article 5 Reports', which reflect the more recent trend towards the proceduralisation of PE based on the policy paper of 2013. Both documents contain references to the historical background of the facts under consideration and proceed with a detailed analysis concerning the subject-matter jurisdiction of the Court, both with regard to the contextual elements for the categories of crimes and the individual alleged crimes[741]. They both provide ample legal reasoning, references to the Court's jurisprudence and doctrine to justify the conclusion that the alleged crimes did not meet the jurisdictional threshold *ratione materiae*. The main difference between the

[738] ICC-OTP, Response to communications received concerning Iraq, 9 February 2006, 4-8.
[739] *Ibidem*, 7, 8.
[740] *Ibidem*, 8.
[741] See ICC-OTP, Art. 5 Report, *Situation in Honduras*, 28 October 2015, par. 42-73 (historical background); 74 (preconditions to the exercise of jurisdiction); 95-100, 102-104, 105-109, 116-126, 132-140 (conclusions on the contextual elements for the various patterns of alleged crimes against humanity and the discrete alleged crimes) and ICC-OTP, Art. 5 Report, *Situation in the Republic of Korea*, 23 June 2014, par. 32-37 (historical background); 38-41 (preconditions to the exercise of jurisdiction); 42-46, 47-58, 59-65, 66-70, 71-81, 82-83 (conclusions on the lack of the contextual elements for the individual crimes).

two documents is dictated by the very different factual background, and particularly by the fact that the situation in Honduras covered a longer time span and a significant number of episodes of criminality[742], while the Korean situation dealt with two single incidents of military operations at sea in the context of the international armed conflict between the Republic of Korea and the Democratic People's Republic of Korea[743].

A comparison between the two earlier decisions declining to proceed with regard to Venezuela and Iraq/UK, and the more recent ones on Honduras, Korea and Gabon reveals a significant shift with regard to the format of these decisions (letters to senders of individual communications v. full-fledged public 'Article 5 Reports') as well as to their style, methodology of analysis and reasoning strategy. Considering the absence of a clear statutory or regulatory requirement, both formal and substantive, for the adoption of public and reasoned documents containing such negative decisions, the contribution of the OTP's practice in shaping the procedural steps and the outcomes of preliminary examination becomes immediately evident. This practice can therefore be considered as a potentially positive effect of the exercise of institutional and administrative prosecutorial discretion at the preliminary examination phase, and is a clear example of *practice-based integration* of the normative texts.

It should be reminded that various other situations are currently undergoing Phase 2 of the preliminary examination and might in the future result in other Article 5 Reports containing a decision not to proceed based on jurisdictional considerations, which may either confirm or contradict the abovementioned trends in the practice of the Office. The most recent decision to close a preliminary examination without opening an investigation relates to the situation in the Gabonese Republic, self-referred by the African state in September 2016. After a two-year PE, the OTP

[742] In particular, the facts under consideration concerned the situation of violence in the country in the immediate aftermath of the coup of 28 June 2009, the post-electoral violence in the period between 27 January 2010 and September 2014 and the alleged crimes committed in the Bajo Aguán region since the coup.

[743] The two episodes are the sinking of a South Korean warship, the *Cheonan*, on 26 March 2010 and the shelling of South Korea's Yeonpyeong Island on 23 November 2010. For the analysis on the existence of an armed conflict between the two states in relation to these incidents, see ICC-OTP, Art. 5 Report, *Situation in the Republic of Korea*, 23 June 2014, par. 46.

decided not to proceed based on the lack of jurisdiction *ratione materiae*, largely confirming the analytical approach adopted in the previous Article 5 Reports.

3.1.3 Failure to meet the admissibility test, in particular gravity

Phase 3 of the preliminary examination is devoted to the assessment of admissibility and may result in a decision not to proceed with an investigation based on a negative conclusion regarding one or both the two main prongs of the admissibility test, namely gravity and complementarity. Up to date the OTP has based a decision not to proceed on the lack of sufficient gravity on only two occasions. While in the Iraq/UK situation considerations of (insufficient) gravity have played a role only with reference to certain conducts under consideration[744], they constituted the crux of the OTP's decision not to proceed in the situation regarding the Registered Vessels of the Comoros, Cambodia and Greece, which therefore warrants further consideration.

The *Comoros* situation has already been the object of attention with regard to the interpretation and application of article 53 of the Statute, in the context of a statutory-based analysis of the OTP-PTC relations concerning the exercise of prosecutorial discretion and of its judicial review[745]. In the present paragraph attention is focused on the reasoning of the OTP's decision not to proceed and, most importantly, on its institutional consequences in the *dialectical relationship* with the reviewing Pre-Trial Chamber. The case at hand represents a clear example of *open clash* between the Office and judges in the interpretation of the pertinent provisions, and reveals a conflicting understanding of the scope of prosecutorial discretion as well as of the standard for its judicial review.

The situation relating to the registered vessels of the Comoros, Greece and Cambodia was referred to the OTP by the Government of the Union of the Comoros on 14 May 2013, "with respect to the 31 May 2010 Israeli raid on the Humanitarian Aid Flotilla bound for Gaza Strip"[746]. The incident is well known and has attracted

[744] See, *supra*, preceding paragraph, especially footnotes 739-740.
[745] See, *supra*, Part Two, Chapter One, par. 3.4.1.
[746] See Referral of the Union of the Comoros under Articles 14 and 12(2)(a) of the Rome Statute arising from the 31 May 2010, Gaza Freedom Flotilla situation, 14 May 2013.

international condemnation[747], and has also formed the object of various fact-finding activities both at the international and national level[748]. The same day of the receipt of the Comoros' referral the OTP announced the opening of a preliminary examination of the situation. The Office closed the PE at the stage of the admissibility assessment (Phase 3), reaching the conclusion that while there was a "reasonable basis to believe that war crimes under the Court's jurisdiction [had] been committed in the context of interception and takeover of the Mavi Marmara by IDF soldiers on 31 May 2010"[749], the "potential case(s) that would likely arise from an investigation into the situation would not be of sufficient gravity to justify further action by the Court and would therefore be inadmissible pursuant to articles 17(1)(d) and 53(1)(b) of the Statute"[750]. This is not only the first time that the OTP declined to open an investigation pursuant to a state referral, but also the first time that it did so based on the alleged inadmissibility of the (potential) cases likely to arise from the situation for lack of sufficient gravity.

From the methodological point of view the OTP's 'Article 53(1) Report' of November 2014 perfectly fits in the new trend of in-depth and analytical decisions, as it considers in great detail both the contextual elements for the category of crimes referred and the constituent elements of each of the alleged individual crimes[751]. After having positively concluded on the existence of a reasonable basis to believe that crimes within the jurisdiction of the Court had been committed[752], the OTP

[747] See, e.g., UNSC Presidential Statement, S/PRST/2010/9, 1 June 2010.
[748] As to international reports, reference must be made to the fact-finding efforts of the Human Rights Council resulting in the Report of the International Fact-Finding mission to investigate violations of international law, including international humanitarian and human rights law, resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance, A/HRC/15/21, 27 September 2010 and to the Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident, September 2011 ('Palmer-Uribe Report'). National inquiries were carried out both in Israel and in Turkey (the state of nationality of all the victims of the incident). With regard to Israel, see the Report of the Public Commission to Examine the Maritime Incident of 31 May 2010, Part I, 23 January 2011 and Report of the Public Commission to Examine the Maritime Incident of 31 May 2010, Part II, 6 February 2013. With regard to Turkey, see the Turkish National Commission's of Inquiry Report on the Israeli Attack on the Humanitarian Aid Convoy to Gaza on 31 May 2010, February 2011.
[749] ICC-OTP, Article 53(1) Report, *Situation on the Registered Vessels of the Comoros, Greece and Cambodia*, 6 November 2014, par. 149.
[750] *Ibidem*, par. 150.
[751] *Ibidem*, par. 19-128. Most of the sixty-one pages of the report are devoted to this analysis.
[752] *Ibidem*, par. 132. This conclusion concerns the alleged war crimes of wilful killing pursuant to article 8(2)(a)(i) of the Statute; wilfully causing serious injury to body and health pursuant to article 8(2)(a)(iii) of the Statute; and committing outrages upon personal dignity pursuant to article 8(2)(b)(xxi) of the Statute. In addition, the OTP considered that if the naval blockade imposed by

proceeded to the assessment of admissibility, beginning with gravity. The gravity assessment was conducted based on the quantitative-qualitative approach endorsed in the Policy Paper on preliminary examinations, and was carried out considering the scale, nature, manner of commission and impact of the alleged crimes[753]. Contrary to the analysis of jurisdiction, the OTP's assessment of gravity is not particularly detailed, and irrespective of the soundness of its conclusions, partly fails to provide adequate reasoning to support the OTP's final determination. In particular, the OTP's insistence on the comparison between the situation under consideration and others already forming the object of investigations, as well as the Office's reliance on the allegedly limited impact of the incident to conclude that the gravity threshold had not been met, are not entirely persuasive[754]. Having negatively concluded on point of gravity, the OTP considered it unnecessary to make any determination on issues of complementarity[755]. As it could be expected, the referring state was not satisfied with the OTP's negative decision and, for the first time ever, made recourse to the review procedure provided for under article 53(3)(a) of the Statute[756], lamenting in particular: (i) The failure to take into account facts which did not occur on the three vessels over which the Court has territorial jurisdiction[757]; and (ii) the errors in addressing the factors relevant for the determination of gravity under article 17(1)(d) of the Statute[758]. Based on these arguments the Comoros asked the PTC to request the

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Israel had to be considered unlawful, an issue on which the Office has not taken a position, there would also be a reasonable basis to believe that the IDF committed the crime of intentionally directing an attack against two civilian objects pursuant to article 8(2)(b)(ii) of the Statute, in relation of the forcible boarding of the *Mavi Marmara* and the *Eleftheri Mesogios/Sofia*. As regards the alleged crimes against humanity, the OTP concludes for the lack of the required contextual elements (*ibidem*, par. 130-131).

[753] *Ibidem*, respectively, par. 138, 139, 140, 141.

[754] *Ibidem*, par. 143-147. A severe critique of the OTP's reasoning as regards the gravity assessment can be found in A. E. BOZBAYINDIR, *The Venture of the Comoros Referral at the Preliminary Examination Stage*, in M. BERGSMO, C. STAHN (eds.), *Quality Control in Preliminary Examinations: Vol. 1*, cit., 631-650. Critically on the potentially unreasonable results of mere quantitative analysis—for instance in comparing gravity across different situations based on the number of victims—see K. J. HELLER, *Situational Gravity Under The Rome Statute*, cit., 239-244, 252.

[755] ICC-OTP, Article 53(1) Report, *Situation on the Registered Vessels of the Comoros, Greece and Cambodia*, 6 November 2014, par. 148.

[756] See Public Redacted Version of the 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, *Situation on the Registered Vessels of the Comoros, Greece and Cambodia*, ICC-01/13-3-Red, 29 January 2015.

[757] *Ibidem*, par. 62-81.

[758] *Ibidem*, par. 82-135.

Prosecutor to reconsider her previous decision not open an investigation. The OTP filed its reply, defending the legality and reasonableness of its previous decision[759].

The PTC I, called for the first time to review a *nolle prosequi* decision pursuant to article 53(3)(a) of the Statute, adopted its decision by majority—Judge Péter Kovács partially dissenting—on 16 July 2015, granting for the most part the Comoros' grounds for review and ordering the OTP to reconsider its previous decision[760]. The Majority, before discussing the applicant's grounds for review, succinctly described the structure and function of the review procedure, clarifying its scope in the context of the OTP-PTC institutional relationship as regards the exercise of prosecutorial discretion. In particular, judges have underlined the *ex parte* nature of the review under article 53(3)(a) of the Statute, affirming that the Chamber is not tasked to put forward an autonomous assessment of the factual and legal elements that supersedes that of the OTP, but to carry out a control over the *legality*—i.e. the absence of errors either in fact, law or procedure—of the OTP's decision, limitedly to the specific grounds for review formulated by the applicant[761]. Nevertheless, the Majority sought to preliminarily restrict the scope of the Prosecutor's discretionary power to decline the opening of an investigation, stating that the text and purpose of article 53(1) of the Statute introduce a (rebuttable) presumption in favour of the opening of an investigation, whenever the information available at the preliminary stage supports "reasonable inferences that *at least one crime* within the jurisdiction of the Court has been committed and that the case would be admissible"[762]. In such cases the OTP *shall* open an investigation to ascertain the facts, this being the only way to provide clarity on facts that are difficult to establish or that form the object of conflicting accounts. In other words, the OTP's assessment of the jurisdictional *and* admissibility requirements (among which gravity and complementarity) at the preliminary stage would be premised on the application of "exacting legal requirements", and true prosecutorial discretion would only express itself in the

[759] See ICC-OTP, Public Redacted Version of Prosecution Response to the Application for Review of its Determination under article 53(1)(b) of the Rome Statute", *Situation on the Registered Vessels of the Comoros, Greece and Cambodia*, ICC-01/13-14-Red, 30 March 2015.
[760] See ICC, Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation, *Situation on the Registered Vessels of the Comoros, Greece and Cambodia*, ICC-01/13-34, PTC I, 16 July 2015.
[761] *Ibidem*, par. 8-10, 12.
[762] *Ibidem*, par. 13 (emphasis added).

OTP's considerations revolving around the interests of justice[763]. The Chamber then went on to analyse the Applicant's grounds for review, and in particular the OTP's interpretation and application of the criteria for the assessment of gravity. The Majority, recalling the Court's case law on the concept of situational gravity[764], then went on to criticise the OTP's arguments, stating that the Office had failed to verify "whether the individuals or groups of persons that are likely to be the object of an investigation, include those who may bear the greatest responsibility for the alleged crimes" [765]. By conflating the two categories of 'most responsible ones' and 'senior leaders', the OTP incurred in an error of law that radically affected the overall assessment of situational gravity[766]. The preliminary judges then went on to critically review the OTP's conclusions based on the four criteria for the determination of gravity, which they considered unreasonable, premature or plainly wrong[767]. In conclusion the Majority, upon review, formally requested the Prosecutor to reconsider her previous decision[768], closing its decision with a rather confrontational message to the OTP: "The Chamber is confident that, when reconsidering her decision, the Prosecutor will fully uphold her mandate under the Statute" [769].

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[763] *Ibidem*, par. 13-15.
[764] *Ibidem*, par. 22. The PTC recalls, in particular, the authorisation decisions pursuant to the OTP's *proprio motu* in the Kenyan and Ivorian situations.
[765] *Ibidem*, par. 22 (recalling par. 135 of the OTP's Article 53(1) Report).
[766] *Ibidem*, 23-24.
[767] *Ibidem*, respectively, par. 25-26 on the *scale* of the alleged crimes, the Majority underlined that the number of potential victims would be comparable and even superior to that of other situations where the OTP had already opened an investigation and/or prosecution; par. 27-30, as regards the *nature* of the alleged crimes, the Majority considered that the OTP had erred in excluding, without further analysis in the context of a full investigation, that the episodes of mistreatment of passengers of the *Mavi Marmara* did not amount to torture or inhuman treatment, but only amounted to "outrages upon personal dignity" pursuant to article 8(2)(b)(xxi) of the Statute; par. 31-45, as regards the *manner of commission*, the Majority considered that the Prosecutor had erred in evaluating the information concerning the opening of live fire by the IDF prior to the boarding of the *Mavi Marmara*; she had unreasonably failed to consider that the alleged cruel and abusive treatment imposed on passengers once disembarked in Israel may have been the result of tacit acquiescence of the military superiors, and not the mere consequence of individual excesses of IDF soldiers; she had unreasonably failed to recognise that the circumstances surrounding the alleged crimes, including the attempts to conceal them, could be compatible with the hypothesis that the alleged crimes had been planned; par. 46-48, in relation to the *impact* of the alleged crimes, the Majority considered that the OTP had erred in concluding that, given the allegedly modest influence of the crimes on the general situation of Gaza and notwithstanding the personal prejudice suffered by the victims, the impact of the alleged crimes was insufficient to warrant the opening of an investigation.
[768] *Ibidem*, par. 50.
[769] *Ibidem*, par. 51. The Majority underlined the striking discrepancy between the international concern that the events have attracted and the OTP's possibly premature conclusions on gravity. This final polemic paragraph of the decision seems to imply that the OTP's negative conclusion on the

In his partially dissenting opinion, Judge Péter Kovács provided a different perspective on some the most relevant aspects of the Majority's decision. In particular, he reasoned that the PTC's power to supervise the OTP's discretionary choices at the preliminary stage shouldn't be construed as a sort of appeal on the merits against those decisions, but exclusively as an external control on their legality in order "to make sure that the Prosecutor has not abused her discretion"[770]. In other words, according to the Hungarian judge the Majority had extended the scope of judicial review well beyond what would have been permissible under the statutory regime, unduly interfering with the exercise of prosecutorial discretion; instead, the PTC should have followed a "a more deferential approach" towards the Prosecutor's use of discretion[771]. As regards the review of the gravity assessment the dissenting judge argued that based on the information available at the preliminary stage the OTP's conclusions could not be deemed unreasonable, also in the light of gravity's function as a criterion for the selection of situations and crimes warranting the Court's involvement[772].

In light of the restrictive stance of the PTC on the latitude of prosecutorial discretion at the preliminary examination stage and the in-depth judicial review conducted by the preliminary judges, the Office sought to appeal the Chamber's decision[773]. Given that article 82 of the Statute does not provide for the direct impugnation of a PTC's review decision rendered under article 53(3)[774], the OTP reasoned in its Notice of Appeal that the Chamber's decision amounted—in substance and despite its *nomen juris*—to a decision "with respect to admissibility", since it affirmed that the potential cases likely to arise from the Comoros situation were admissible[775]. The Comoros asked the Appeals Chamber to dismiss the appeal

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opening of an investigation had been the result of the Office's failure to fully uphold its mandate under the Statute.

[770] See Partly Dissenting Opinion of Judge Péter Kovács, *Situation on the Registered Vessels of the Comoros, Greece and Cambodia*, ICC-01/13-34-Anx-Corr, 16 July 2015, par. 2, 7.

[771] *Ibidem*, par. 8.

[772] *Ibidem*, par. 14-23.

[773] See ICC-OTP, 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' (ICC-01/13-34), *Situation on the Registered Vessels of the Comoros, Greece and Cambodia*, ICC-01/13-35, 27 July 2015.

[774] See article 82(1)(a) of the Statute.

[775] See ICC-OTP, 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' (ICC-01/13-34), *Situation on the Registered Vessels of the Comoros, Greece and Cambodia*, ICC-01/13-35, 27 July 2015, par. 2, 8-10.

in limine for procedural reasons, arguing that the impugned decision could not qualify as one regarding admissibility[776]. The majority of the AC—Judges Silvia Fernández de Gurmendi e Christine Van den Wyngaert jointly dissenting[777]—shared this latter view, and dismissed the appeal declining to decide on the merits, having taken into consideration the Court's pertinent precedents[778], the statutory scheme of judicial review pursuant to article 53 of the Statute[779] and the Statute's negotiating history[780]. In particular, the AC's reasoning on the statutory scheme for judicial review under article 53 provides a clear-cut explication of the differences between the *ex parte* review under paragraph (3)(a) and the *ex officio* review under paragraph (3)(b) of this provision. As already seen in the static analysis carried out in Part Two, in the first of these two scenarios—the one relevant to the situation at hand—the PTC can only request the OTP to reconsider its previous decision, while it cannot compel the Office to open an investigation[781]. In other words, the Prosecutor has the last word on the decision to open or not to open the investigation, but is certainly under an obligation to reconsider its previous decision (and to do so in a timely manner)[782].

The OTP's reconsideration of the situation only came to an end in November 2017, more than two years after the PTC's decision had become final as a result of the AC's decision on the inadmissibility of the appeal, and three years after the original decision contained in the Article 53(1) Report. The Office put forward a detailed and extremely analytical document explaining the reasons that had led the

[776] See Application by the Government of the Comoros to dismiss *in limine* the Prosecution '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" (ICC-01/13-34)'", *Situation on the Registered Vessels of the Comoros, Greece and Cambodia*, ICC-01/13-39, 3 August 2015, par. 1, 3-4, 9-12, 15-18, 22. According to the Comoros the impugned decision couldn't qualify as a decision with respect to admissibility on the one hand because it lacked the character of finality (in that it did not explicitly decide on the issue of admissibility), and on the other because it simply invited the OTP to reconsider its previous decision, without predetermining the outcome of such reconsideration or mandating the opening of the investigation.
[777] See Joint Dissenting Opinion of Judge Silvia Fernández De Gurmendi and Judge Christine Van Den Wyngaert", *Situation on the Registered Vessels of the Comoros, Greece and Cambodia*, ICC-01/13-51-Anx, 6 November 2015.
[778] See ICC, 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", *Situation on the Registered Vessels of the Comoros, Greece and Cambodia*, ICC-01/13-51, AC, 6 November 2015, par. 41-52.
[779] *Ibidem*, par. 53-60.
[780] *Ibidem*, par. 61-65.
[781] *Ibidem*, par. 54-56, 59, 64.
[782] See Rule 108(2) of the RPE.

Prosecutor to confirm her previous decision, largely disagreeing with the PTC's approach[783]. This document is of paramount importance in order to understand the OTP-judges relationships and the dynamics of prosecutorial discretion at the preliminary stage, as it reveals the existence of clearly conflicting interpretations of the relevant statutory provisions, in the purported absence of a judicial forum where such disagreement can be resolved[784]. It also stands out as a clear example of the OTP's determination to safeguard in any possible manner its discretion vis-à-vis the PTC's supervisory powers.

The Office's Final Decision articulates its analysis around three main issues, namely: i) whether the reasoning in the Request discloses a well founded basis to reach a different conclusion than that contained in the Report; ii) whether the Prosecution considers there is a well founded basis to reach a different conclusion, among other factors, on the arguments raised by the Comoros and the victims before the Pre-Trial Chamber; iii) whether there is a well founded basis to reach a different conclusion than that contained in the Report based on any new facts or information which have become available since its publication in November 2014[785]. The most relevant disagreements between the OTP and PTC are articulated in the Office's submissions sub i). In this part of the decision the Prosecutor takes issue with the PTC's request for reconsideration with regard to three main points.

Firstly, the OTP disagrees with the Chamber as regards the interpretation of the "reasonable basis to believe" standard under article 53(1) of the Statute, considering that the PTC has interpreted it as a "screening standard" as opposed to the more appropriate construction as a "result standard"[786]. In other words, according to the Office the PTC oversimplified the nature of the article 53(1) assessment, requiring the OTP to "accept as true (for the purpose of a preliminary examination) any information or claim which is not 'manifestly false'"[787], thereby suggesting that "*any* contradictions or inconsistencies in the available information—which do not

[783] See ICC-OTP, Final decision of the Prosecution concerning the "Article 53(1) Report" (ICC-01/13-6-AnxA), dated 6 November 2014, *Situation on the Registered Vessels of the Comoros*, *Greece and Cambodia*, ICC-01/13-57-Anx1, 30 November 2017, par. 2-3.
[784] *Ibidem*, par. 14. The OTP alleges that in the absence of an obvious forum to reconcile these differences, the only option available to the Office is to transparently put forward "clearly reasoned submission" to explain its position, such as those contained in the final decision at hand.
[785] *Ibidem*, par. 8.
[786] *Ibidem*, par. 24.
[787] *Ibidem*.

rise to the level of making the information "manifestly false" but which prevent the result standard being met—*likewise* militate in favour of investigation"[788]. Based on these arguments the OTP regrets the impossibility to concur with the PTC's request, stressing in particular the fact that the Chamber "confused the Prosecution's assessment of the *specific information* concerning [each incident] with its assessment, in the context of all the other available information, of *the conclusions which could reasonably be drawn from the totality of the available information*"[789].

Secondly, the OTP disagrees on the standard of review concretely applied by the Chamber in its request for reconsideration[790]. According to the Prosecutor the Chamber, while in principle subscribing to an error-based review of the OTP's decision, had in practice entered a *de novo* review[791]. In other words, the Chamber reached an alternative conclusion, overwriting its own assessment of the facts and inferences to be drawn from such facts to that of the Prosecutor[792]. In so doing the Chamber allegedly failed to recognise any measure of deference to the primary fact-finder, thus risking to compromise the Prosecutor's independence and giving the impression "that the Prosecution's original decision-making was arbitrary— if the Prosecution is willing to alter its conclusions simply when asked, without a showing of error, this may imply that the Prosecution's reasoning was not dictated by the law and the facts" [793].

Thirdly, the OTP strongly disagrees on various points of the reasoning of the Chamber's request for reconsideration[794]. In particular, the Office considers the Chamber's reasoning insufficient to warrant the conclusions reached in its decision; that the preliminary judges had mistaken or mischaracterised the OTP's position on a number of points; and that they failed to address certain fundamental aspects of the

[788] *Ibidem*, par. 25 (emphasis in the original text).
[789] *Ibidem*, par. 34 (emphasis in the original text).
[790] *Ibidem*, par. 36-57.
[791] *Ibidem*, par. 52. On the distinction between the forms of review see, *ibidem*, par. 41-42.
[792] *Ibidem*, par. 51.
[793] *Ibidem*, par. 51 and par. 58, 62, 65 with regard to the appropriate degree of deference that should be recognised to the OTP. It should also be added that the Chamber, according to the OTP, entered such a *de novo* review without having before itself all the information on which the OTP had based its decision, since the Chamber had not requested them pursuant to Rule 107(2) of the RPE. For this reason, the OTP argues that "Disagreements concerning the evaluation of the available information can only be given very limited weight by the Prosecution when the reviewing body has not had opportunity to examine the available information itself" (*Ibidem*, par. 68).
[794] *Ibidem*, par. 69.

OTP's Report, thereby "imped[ing] the Prosecution's ability to understand why its reasoning may have been erroneous . . . giv[ing] no explanation for any such determination which would allow the Prosecution meaningfully to (re)consider such views on their merits"[795]. The Office considered that these profound disagreements with the PTC on key points of the Chamber's request for reconsideration could have been sufficient to terminate the reconsideration and to confirm its previous decision[796]. Nevertheless, "mindful of the relative novelty of the article 53 procedure, and the importance of the issues at stake . . . in the exercise of its discretion under article 53(3)(a) and rule 108", the Office decided to consider on its own motion whether the arguments put forward by the victims and the referring state[797], as well as the alleged new facts and circumstances posterior to the adoption of the Article 53(1) Report, could lead the Office to change its previous conclusions[798]. The Office, after a detailed analysis, concluded in the negative on both points, thereby reconfirming in full its previous decision[799].

The Comoros have recently sought to challenge the OTP's Final Decision notified to the parties pursuant to Rule 108(3) of the RPE, on the assumption that such document is a (second) autonomous decision pursuant to article 53(1) of the Statute, reviewable by the PTC upon request of the referring state[800]. The OTP asked the PTC to dismiss *in limine* the request for lack of jurisdiction arguing that the decision rendered upon reconsideration cannot be itself subject to further judicial review[801]. At the time of writing the case is still pending, but it seems unlikely that the Chamber will accept to decide on the merits of the second request for judicial

[795] *Ibidem*, par. 71. A detailed analysis of the issues affected, according to the OTP, by insufficient reasoning is provided in par. 73-94.
[796] *Ibidem*, par. 95.
[797] *Ibidem*, par. 96-97. This analysis is carried out in detail in par. 99- 170 of the decision.
[798] *Ibidem*, par. 171-331.
[799] *Ibidem*, par. 123, 125, 131-132, 134, 138, 144-145, 147, 154, 158-159, 165, 170 and, ultimately, 331-334.
[800] See Public Redacted Version of "Application for Judicial Review by the Government of the Union of the Comoros", *Situation on the Registered Vessels of the Comoros*, *Greece and Cambodia*, ICC-01/13-58-Red, 23 February 2018, par. 23-36. The Comoros also challenged the part of decision in which the OTP, based on a *proprio motu* analysis of allegedly "new facts", concluded that even considering such new information there would be no ground for changing its previous decision (*ibidem*, par. 37-41).
[801] See ICC-OTP, Prosecution's Response to the Government of the Union of the Comoros' "Application for Judicial Review" (ICC-01/13-58) (Lack of Jurisdiction), *Situation on the Registered Vessels of the Comoros*, *Greece and Cambodia*, ICC-01/13-61, 13 March 2018, par. 4-8, 11-12, 19-20. On the most recent developments of the situation see, *infra*, the Addendum to this work (347-351).

review, given the traditional formalism and self-restraint in granting leaves to appeal and other challenges to judicial decisions.

The Comoros situation has been a serious test bench for the ICC's mechanism of checks and balances with regard to the exercise of prosecutorial discretion. It showed a clear institutional tension between the OTP's uncompromising defence of its discretionary powers and the judges' attempt to influence the Office's approach towards the assessment of gravity through the request for reconsideration. Such dialectic rests on incompatible interpretations on the very nature of article 53(1) and (3)(a) of the Statute, which at present—failing any other mechanism of solution—cannot be authoritatively settled by means of a judicial determination. Nevertheless, the drafters' deliberate choice to give the OTP the final say on the investigation suggests that a certain degree of uncertainty and mutual disagreement may be tolerated by the system, subject two caveats. First, the OTP—irrespective of the non-binding nature of the request for reconsideration with respect to its results—must act in good faith when reconsidering its previous decision. She must carefully address the substance of the PTC's findings and avoid reconfirming its decision based on a mere restatement of the original arguments. This duty of good faith includes the Office's obligation under Rule 108(2) of the RPE to timely put forward its final decision, something that clearly did not happen in the Comoros situation. Second, as aptly suggested by the OTP, when the Prosecutor is resolved to confirm its previous decision and disagrees with the Chamber's interpretation of the applicable standards, she must openly and transparently explain the reasons for not being able to concur with the Chamber's request for reconsideration. It is only by promoting this institutional 'dialogue' that the inherent fuzziness connected to the exercise of prosecutorial discretion and its judicial review can somehow be rationalised, leading to more consistent results in the future. It should also be added that the Pre-Trial Chambers (and eventually the AC) could greatly contribute to this dialogue, providing greater clarity on the standards of article 53 and adopting a constructive and less confrontational attitude towards the Office in discharging their responsibilities of judicial review.

In any event, it should be borne in mind that the Comoros situation is but the first example of practice as to the judicial review of article 53(1) negative decisions,

and that its outcomes might have been influenced by the peculiar underlying factual and legal circumstances. In other words, nothing precludes that in future situations the procedural posture of the OTP could be different and conveniently adapted to a different context, or that other PTCs could differ from the *Comoros* one in the exercise of judicial review.

3.1.4 Closing a preliminary examination based on complementarity and the interests of justice

So far the OTP has never closed a PE with a decision not to proceed based on complementarity or on the consideration that the opening of an investigation would run contrary to the interests of justice. Nevertheless, while the OTP's practice as regards the latter is virtually inexistent[802], the Office has been keeping on Phase 3 of the preliminary examination various situations, sometimes for extended periods of time, on grounds of complementarity. It did so in order to assess and monitor the national efforts to investigate and prosecute alleged crimes that could potentially form the object of the attention of the Court. This follow-up may play a role in promoting genuine national judicial proceedings, through a policy of proactive complementarity. The practice of the Office in this area is well established, as the situations of Colombia, Guinea and Nigeria clearly demonstrate[803]. In other situations, such as the one of Georgia, the OTP finally concluded that based on complementarity arguments an investigation was needed in order to overcome the

[802] In practice, when the OTP decides to proceed with an investigation or to seek authority from the PTC to open one, it generally deals with the interests of justice in an extremely succinct way, by confirming in few words that according to the Office there is no risk that the opening of an investigation would run contrary to the interests of justice. See, e.g., ICC-OTP, Article 53(1) Report, *Situation in the Republic of Mali*, 16 January 2013, par. 171-172; ICC-OTP, Article 53(1) Report, *Situation in Central African Republic II*, 24 September 2014, par. 265-266; ICC-OTP, Request for authorisation of an investigation pursuant to article 15, *Situation in Georgia*, ICC-01/15-4, 13 October 2015, par. 16, 43, 338, 343-344.

[803] For an idea of the activities performed by the OTP in the supervision of national proceedings with regard to these situation see Report on Preliminary Examination activities 2011, 13 December 2011, par. 74-87; ICC-OTP, Report on Preliminary Examination activities 2012, November 2012, par. 108-119, 152-163; ICC-OTP, Report on Preliminary Examination activities 2013, November 2013, par. 130-152, 191-200, 220-229; ICC-OTP, Report on Preliminary Examination activities 2014, 2 December 2014, par. 111-131, 162-170, 182-189; ICC-OTP, Report on Preliminary Examination activities 2015, 12 November 2015, par. 146-167, 175-186, 194-224; ICC-OTP, Report on Preliminary Examination activities 2016, 14 November 2016, par. 240-263, 271-283, 298-307; ICC-OTP, Report on Preliminary Examination activities 2017, 4 December 2017, par. 130-155, 163-171, 215-229.

lack of progress of national proceedings as regards the alleged criminal conducts under examination[804].

It should be borne in mind that a decision not proceed based on complementarity involves a positive conclusion—albeit potentially revisable based on a change of the circumstances—on the willingness and ability of the national authorities to genuinely investigate and prosecute. It seems justified that the OTP will only defer to national proceedings when reasonably sure that they are representative of the main forms of criminality underlying the situation and cover substantially the same conducts that may have formed the object of investigation and prosecution at the ICC, in the context of procedures that are respectful of internationally recognised standards. This assessment, especially in countries in a situation of conflict, unrest, with unstable institutions or undergoing pacification efforts might take a long time, as the practice of the Office shows[805]. It could be asked whether the fact of keeping a situation on Phase 3 examination for a virtually indefinite period of time amounts to an implicit decision on complementarity, but the question must be answered in the negative. A preliminary examination can only be deemed concluded with an explicit prosecutorial decision either to proceed to an investigation or to close the PE. This is confirmed also in the light of the absence of any effective judicial remedy against the inaction or dilatory behaviour of the OTP in (not) taking a decision pursuant to article 53(1) of the Statute. In any event, also looking at the reporting practice of the Office, it seems difficult to deny that during the assessment of complementarity the OTP—notwithstanding the 'mantra' on the exclusively legal nature of such an assessment—must take into account the prospective institutional (and *lato sensu* political) effects of the preliminary examination on the national situation and its potential outcomes. This requires a good measure of caution and the use of various tools of 'legal diplomacy' on the part of the Office, which find their most evident expression in the dialogue with national authorities, in particular with the prosecutorial and judicial institutions of the interested states. To deny that practical considerations and reasons of institutional opportunity play a role—although subordinated to strictly legal considerations—in

[804] See ICC-OTP, Request for authorisation of an investigation pursuant to article 15, *Situation in Georgia*, ICC-01/15-4, 13 October 2015, par. 6, 13, 14, 41, 42.
[805] See, *supra*, the table of page 194-195.

shaping the OTP's behaviour at the preliminary examination stage of proceedings would simply run contrary to empirical evidence and defeat the purpose of a mechanism premised on the orderly exercise of prosecutorial discretion.

With regard to the possibility to close a preliminary examination pursuant to a Phase 4 assessment on the contrariety of an investigation to the interests of justice, it has already been stressed that there are no instances of practice in this field, given that the OTP interprets this discretionary clause in the outmost restrictive terms. At present the Office does not seem intentioned to change its policy on the interests of justice and expose itself to the *ex officio* review of the PTC pursuant to article 53(3)(b) of the Statute, particularly after the episode of stark disagreement with the *Comoros* PTC in the first instance of judicial review of an article 53(1) decision not to proceed. In terms of evaluation of the transformative role of prosecutorial practice it can preliminarily be concluded that the OTP's strict position on the interests of justice—probably justified by the intention to stay away from exceedingly politically-sensitive decisions—has somehow 'sterilised' the discretionary potential of the clause as well as the Court's potential contribution to peace and transitional justice, showing an example of discrepancy between the statutory model and its practical implementation on the part of the OTP and Chambers.

3.2 Decisions to open an investigation of a situation pursuant to article 53(1) of the Statute

The OTP has so far opened investigations—or obtained a judicial authorisation to open one—with regard to eleven country-situations[806]. Of these, five were opened pursuant to state referrals, two pursuant to UNSC referral and four pursuant to the OTP's *proprio motu* followed by the authorisation of the competent PTC.

Early in the practice of the Office, before the adoption of the Policy Paper on preliminary examinations in 2013, the OTP used to announce to the public the conclusion of the preliminary examination activities and the opening of an

[806] The situations currently under investigation concern the Democratic Republic of the Congo, Uganda, Darfur/Sudan, Central African Republic (I and II), Kenya, Libya, Côte d'Ivoire, Mali, Georgia and Burundi. A twelfth investigation might be launched in the near future were the PTC to authorise the OTP's request to investigate in the situation in Afghanistan.

investigation (or the decision to request an authorisation to the PTC) by means of an official statement[807], without producing a dedicated report stating the reasons for its decision and explaining in detail the activities performed during the preliminary examination[808]. Only in case of *proprio motu* additional information on the conduct of PE and the inferences that had led the Office to ask a judicial authorisation could be more thoroughly examined through the analysis of the request for authorisation itself.

This practice was later superseded in favour of a more transparent decision-making process where the Office not only continuously reports on the progress of the preliminary examination through the annual reports, but also puts forward a final in-depth 'Article 53(1) Report' containing the factual and legal analysis sustaining the decision to open an investigation[809].

In the following paragraphs the practice of the Office (and the PTC in case of *proprio motu*) in the opening of investigations pursuant to an article 53(1) positive determination is analysed having regard to the distinction between the different triggering mechanisms and the supervisory role played by the PTC. As it will be seen, in this field the interpretive disagreements between the OTP and the referring entity on the one hand and, on the other, between the OTP and judges, seem to be relatively limited, in particular when considering the PTCs' rather liberal practice as regards the authorisation of *proprio motu* investigations.

3.2.1 Investigations opened in case of state and UNSC referrals

As it is well known the first few situations to come to the attention of the OTP and of the Court were the result of state referrals, in the peculiar version—initially contested by some—of self-referrals. Most of the situations self-referred by

[807] See ICC-OTP, Press release, The Office of the Prosecutor of the International Criminal Court opens its first investigation, ICC-OTP-20040623-59, 23 June 2004; ICC-OTP, Press release, Prosecutor of the International Criminal Court opens an investigation into Northern Uganda, ICC-OTP-20040729-65, 29 July 2004; ICC-OTP, Statement, Prosecutor opens investigation in the Central African Republic, 22 May 2007.

[808] The analytical documents or internal reports supporting the OTP's conclusion are not publicly available and the press releases or announcements of the OTP only refer to the positive conclusion on the opening of the investigation and a summary of the reasons for such decision.

[809] Two examples of this new practice are the situation in Mali and CAR II. See, respectively, ICC-OTP, Article 53(1) Report, *Situation in the Republic of Mali*, 16 January 2013 and ICC-OTP, Article 53(1) Report, *Situation in the Central African Republic II*, 24 September 2014.

States Parties later resulted in the opening of an investigation, with the only exception of the situation concerning the Comoros and, recently, the Gabonese Republic[810]. In other words the success rate of a state referral in terms of prospective opening of an investigation by the OTP has been in the practice very high. An analogous trend can be observed with regard to the situations referred by the UNSC, both of which were characterised by extremely short PE followed by the opening of an investigation. In order to elucidate the connection between the triggering mechanism and the high success rate of preliminary examinations stemming from state or UNSC referrals, it is important to reflect on the reasons that have persuaded the OTP to conclude that an investigation was warranted in all those situations.

With regard to the UNSC's referrals, as it emerges also from the temporal analysis carried out earlier in this chapter, the OTP decided to open an investigation pursuant to a very short preliminary examination mainly on grounds of gravity and complementarity arguments. The situation of Darfur/Sudan had already been the object of extensive fact-finding activities revealing the magnitude, scale and nature of the alleged crimes, inducing the UNSC to refer the situation to the Court. In addition to that, given that the patterns of criminal conduct involved, among the others, various Sudanese state officials—including the sitting Head of State—the OTP considered that nothing could reasonably be expected in terms of genuine national proceedings with regard to the complementarity assessment[811]. As a result, the OTP's determination that the criteria for the opening of an investigation had been met was relatively straightforward[812]. The Libyan situation, also stemming from a UNSC's referral, shares some of these features as regards the OTP's preliminary

[810] To be more precise the Comoros' referral was a self-referral only in respect of the alleged criminal conducts that took place on the *Mavi Marmara*, a vessel registered in the Union of the Comoros. The lawyers acting on behalf of the Comoros had nevertheless clarified that the referral encompassed also the conducts that took place on other vessels of the so-called *Freedom Flottilla*, registered respectively in the Hellenic Republic and the Kingdom of Cambodia, both of which are States Parties to the Statute. For that part, the Comoros' referral is technically an inter-state referral, i.e. a state denouncing the commission of alleged crimes within the jurisdiction of the Court taking place in the territory of another State Party, or such as in this case, on a vessel registered in another State Party.

[811] See ICC-OTP, Statement of the Prosecutor of the International Criminal Court Mr. Luis Moreno Ocampo to the Security Council on 29 June 2005 pursuant to UNSCR 1593 (2005), 29 June 2005, 2-3; ICC-OTP, First Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593 (2005), 29 June 2005, 3-4.

[812] On the importance of considerations of gravity in the opening of an investigation pursuant to the UNSC's referral in the Darfur-Sudan situation see, e.g., ICC-OTP, Report on the activities performed during the first three years (June 2003—June 2006), 12 September 2006, 7: "The situation in Darfur, the Sudan, referred to the Prosecutor by the Security Council, also clearly met the gravity standard".

examination, except for the absence in this situation of any fact-finding activity ahead of the referral to the Court. Again, gravity and complementarity (at least initially and at the preliminary and situational stage) have played a major role in prompting the Office to open an investigation just a few days after the referral. Nevertheless, the individual cases prosecuted within the situation by the OTP gave rise to differing assessments of admissibility *sub specie* complementarity, which were likely influenced by the underlying political and institutional developments in Libya after the deposal of Qaddafi[813].

The assessment of gravity and complementarity was at the centre of the decisions to open investigations in cases of state self-referral, although the Office's conclusions on the point were more categorical than analytical. With regard to the decisions to open an investigation in the DRC and Uganda, the OTP plainly considered that "After thorough analysis, the Office concluded that the situations in the Democratic Republic of the Congo ("DRC") and Northern Uganda were the gravest admissible situations under the jurisdiction of the Court"[814]. With regard to complementarity, it should be reminded that both situations were characterised by the Prosecutor's choice to encourage state self-referrals under the threat of *proprio motu* action[815], in line with the idea expressed in one of the earliest OTP's policy papers, according to which "There may be cases where inaction by States is the

[813] Reference here is to the different treatment of the admissibility issue in the *Qaddafi* and *Al-Senussi* cases. See, *supra*, Part Two, Chapter One, par. 3.3, footnotes 322, 326-327.
[814] See ICC-OTP, Report on the activities performed during the first three years (June 2003—June 2006), 12 September 2006, 6-7. While it cannot be doubted that this analysis had been "thorough", the public did not have access to any prosecutorial document providing the reasons for such conclusion, together with the relevant supporting information.
[815] With regard to the DRC, see ICC-OTP, Report of the Prosecutor of the ICC, Mr Luis Moreno-Ocampo to the Second Assembly of States Parties to the Rome Statute of the International Criminal Court, 8 September 2003, 4: "If necessary, however, I stand ready to seek authorisation from a Pre-Trial Chamber to start an investigation under my *proprio motu* powers. In this eventuality, and in light of the current circumstances in the field, the protection of witnesses, gathering of evidence and arrest of suspects will be extremely difficult without the strong support of national or international forces. If these forces are not available, the Office of the Prosecutor will need to investigate from outside and rely on international cooperation for the arrest and surrender of the alleged perpetrators. Our role could be facilitated by a referral or active support from the DRC. The Court and the territorial State may agree that a consensual division of labour could be an effective approach". More generally on this practice of the first Prosecutor see S. M. H. NOUWEN, W. G. WERNER, *Doing Justice to the Political: The International Criminal Court in Uganda and Sudan*, in *European Journal of International Law*, vol. 21, no. 4, 2010, 947 and P. CLARK, *Chasing cases: The ICC and the politics of state referral in the Democratic Republic of the Congo and Uganda*, in C. STAHN, M. M. EL ZEIDY (eds.), *The International Criminal Court and Complementarity: From Theory to Practice*, Cambridge, 2011, 1180.

appropriate course of action"[816]. Leaving aside the issue of the compatibility of territorial state self-referrals with the institutional architecture of complementarity[817], suffices here to observe that the early practice of the Office of instigating such referrals significantly influenced the states' attitude towards the Court as well as the Chambers' acceptance of this problematic mechanism, with particular regard to the notion of "state inaction" for the purposes of the admissibility assessment[818]. In contrast, in the situation of Central African Republic I, the OTP carried out a significantly longer preliminary examination compared to the situations in the DRC and Uganda[819], and heavily relied on the position expressed by national authorities to conclude on point of complementarity, with particular regard to the inability of domestic judicial institutions to genuinely investigate and prosecute the alleged crimes[820].

Only thanks to the recent developments in prosecutorial reporting practices can observers more thoroughly analyse the OTP's reasoning as regards the opening of investigations in case of state referral. In the situation of Mali and CAR II, the Office provided the details of its admissibility assessment in dedicated sections of the concluding 'Article 53(1) Report'.

With regard to the Malian situation, the complementarity prong of the admissibility test has been quickly dealt with by the Office, on grounds of the inexistence of genuine national proceedings on the conducts forming the object of preliminary examination and prospective investigation. The lack of national

[816] See ICC-OTP, Paper on some policy issues before the Office of the Prosecutor, September 2003, 5.
[817] See, *supra*, footnote 86.
[818] See, e.g., ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte D'Ivoire, *Situation in the Republic of Côte D'Ivoire*, ICC-02/11-12, PTC III, 3 October 2011, par. 193; ICC, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, *Prosecutor v. Katanga*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-1497, AC, 25 September 2009, par. 78; ICC, *Corrigendum* to the Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled "Decision on the Admissibility and Abuse of Process Challenges", *Prosecutor v. Bemba*, *Situation in the Central African Republic*, ICC-01/05-01/08-962-Corr, AC, 19 October 2010, par. 107-109.
[819] See, *supra*, the table of page 193. The PE of CAR I lasted 882 days, while the examination for the DRC and Uganda lasted, respectively, 111 and 226 days.
[820] In particular, the OTP relied on the fact that the *Cour de Cassation* of the Central African Republic had confirmed in April 2006 that the "national system was unable to carry out the complex criminal proceedings necessary to investigate and prosecute the alleged crimes." See, ICC-OTP, Statement, Prosecutor opens investigation in the Central African Republic, 22 May 2007; Court of Cassation of the Central African Republic, Arrêt du 11 avril 2006 de la Chambre criminelle de la Cour de Cassation, CAR-OTP-0019-0258, EVD-P01327, 0260-0261.

proceedings due to the alleged inability to entertain judicial activities in the interested areas of the country had been confirmed by the state in providing information in support of its referral[821]. The assessment of gravity goes into greater detail, by discretely assessing each set of incidents under the usual criteria of scale, nature, manner of commission and impact of the alleged crimes, to conclude that the sufficient gravity threshold had been met[822].

With regard to the situation in Central African Republic II, notwithstanding the position expressed by the state in its referral and according to which "Les juridictions centrafricaines . . . ne sont pas en mesure de mener à bien les enquêtes et les poursuites nécessaires sur ces crimes"[823], the Office thoroughly assessed the multiple efforts of domestic institutions to initiate proceedings against those who appeared to bear the greatest responsibility for the crimes allegedly committed in the situation[824]. Upon consideration, also based on the first-hand information gathered during a visit in Bangui, the Office concluded that "existing proceedings remain limited to the preliminary stage and . . . prosecutors and police generally lack the capacity and security to conduct investigations and apprehend and detain suspects" and that therefore the potential cases likely to arise from the situation would be admissible[825]. The Office's conclusions on point of gravity are based on a rather cursory analysis of the incidents under examination based on the four non-exhaustive criteria listed under Regulation 29(2) of the Regulations of the OTP[826].

In all the situations stemming from state referrals, the OTP did not enter into a positive assessment regarding the interests of justice, plainly concluding that the opening of an investigation, having considered the relevant statutory factors, did not run contrary to such interests[827].

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[821] See ICC-OTP, Article 53(1) Report, *Situation in the Republic of Mali*, 16 January 2013, par. 136-141.
[822] *Ibidem*, par. 142-170.
[823] See Referral of the Central African Republic, annexed to the Decision Assigning the Situation in the Central African Republic II to Pre-Trial Chamber II, *Situation in the Central African Republic II*, ICC-01/14-1-Anx1, 18 June 2014.
[824] See ICC-OTP, Article 53(1) Report, *Situation in the Central African Republic II*, 24 September 2014, par. 226-251.
[825] *Ibidem*, par. 250.
[826] *Ibidem*, par. 255-264.
[827] See, e.g., ICC-OTP, First Report of the Prosecutor of the International Criminal Court, Mr. Luis Moreno Ocampo, to the Security Council pursuant to UNSCR 1593 (2005), 29 June 2005, 4-5; ICC-OTP, First Report of the Prosecutor of the International Criminal Court to the UNSC pursuant to UNSCR 1970 (2011), 4 May 2011, par. 21; ICC-OTP, Article 53(1) Report, *Situation in the Republic*

From the above analysis of the prosecutorial practice on the opening of investigation in case of state and UNSC referrals a few preliminary conclusions seem warranted.

In the first place, it can be argued that the OTP has so far shown a certain measure of deference towards the referring entity, declining to open an investigation pursuant to a state referral only in the peculiar situation referred by the Comoros and in the Gabonese situation. In both instances of UNSC's referral the Office swiftly proceeded to open the investigation. With regard to state referrals, this might be at least partially explained on grounds of the 'negotiated character' of some of the self-referrals, whereby the OTP refrained from acting *proprio motu* after having actively engaged in consultations and 'legal diplomacy' with national authorities in order to convince the state of the opportunity of a self-referral. With regard to UNSC's referrals, while it seems very unlikely to derive from the Statute an unconditional obligation to open an investigation in such situations[828], it cannot be denied that the authority of the Security Council, coupled with the undisputed gravity of the referred situations, have so far led the Office to rapidly conclude in favour of the opening of investigations, cutting back on the average duration of PE[829].

In the second place, the OTP—in case of state self-referral—has strongly relied on the states' self-proclaimed partial or complete inability to carry out investigations and prosecutions of the alleged crimes, for the purposes of the complementarity test. This dynamic contributed to simplify the admissibility assessment, although the state's own judgement cannot relieve the Office from a concrete and specific analysis on the existence and genuineness of national proceedings. In case of UNSC's referral, a negative assessment on the willingness and/or ability to genuinely investigate or prosecute was somehow implicit in the

of Mali, 16 January 2013, par. 171-172 and ICC-OTP, Article 53(1) Report, *Situation in the Central African Republic II*, 24 September 2014, par. 265-266.

[828] See, *supra*, footnote 208. The fact that the Office, as a matter of policy and practice, carries out a preliminary examination irrespective of the triggering mechanism clearly shows that the OTP does not consider itself bound to open an investigation in case of UNSC referral. See, ICC-OTP, Policy Paper on Preliminary Examinations, November 2003, par. 73, 76.

[829] See, *supra*, the table of page 193.

referring resolutions and was plainly endorsed by the Office, without the need for in-depth decisions containing the reasoning on complementarity[830].

In the third place, it should be reminded that in terms of judicial supervision of article 53(1) positive decisions, the OTP's preliminary assessment of 'situational admissibility' is not generally subject *per se* to judicial review, given the lack of any practical application of the procedure for preliminary rulings regarding admissibility under article 18 of the Statute. The OTP's preliminary conclusion that the potential cases likely to arise from a situation are admissible can only be subject to judicial review at the more individualised stage of the case, in line with the procedure of article 19 of the Statute.

A potential development in the direction of an early judicial supervision emerged from the OTP's recent request for a pre-preliminary ruling on jurisdiction concerning the alleged crimes against the Rohingya across Myanmar and Bangladesh. The Majority of the competent PTC shared the Office's reasoning on the Court's power to entertain the request, although it based its decision on an entirely different legal basis than the one relied on by the Office and held that, in effect, the request did not properly pertain to a pre-preliminary phase, but rather to an 'informal' preliminary examination whose formal opening had not been officially declared by the Office[831]. This recent decision might inaugurate a novel practice of early rulings on jurisdiction and/or admissibility whereby the OTP and preliminary judges interact in pre-emptively defining the scope of a preliminary examination

[830] See, ICC-OTP, Report of the Prosecutor of the International Criminal Court, Mr. Luis Moreno Ocampo, to the Security Council pursuant to UNSCR 1593 (2005), 29 June 2005, 3-4; ICC-OTP, First Report of the Prosecutor of the International Criminal Court to the UNSC pursuant to UNSCR 1970 (2011), 4 May 2011, par. 13-14.

[831] See, ICC, Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", *Application under Regulation 46(3) of the Regulations of the Court*, ICC-RoC46(3)-01/18-37, PTC I, 6 September 2018, 26-33. The Majority completely shifted *ex proprio motu* the analysis from article 19(3) of the Statute—on which the OTP's request was based—and grounded its decision on the principle of *Kompetenz-Kompetenz*, primarily as incorporated by the Rome Statute under article 119(1) and, concurrently, as an established principle of international law to which the Court could resort under article 21(1)(b) of the Statute. At the same time the Majority criticised the OTP's qualification of the procedural phase at hand as pre-preliminary, alleging that the activities already performed by the Office did in fact have the character of a preliminary examination (*ibidem*, par. 81-82). In any event the OTP, following the Chamber's decision, has announced the opening of a full-fledged preliminary examination. See ICC-OTP, Statement of ICC Prosecutor, Mrs Fatou Bensouda, on opening a Preliminary Examination concerning the alleged deportation of the Rohingya people from Myanmar to Bangladesh, 18 September 2018 (available at: https://www.icc-cpi.int/Pages/item.aspx?name=180918-otp-stat-Rohingya, last accessed 6 November 2018).

ahead of its formal opening by the Office[832]. While this case concerns jurisdiction rather than admissibility, it cannot be excluded that in the future the Office might approach the PTC to obtain preliminary clarifications also on point of admissibility, essentially for purposes of judicial economy and to promote the efficient use of the OTP's resources[833].

3.2.2 Prosecutorial and judicial practice in case of proprio motu

The OTP refrained from actively exercising its *proprio motu* powers until late 2009, when it first applied to the PTC for the authorisation to open an investigation on the 2007 post-electoral violence occurred in Kenya[834]. Since then the Office requested an authorisation on other four occasions, namely Côte d'Ivoire, Georgia, Burundi and Afghanistan[835]. It is therefore necessary to reflect on the prosecutorial and judicial trends concerning the 'request-and-authorisation' procedure under article 15 of the Statute, which represent one of the most relevant test benches for the concrete functioning of the checks and balances mechanism as regards the exercise of prosecutorial discretion at the ICC. In particular we shall analyse, on the one hand, the OTP's reasoning strategy to convince the PTCs of the necessity to authorise an investigation and, on the other hand, the PTCs' approach towards the function and

[832] This would be a significant example of institutional interplay between OTP-judges in the early setup of the jurisdictional and admissibility parameters of a situation for purposes of preliminary examination and investigation. It shall be necessary to wait the future practice of the Office and of the PTCs, and see whether it will lead to an interpretive agreement between the Prosecutor and judges or, to the contrary, it will produce instances of open clash between the two actors in other similar circumstances.

[833] Commentators of the Statute positively consider this possibility. See C. K. HALL, D. D. NTANDA NSEREKO, M. J. VENTURA, *op. cit.*, 875: "in certain circumstances, the Prosecutor could attempt to seek a ruling that the Court has jurisdiction over an entire situation or that the situation was admissible … In other words, the Prosecutor could perhaps seek a prompt determination that … investigations and prosecutions were admissible in a situation where there is no doubt that the State's judicial system was unable or unwilling to genuinely investigate or prosecute, thus conserving the Court's resources so that these issues do not have to be relitigated case by case".

[834] See ICC-OTP, Request for authorisation of an investigation pursuant to Article 15, *Situation in the Republic of Kenya*, ICC-01/09-3, 26 November 2009.

[835] See, respectively, ICC-OTP, Request for authorisation of an investigation pursuant to Article 15, *Situation in the Republic of Côte d'Ivoire*, ICC-02/11-3, 23 June 2011; ICC-OTP, Request for authorisation of an investigation pursuant to Article 15, *Situation in Georgia*, ICC-01/15-4, 13 October 2015; ICC-OTP, 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 the Republic of Burundi*, ICC-01/17-5-Red, 15 November 2017; ICC-OTP, Public redacted version of "Request for authorisation of an investigation pursuant to article 15", 20 November 2017, ICC-02/17-7-Conf-Exp, *Situation in the Islamic Republic of Afghanistan*, ICC-02/17-7-Red, 20 November 2017.

latitude of the judicial supervision implicit in the authorisation procedure. This will allow to draw some preliminary conclusions on the current status of the OTP-PTC interactions under article 15 as well as to underline the major points of interpretive agreement and—if any—of disagreement between the two institutional subjects, and the creative/transformative potential of their practices.

It is convenient to focus first on the OTP's practice concerning the requests for judicial authorisation pursuant to article 15(3) of the Statute, with a view to assess any recurring behaviours on the part of the Office, as well as any relevant evolutionary trend based on the dialogue with the competent PTCs. While differences in the content and reasoning among the five requests submitted so far to the PTC are obviously present, based on the specificities of each situation, the structure of these documents is relatively standardised[836].

The first request for authorisation concerning the Kenyan situation contained a relatively thorough summary of the information on which the OTP founded its assessment, with particular attention to both national and international sources, including the reports of various UN bodies and NGOs[837]. The discussion of jurisdiction—in particular *ratione materiae*—takes up most of the request, a trend that has been later generally confirmed in subsequent requests[838]. Being it the first time that the OTP made recourse to the article 15(3) procedure, the Office explored in greater detail key issues such as the scope of the "reasonable basis" standard and the legal nature of the article 15(3) authorisation procedure. The OTP argued in favour of the recognition of a low evidentiary standard to grant the authorisation, of a limited scope for the PTC's judicial supervision and of the "expeditious and summary" character of the authorisation procedure[839]. With regard to the crucial

[836] All the requests contain sections on the procedural background and the historical context; a summary of the information on which the request is based, presented according to their source; the analysis of the criteria to be taken into consideration pursuant to article 53(1) of the Statute—via the 'cross link' contained in Rule 48 of the RPE—namely jurisdiction (temporal, personal, territorial and subject-matter), admissibility (complementarity and gravity), the interests of justice; and the conclusion on the "reasonable basis" standard accompanying the request of authorisation. In general, the most analytical part of the document concerns the analysis of jurisdiction *ratione materiae*, where the existence of both the contextual elements and the specific conducts relating to the alleged crimes is assessed against the applicable evidentiary standard.
[837] ICC-OTP, Request for authorisation of an investigation pursuant to Article 15, *Situation in the Republic of Kenya*, ICC-01/09-3, 26 November 2009, par. 25-44.
[838] *Ibidem*, par. 63-101.
[839] *Ibidem*, par. 103-104, 106-107, 109-111.

aspect of admissibility, the assessment of both complementarity and gravity is relatively 'minimalistic', and does not delve into a detailed in-depth analysis of the constituent elements of the two-pronged complementarity test[840]. Nevertheless, it should be noted that with regard to both jurisdiction and admissibility it is in the Kenya request that the OTP first introduced the concept that at the preliminary stage their assessment must be carried out with regard to the "potential cases" likely to arise from an investigation; a concept that has been fully endorsed by the PTC and is currently at the core of article 15(3) and (4) request and authorisation practices[841]. In this regard, on point of admissibility of the potential cases at the situation stage, the *Kenya* PTC established that such an assessment cannot be made in the abstract, and went on to introduce the criteria that define a "potential case", namely: (i) the groups of persons involved that are likely to be the focus of an investigation; and (ii) the crimes within the jurisdiction of the Court allegedly committed during the incidents that are likely to be the focus of an investigation. In other words the PTC required the Office to provide, together with the request and the accompanying information, a non-binding preliminary list of the crimes and of the potential perpetrators as a term of reference to carry out a meaningful judicial supervision[842]. The OTP, in all subsequent requests for authorisation, followed the PTC's advice and provided the competent Chamber with dedicated annexes containing such confidential preliminary lists[843].

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[840] *Ibidem*, par. 53-55, 56-59.

[841] *Ibidem*, par. 51, 107 (particularly footnote 101). For the judicial recognition of this concept see ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *Situation in the Republic of Kenya*, ICC-01/09-19-Corr, PTC II, 31 March 2010, par. 48-51, 58-59, 64, 182, 197-200.

[842] *Ibidem*, par. 49, 50: "The Prosecutor's selection of the incidents or groups of persons that are likely to shape his future case(s) is preliminary in nature and is not binding for future admissibility assessments. This means that the Prosecutor's selection on the basis of these elements for the purposes of defining a potential "case" for this particular phase may change at a later stage, depending on the development of the investigation". It should be added that this request of the Chamber could explicitly be based on Regulation 49(2) and (3) of the Regulations of the Court, which stipulate the formal requirements for the OTP's request and the necessary accompanying documents. Nevertheless, the Chamber did not expressly recall these provisions.

[843] See ICC-OTP, Request for authorisation of an investigation pursuant to Article 15, *Situation in the Republic of Côte d'Ivoire*, ICC-02/11-3, 23 June 2011, par. 54-58; ICC-OTP, Request for authorisation of an investigation pursuant to Article 15, *Situation in Georgia*, ICC-01/15-4, 13 October 2015, par. 276; ICC-OTP, 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 the Republic of Burundi*, ICC-01/17-5-Red, 15 November 2017, par. 145; ICC-OTP, Public redacted version of "Request for authorisation of an investigation pursuant to article 15", 20 November 2017,

The second request for authorisation in the situation of Côte d'Ivoire substantially mimics the style and structure of the Kenyan request, building on the most relevant determination of the *Kenya* PTC as regards the evidentiary standard and the manner of assessing jurisdiction and admissibility. Consistently with the *Kenya* PTC's indications, the OTP annexed to the request the two-abovementioned preliminary lists of crimes and potential perpetrators[844]. One interesting note on this request regards the proposed temporal framework of the request for authorisation, provided that based on the state's declarations of acceptance the jurisdiction of the Court could potentially extend from 19 September 2002 onwards (well before the main temporal focus of the incidents under examination). The Office did not formally ask that the authorisation be extended to cover facts occurred before the 2010 electoral violence, but suggested that the PTC "may . . . broaden the temporal scope of the investigations to events that occurred between 19 September 2002 (the date from which the Republic Côte d'Ivoire accepted the exercise of jurisdiction by the Court in accordance with article 12(3) of the Rome Statute) and 23 June 2011 (the date of the filing of this Application)"[845]. With regard to the admissibility test, the Office relied on the Appeals Chamber's case law regarding the concept of "inaction" as a preliminary step in the assessment of complementarity, whose existence relieves the OTP and the Court from entering an in-depth analysis of unwillingness or inability. It seems obvious that the allegation of inaction is particularly convenient for the OTP in that it greatly simplifies the burden of the proof, thereby raising a presumption of admissibility[846]. The Office also attached significant weight to the self-proclaimed inability of national authorities to effectively deal with the investigation and prosecution of the alleged crimes[847]. As regards the gravity assessment, the analysis is once again rather cursory and 'circular'[848].

ICC-02/17-7-Conf-Exp, *Situation in the Islamic Republic of Afghanistan*, ICC-02/17-7-Red, 20 November 2017, par. 264-266.

[844] Respectively Annex 1A ("Confidential List of incidents") and Annex 1B ("Confidential list of Persons appearing to be the Most Responsible") to the ICC-OTP, Request for authorisation of an investigation pursuant to Article 15, *Situation in the Republic of Côte d'Ivoire*, ICC-02/11-3, 23 June 2011.

[845] *Ibidem*, par. 40-42.

[846] *Ibidem*, par. 47-48.

[847] *Ibidem*, par. 49.

[848] *Ibidem*, par. 54-58.

The OTP's request concerning Georgia marks a shift from earlier practices in that the document is significantly longer than the previous ones and proceeds in a slightly different logical order, in particular placing the detailed analysis of jurisdiction *ratione materiae*—both as regards the contextual elements and the individual alleged crimes—before the assessment of admissibility and the interest of justice[849]. The most relevant aspect of the *Georgia* request is that most of the reasoning of the Office revolves around the assessment of admissibility, in particular of its complementarity prong[850]. It should be reminded that the preliminary examination of the Georgian situation lasted many years precisely for the need to follow the development of national proceedings in Georgia and in the Russian Federation. For this reason, the Office provides an in-depth analysis of these proceedings, coming to the conclusion that the lack of progress at the domestic level as regards most of the alleged crimes makes the potential cases likely to arise from an investigation admissible before the Court[851]. At the same time, the assessment of gravity is relatively more detailed than in the two previous requests, taking into consideration in discrete paragraphs the four non-exhaustive criteria that define gravity under the statutory framework[852]. The assessment of the interests of justice is also more analytical than in previous occasions. The OTP attaches great consideration to the strong demand for justice expressed by the victims both domestically and internationally, considering that the delicate situation in the Georgian-Russian international relations does not raise the concern that an investigation would run contrary to the interests of justice[853].

The *Burundi* request of late 2017 is particularly relevant for some unprecedented procedural features stemming from Burundi's withdrawal from the Statute and the state's efforts to hamper the effectiveness of the preliminary examination process. For the first time the OTP filed its request under seal and in the context of an *ex parte* procedure to which only the Prosecutor took part, pursuant to

[849] See ICC-OTP, Request for authorisation of an investigation pursuant to Article 15, *Situation in Georgia*, ICC-01/15-4, 13 October 2015, 3-4 (table of contents of the request).
[850] *Ibidem*, 41-43.
[851] *Ibidem*, 279-303 ("National proceedings in Georgia"), 304-320 ("National proceedings in the Russian Federation"), 321-322 ("National proceedings in third States").
[852] *Ibidem*, 329-333.
[853] *Ibidem*, 338-344.

Regulation 23*bis* of the Regulations of the Court[854]. The OTP acted in this fashion based on the "potential risks to the success and integrity of a future investigation, as well as on considerations concerning the safety and security of witnesses and victims of the alleged crimes"[855]. The Office then went on to ask the Chamber to release its decision, be it favourable or not to the prosecution, with the same level of confidentiality of the article 15(3) request[856]. In addition, the Prosecutor asked the Chamber—in the event of authorisation—to be exceptionally allowed a ten-day delay period to notify the States Parties of the opening of the investigation pursuant to article 18 of the Statute, in order to complete its planning and ensure adequate protection to victims and witnesses[857]. Another relevant procedural issue concerned the temporal scope of the request and prospective authorisation and in particular its end date, considering the then imminent taking of effects of Burundi's withdrawal. The Office aptly argued that the outer limit of the Court's temporal jurisdiction—hence of the facts covered by the eventual authorisation—could extend up to the day before the taking of effects of withdrawal on 27 October 2017[858]. Besides these challenging procedural issues, the request follows the scheme of its Georgian counterpart, by analysing in turn jurisdiction, admissibility and the interests of justice. With regard to admissibility, the complementarity assessment is interesting in that while the Office concluded in part for the inactivity of domestic institutions and in part for the lack of genuineness of certain national proceedings, it nevertheless examined in detail the work of the three investigating commissions created in Burundi "Out of an abundance of caution, and to ensure completeness of its analysis"[859]. Similarly to the other requests the assessment of gravity is not overly analytical, such as that of the interests of justice[860].

[854] ICC-OTP, 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 the Republic of Burundi*, ICC-01/17-5-Red, 15 November 2017, par. 9-10.
[855] *Ibidem*, par. 9, 10-11, 12.
[856] *Ibidem*, par. 13.
[857] *Ibidem*.
[858] *Ibidem*, par. 38-39.
[859] *Ibidem*, par. 153. In particular the Office observed that the three commissions "do not appear to have had full investigatory powers or conducted full criminal inquiries".
[860] *Ibidem*, par. 186-195 and 196-199.

The request for authorisation concerning Afghanistan was also filed under seal and *ex parte*, based on the precedent concerning the situation in Burundi[861]. This request is particularly relevant for the very delicate nature of a prospective investigation, particularly of its *ratione personae* dimension, given that some of the potential suspects are likely to be citizens of a state which is not a party to the Statute (the United States of America), and more specifically members of the armed forces and intelligence services that the interested state has always sought to shield from the exercise of the Court's jurisdiction[862]. At the beginning of the request the OTP explained the reasons for the significant length of the preliminary examination activities, referring to a number of material and legal difficulties that made it allegedly impossible to reach a determination in a shorter period of time[863]. It should be noted that the OTP, before entering a detailed discussion of the alleged conducts for the purposes of assessing jurisdiction *ratione materiae*, deals with the issue of personal jurisdiction in respect of nationals of states that are not parties to the Statute. The Office takes a firm position on this issue, underlining the unexceptional character of the Rome regime when it allows the exercise of criminal jurisdiction on citizens of non-consenting states (provided that a territorial link to a State Party, such as Afghanistan, is present)[864]. The OTP is also adamant in holding that the conclusion of agreements pursuant to article 98 of the Statute or of other agreements such as the so-called Status of Forces Agreements (SOFAs), between Afghanistan and a sending state by which the former "ceded exclusive criminal jurisdiction to a sending State with respect to alleged crimes committed by that sending State's nationals on Afghan soil *does not affect the Court's jurisdiction*". To the contrary, the conclusion of such agreements "might constitute a relevant ground for admissibility in view of the

[861] ICC-OTP, Public redacted version of "Request for authorisation of an investigation pursuant to article 15", 20 November 2017, ICC-02/17-7-Conf-Exp, *Situation in the Islamic Republic of Afghanistan*, ICC-02/17-7-Red, 20 November 2017, par. 7-9.
[862] On the complex relationship between the ICC and the American administration see, recently, L. N. SADAT, *The United States and the International Criminal Court: A Complicated, Uneasy, Yet at Times Engaging Relationship*, in *Washington University in St. Louis Legal Studies Research Paper Series*, 2016, 1-25. For an in-depth analysis of American opposition to the ICC see J. RALPH, *Defending the Society of States: Why America Opposes the International Criminal Court and its Vision of World Society*, New York, 2007 (particularly Chapter 5 titled "Understanding US Opposition to the ICC").
[863] ICC-OTP, Public redacted version of "Request for authorisation of an investigation pursuant to article 15", 20 November 2017, ICC-02/17-7-Conf-Exp, *Situation in the Islamic Republic of Afghanistan*, ICC-02/17-7-Red, 20 November 2017, par. 22-28, 30-38.
[864] *Ibidem*, par. 45.

resultant inaction, or otherwise unwillingness or inability, of the territorial State to exercise criminal jurisdiction with respect to a particular category of persons or groups"[865]. Attention is also given to conducts that allegedly took place on the territory of other States Parties, such as Poland, Lithuania and Romania mainly in the context of the so-called extraordinary renditions. Such conducts might fall under the jurisdiction of the Court provided that they are associated with the armed conflict in Afghanistan and "sufficiently linked" to the parameters of the situation at hand[866]. Considering the OTP's introductory remarks on the activities performed by the Office during preliminary examination, the assessment of admissibility is particularly thorough in the request. The OTP made clear that in principle "only national criminal investigations and/or prosecutions of a State . . . can trigger the application of article 17(1)(a)-(c)"[867]. Notwithstanding the fact that most national proceedings did not possess a fully jurisdictional and criminal character, the Office "out of an abundance of caution, and to ensure completeness of its analysis, [considered] their findings . . . as national criminal investigations, even if on their face these initiatives would appear to fall outside the technical scope of the term"[868]. The request then goes on to assess the proceedings in Afghanistan concluding that both the potential cases against members of the Taliban and of the Afghan National Security Forces (ANSF) would be admissible[869]. The Office reached the same conclusion as regards the potential cases relating to the conduct of US armed forces and CIA's personnel[870]. Given the lack of cooperation of the US authorities in providing specific information on pertinent national proceedings, the OTP based its assessment on "publicly available information contained in open sources"[871]. The assessment of gravity deals separately with the alleged crimes of the Taliban, ANSF and American military and intelligence forces, according to the usual four-criteria scheme[872]. Similarly to the Georgian situation the assessment of the non-contrariety of an investigation to interests of justice is relatively more analytical than in other requests, taking into

[865] *Ibidem*, par. 46 (emphasis added).
[866] *Ibidem*, par. 49.
[867] *Ibidem*, par. 268.
[868] *Ibidem*.
[869] *Ibidem*, par. 275, 288-289.
[870] *Ibidem*, par. 311, 312, 328. For the general conclusions on complementarity see par. 335.
[871] *Ibidem*, par. 290, 295-298.
[872] *Ibidem*, par. 337-343, 344-351, 352-363.

particular consideration the active role played by victims in requesting that justice be done for the atrocities suffered, through instruments such as surveys and reports of national human rights bodies and NGOs[873].

Turning our attention to the authorisation practices of the various PTCs that have entertained the OTP's request for authorisation it should preliminarily be reminded that up to date all such requests were granted by the Chambers, determining a hundred per cent success rate for the OTP's *proprio motu* procedures in terms of authorisations obtained[874]. The most relevant findings of the Chambers in the four authorisation decisions adopted so far are briefly summarised—including references to the dissenting opinions—with a view to draw a comparison between the OTP's and PTCs' approaches towards the authorisation procedure and provide, in conclusion of the present paragraph, an overview of the main trends of the ICC's practice on the point.

In its first authorisation decision pursuant to the request concerning the situation in Kenya the PTC—Judge Hans Peter Kaul dissenting—clarified many key aspects of the procedure, in the light of a textual, contextual and teleological interpretation of the Statute[875]. In particular it concluded that:

a) The statutory and regulatory regime institute a fundamental link between article 15 and article 53 of the Statute, introducing the same standard of evaluation in the respective procedures[876].

b) The PTC must apply to its judicial supervision the same evidentiary standard applied by the OTP in reaching its decision, namely the "reasonable basis to believe", which is the lowest evidentiary standard among those envisaged by the ICC legal texts[877]. As a consequence the information provided by the OTP at this stage "certainly need not point towards only one conclusion"[878].

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[873] *Ibidem*, par. 364-372.
[874] It should be reminded that at the time of writing the authorisation procedure concerning Afghanistan is still pending in front of the PTC.
[875] ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *Situation in the Republic of Kenya*, ICC-01/09-19-Corr, PTC II, 31 March 2010.
[876] *Ibidem,* par. 21-22
[877] *Ibidem,* par. 24, 27, 31.
[878] *Ibidem,* par. 34.

c) The PTC's supervisory function entails the assessment of the "necessary jurisdictional prerequisites under the Statute"[879], as well as a positive determination on admissibility. With regard to jurisdiction *ratione materiae* the judges clarified that the OTP is not barred from modifying the exact focus on individual crimes and potential perpetrators in the course of the investigation, provided that they fall under the parameters of the authorised investigation[880]. The admissibility assessment must be carried out having regard to the "potential cases" in the context of a situation[881]. Such analysis cannot be carried out in the abstract and requires the OTP to present the Chamber with a preliminary list of incidents and potential perpetrators[882].

d) The assessment of complementarity must take into consideration what had already been established by the Court on point of inaction, unwillingness and inability of the interested state; whereas the assessment of gravity—also to be referred to the potential cases—must take into account both quantitative and qualitative factors such as those reflected in Rule 145 of the RPE[883].

e) The OTP is not required to positively show that an investigation is in the interests of justice and the Chamber shall only review this aspect of the request when the Office concludes that the investigation runs contrary to the interests of justice[884].

The Chamber then went on to apply these principles to the request under examination concluding that all the required statutory criteria had been met in terms of jurisdiction and admissibility, both *sub specie* complementarity (due to the inaction of national authorities) and gravity[885]. Lastly, the Chamber provided clarifications on the temporal and material scope of the authorisation. It established that the temporal scope extends to the lapse of time stretching from the entry into force of the Statute in respect to Kenya to the date of the OTP's request for authorisation[886]. As regards the material scope, this is limited to the category of crimes for which the request had been presented by the OTP and authorised by the Chamber (i.e. crimes against humanity). A more permissive solution would have

[879] *Ibidem,* par. 37
[880] *Ibidem,* par. 74-75.
[881] *Ibidem,* par. 43-48.
[882] *Ibidem,* par. 49-50.
[883] *Ibidem,* par. 55-62.
[884] *Ibidem,* par. 63.
[885] *Ibidem,* par. 143, 153, 158, 168, 174, 178, 181-187, 188-200.
[886] *Ibidem,* par. 207.

resulted in the conferral of excessive discretion to the Prosecutor in determining the scope of the investigation, beyond the reach of judicial supervision[887].

The Chamber's rather liberal approach to the authorisation was criticised by the dissenting judge H. P. Kaul, who disagreed both as regards the Majority's conclusions on the authorisation and as to the methodological approach to judicial review endorsed by the PTC[888]. In particular, the dissenting judge, while agreeing on the low character of the applicable standard of review, argued that the PTC's supervision could only be meaningful if it consisted in a "full, genuine and substantive determination of the Chamber whether there exists a reasonable basis to believe that crimes falling under the jurisdiction of the Court have been committed"[889]. He also argued in favour of a more rigorous examination of the Court's jurisdiction *ratione materiae*, failing which the authorisation procedure would result in a merely administrative procedure, turning the PTC into "a mere rubber-stamping instance"[890].

In the Ivorian authorisation decision the competent PTC—Judge de Gurmendi partially dissenting—confirmed much of the reasoning of the *Kenya* PTC's decision as regards the "reasonable basis to believe" standard and the functioning of the procedure under article 15 of the Statute[891]. It also preliminarily added a few relevant considerations on the effect of the declarations of acceptance lodged by the state and on the relevance of information submitted by victims, which according to the Majority had to be approached in a "non-restrictive manner"[892]. The Majority nevertheless distanced itself form the *Kenya* PTC as regards the temporal scope of the authorised investigation, through a more liberal approach to the judicial framing of the starting and end date of the authorisation. Going beyond the request of the OTP as regards the starting date, the Chamber clarified that it was prepared to authorise the investigation also with regard to facts occurred between 2002 and 2010,

[887] *Ibidem,* par. 208-209.
[888] Dissenting Opinion of Judge Hans Peter Kaul, attached to ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *Situation in the Republic of Kenya*, ICC-01/09-19-Corr, PTC II, 31 March 2010, par. 3, 8-9, 10, 148-150.
[889] *Ibidem*, par. 14-15.
[890] *Ibidem*, par. 18-19.
[891] ICC, 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 the Republic of Côte d'Ivoire*, ICC-02/11-14, PTC III, 3 October 2011, par. 17-18, 21, 23-25.
[892] *Ibidem*, par. 10-15 and 19-20.

but in the lack of sufficient information relating to that period it directed the OTP to provide additional information pursuant to Rule 50(4) of the RPE[893]. The Office did so with a dedicated submission and the PTC consequently extended, in a separate decision, the temporal scope of the authorisation to cover those earlier conducts[894]. With regard to the end date for the authorisation, the Majority decided that the investigation could cover the "continuing crimes", i.e. those committed after the date of the OTP's request, "insofar as the contextual elements of the continuing crimes are the same as for those committed prior to 23 June 2011. They must, at least in a broad sense, involve the same actors and have been committed within the context of either the same attacks . . . or the same conflict"[895]. Another notable aspect of the decision is that the Chamber went beyond the request of the OTP also with regard to the analysis of the individual conducts, by extrapolating from the available information the potential commission of additional crimes which had not been discretely presented by the Office in the request[896]. The Chamber then considered that the potential cases likely to arise from the investigation would be admissible, in the light of the absence of national proceedings and of their sufficient gravity[897]. Lastly, the Chamber agreed with the OTP that an investigation would not run contrary to the interests of justice[898].

Judge de Gurmendi, while concurring with the Majority on the authorisation, appended a partially dissenting opinion, criticising the Majority's methodological approach towards the judicial supervision procedure and the definition of the temporal scope of the authorised investigation. On the first issue, the partially dissenting judge stigmatised the Majority's analysis of the OTP's request, which had allegedly resulted in a "duplication of the preliminary examination conducted by the

[893] *Ibidem*, par. 180-185.
[894] See ICC-OTP, Prosecution's provision of further information regarding potentially relevant crimes committed between 2002 and 2010, ICC-02/11-25, 3 November 2011 and ICC, Decision on the "Prosecution's provision of further information regarding potentially relevant crimes committed between 2002 and 2010", *Situation in the Republic of Côte d'Ivoire*, ICC-02/11-36, PTC III, 22 February 2012.
[895] ICC, 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 the Republic of Côte d'Ivoire*, ICC-02/11-14, PTC III, 3 October 2011, par. 179.
[896] *Ibidem*, 83-86 (torture and other inhumane acts as crimes against humanity); 144-148 (rape and sexual violence as a war crime); 162-165 (pillage as war crime); 166-169 (torture and cruel treatment as war crimes).
[897] *Ibidem*, 192-200 (analysis of complementarity) and 201-206 (analysis of gravity).
[898] *Ibidem*, 207-208.

Prosecutor" instead of limiting itself to "a review of the request and material presented by the Prosecutor [with the] underlying purpose of providing a judicial safeguard against frivolous or politically-motivated charges"[899]. Judge de Gurmendi also criticised the fact that the Majority autonomously extrapolated from the available information the potential commission of additional crimes, in the absence of a specific request of the OTP to that end[900]. In so doing, the Chamber would have impermissibly exercised quasi-investigative powers, contravening to the purpose of the procedure and exceeding its supervisory role, in a manner judged incompatible with the requirement of neutrality[901]. As regards the second issue, the dissenting judge considered that the Chamber had the authority to extend *ex officio* the authorisation to earlier crimes even in the absence of the supplementary information the Majority directed the OTP to provide[902]. Furthermore, she argued that the authorisation should have covered not only the "continuing crimes" but also any future crimes, provided that they are sufficiently linked to the situation of crisis under consideration[903]. This part of the dissent, aimed at extending the scope of the authorisation beyond what was originally requested by the OTP seems difficult to reconcile with the more restrictive approach advocated for in the first part of the dissent, based on the *ne ultra petita* principle.

The PTC's decision to authorise an investigation in the Georgian situation—notwithstanding the extensive character of the OTP's request—is the most concise of the four adopted so far by the competent Chamber[904]. In particular, the analysis of subject-matter jurisdiction is significantly more succinct than in previous decisions, and does not enter in an in-depth analysis of the contextual elements of the alleged war crimes and crimes against humanity, nor of the individual crimes referred to in

[899] *Corrigendum* to Judge Fernández de Gurmendi's separate and partially dissenting opinion to the Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, *Situation in the Republic of Côte d'Ivoire*, ICC-02/11-15-Corr, 6 October 2011, par. 15-16.
[900] *Ibidem*, 19-20.
[901] *Ibidem*, 27, 30-35, 37-45.
[902] *Ibidem*, 56-57, 61.
[903] *Ibidem*, 62-73. The dissenting judge relied on the reasoning contained in ICC, Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana, *Prosecutor v. Mbarushimana*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/10, PTC I, 28 September 2010, re-classified "Public" pursuant to ICC-01/04-01/10-7, 11 October 2010, par. 5-7.
[904] ICC, Decision on the Prosecutor's request for authorization of an investigation, *Situation in Georgia*, ICC-01/15-12, PTC I, 27 January 2016. The decision consists of mere 26 pages, compared to the 83 of the *Kenya* and 86 of the *Côte d'Ivoire* authorisation decisions.

the OTP's request. The Chamber—upon examination of the information provided by the OTP—swiftly considered that both the required evidentiary standard and the elements of the alleged crimes had been met[905]. Nevertheless the PTC took the occasion to criticise the OTP's assessment of the available information with regard to certain incidents—namely the alleged indiscriminate or disproportionate attacks against the civilian population and sexual and gender-based violence—lamenting that the OTP "acted too restrictively and has imposed requirements on the material that cannot reasonably be met in the absence of an investigation, the initiation of which is precisely the issue at stake"[906]. However, the Chamber decided not to "rectify" the OTP's assessment, given that the Prosecutor would in any case be permitted to extend the investigation to those incidents based on the PTC's authorisation. By rectifying the OTP's assessment the PTC would have exceeded its powers under article 15(4) of the Statute, going "beyond the submissions in the request in an attempt to correct any possible error on the part of the Prosecutor", something the Chamber considered "unnecessary and inappropriate"[907]. Consistently with the OTP's emphasis on the admissibility test, the Chamber analysed in detail the aspects of complementarity and gravity. With regard to the former, the Chamber considered that the situation in Georgia revealed the then current inaction of national authorities, certified by a letter of the Georgian authorities on the halt of domestic proceedings[908]. Concerning the proceedings in the Russian Federation, the Chamber considered that—with regard to certain incidents—it was unable conclude that national proceedings are inadequate under article 17(1)(b) of the Statute. Nevertheless, given that the domestic proceedings "only cover a portion of the potential cases arising out of the situation" and that there are other potential cases that would be admissible, the Chamber considered it unnecessary to reach a

[905] *Ibidem*, par. 26, 27-29 and 30-31.
[906] *Ibidem*, par. 35. The Office in its request approached with great caution the information regarding these incidents, alleging that a determination on the point couldn't be reached based on the limited amount of information and on the fact that it came from only one party, with the potential risk of bias.
[907] *Ibidem*.
[908] *Ibidem*, par. 41. The Chamber considered this letter as "dispositive of the matter", certifying the inactivity and hence the admissibility of the potential cases likely to arise from an investigation. More generally, on the role of the two interested states, Georgia and the Russian Federation, and the external "political control" exercised vis-à-vis the activities performed by the OTP, see N. TSERETELI, *Quality Control in the Preliminary Examination of the Georgia Situation*, in M. BERGSMO, C. STAHN (eds.), *Quality Control in Preliminary Examinations: Vol. 1*, cit., 536-541.

conclusive determination on the overall adequacy of Russian national proceedings[909]. As regards the domestic proceedings concerning the alleged attacks on Russian peacekeepers, the Chamber concurred with the OTP in concluding that there exists neither unwillingness nor inability on the part of Russian authorities, and that consequently the corresponding potential cases could be inadmissible at the ICC[910]. The Chamber then positively concluded on point of gravity, following the usual quadripartite analysis (nature, scale, manner of commission and impact)[911]. Finally, the PTC considered it necessary to clarify the scope of the authorised investigation. It endorsed the position of the OTP—also expressed by judge de Gurmendi in its partial dissent in the Ivorian authorisation—on the material scope of the investigation, confirming that the Office is permitted to extend the investigation to any crimes other than those explicitly mentioned in the authorisation, provided that they are sufficiently linked to the parameters that define the situation and that they fall within the Court's jurisdiction[912]. Limiting the material scope of the authorised investigation would not only be "illogical"—given that the authorisation procedure is structurally based on limited information—but also in "conflict with [the OTP's] duty to investigate objectively, in order to establish the truth"[913].

Judge Péter Kovács appended a separate opinion, criticising the Majority's approach toward the supervision procedure, on the same lines of judge Kaul's dissent on the Kenyan authorisation[914]. In particular, he criticised the Majority's conclusions on the "strictly limited" nature of the PTC's supervision and the apparent departure from the in-depth character of the *Kenya* and *Cote d'Ivoire* decisions, arguing that the Chamber must reach its own conclusions in furtherance of an "independent judicial inquiry" entailing the "full and proper examination of the supporting material"[915]. The outcome of the PTC's supervision should be a clear, well-reasoned

[909] *Ibidem*, par. 42, 46.
[910] *Ibidem*, par. 47-50.
[911] *Ibidem*, par. 51-57.
[912] *Ibidem*, par. 62-64.
[913] *Ibidem*, par. 63.
[914] Separate Opinion of Judge Péter Kovács, ICC-01/15-12-Anx-Corr, 27 January 2016. On the disagreements between the Majority and the dissenting judge, particularly on the importance given by Judge Kovács to a "better understanding the local context", see N. TSERETELI, *op. cit.*, 548-550.
[915] Separate Opinion of Judge Péter Kovács, ICC-01/15-12-Anx-Corr, 27 January 2016, par. 3-4, 5-7, 10.

and persuasive decision, something that the Majority allegedly did not deliver[916]. In addition, the dissenting judge considered that the Chamber's determination lacked sufficient clarity in delineating the facts underpinning its conclusions on the alleged crimes. After clarifying that the Chamber is permitted to go *ultra petita* in reaching its determination, he then went on to present his own autonomous analysis of various potential crimes based on the available information, including some that were not presented in the OTP's request[917]. Similarly, he took issue with the Chamber's analysis of admissibility, reaching alternative conclusions on certain complementarity profiles[918].

The PTC's decision to authorise an investigation in the situation in Burundi—the first unanimous so far—is particularly interesting in its treatment of the procedural issues raised by the OTP as regards the confidentiality and *ex parte* nature of the authorisation procedure [919]. The Chamber, while granting the OTP's request for classification, established that the OTP's assessment on the necessity to keep the procedure *ex parte* and under seal—without giving notice to the victims based on alleged threats to their well-being as well as to the integrity of the investigation—was only preliminary in character and must undergo the Chamber's judicial scrutiny based on the concrete circumstances of the case[920]. At the same time, the PTC forcefully clarified—contrary to the arguments put forward by the OTP—that meaningful measures for the protection of victims and witnesses can be adopted by the Office pursuant to article 68(1) of the Statute, *prior* to the Chamber's authorisation to open an investigation[921]. Additionally, the preliminary judges granted to the OTP the required ten-day delay term to notify the states under article 18(1) of the Statute, considering the "exceptional circumstances" of the situation [922]. Considering the exceptional *ex parte* and under seal nature of the proceedings the Chamber, in order to guarantee the participatory rights of victims, "requested

[916] *Ibidem*, par. 12.
[917] *Ibidem*, par. 18-22, 26-36.
[918] *Ibidem*, par. 37-67.
[919] See, *supra*, footnotes 854-858.
[920] ICC, Public Redacted version of the "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi", ICC-01/17-X-9-US-Exp, 25 October 2017, *Situation in the Republic of Burundi*, ICC-01/17-9-Red, PTC III, 9 November 2017, par. 9-11, 13-14.
[921] *Ibidem*, par. 15.
[922] *Ibidem*, par. 19.

additional information under rule 50(4) of the Rules to assess the views of the victims and deems it appropriate to consider such information for the purposes of its article 15(4) decision"[923]. Lastly, the PTC concurred with the Prosecutor on the temporal scope of the authorised investigation in relation to the effects of Burundi's withdrawal from the Statute, deciding that "the Court retains jurisdiction over any crimes falling within its jurisdiction that may have been committed in Burundi or by nationals of Burundi up to and including 26 October 2017"[924] and that, consequently, "any obligations on the part of Burundi arising out of the Chamber's article 15(4) decision would survive Burundi's withdrawal [because] the present decision is delivered prior to the entry into effect of Burundi's withdrawal on 27 October 2017"[925]. The PTC's assessment of jurisdiction reverted back to the analytical approach adopted by the Kenyan and Ivorian decisions, instead of following the summary and somewhat perfunctory approach taken by the *Georgia* PTC[926]. Nevertheless, similarly to the *Georgia* PTC, the Chamber underlined that he OTP had acted too restrictively in considering the available information with particular regard to the potential commission of war crimes in the situation under examination. For this reason the Chamber expressed the view "that the Prosecutor *will have* to enquire during her investigation whether a non-international armed conflict existed in Burundi during the relevant period and whether war crimes were committed"[927]. For the purposes of the admissibility assessment the Chamber confirmed the importance of the preliminary lists of incidents and potential suspects to be provided by the OTP as the necessary term of reference for its judicial supervision[928]. With specific regard to the complementarity prong, the preliminary judges made reference to the Court's case law on the "substantially the same conduct" test and took into consideration the work of three national commissions tasked of shedding light on

[923] *Ibidem*, par. 20-21. The Chamber affirmed that "Accordingly, even though this procedure is exceptionally classified as under seal, *ex parte,* only available to the Prosecutor, the Chamber is additionally guided by the views expressed by the victims in the aforementioned documents. However, this exceptional procedure is not to be seen as replacing the procedural right accorded to victims under article 15(3) of the Statute".
[924] *Ibidem*, par. 24.
[925] *Ibidem*, par. 26.
[926] *Ibidem*, par. 32-141.
[927] *Ibidem*, par. 141 (emphasis added). This approach seems more stringent than the one adopted by the *Georgia* PTC, where judges declared that it was unnecessary to rectify the OTP's assessment (see, *supra*, footnote 907).
[928] *Ibidem*, par. 144.

certain episodes of violence under examination, mindful of the OTP's doubts on their correct qualification as proper judicial proceedings[929]. Nevertheless, the Chamber clarified that "national investigation merely aimed at the gathering of evidence does not lead, in principle, to the inadmissibility of any cases before the Court, considering that, for the purposes of complementarity, an investigation must be carried out with a view to conducting criminal prosecutions"[930]. The assessment of gravity and of the interests of justice follows the well-established precedents of the other authorisation decisions. The Chamber followed the *Georgia* PTC in authorising the Office to investigate "*any crime* within the jurisdiction of the Court committed between 26 April 2015 and 26 October 2017", including crimes committed before the staring date but sharing the same contextual elements, and the crimes of continuous nature whose commission continues after the end date[931].

Based on the preceding analysis of the available prosecutorial and judicial practice it is possible to formulate the following preliminary conclusions on the current trends concerning article 15 authorisation procedure.

a) The practice of the Office emerging from the five requests for authorisation reveals the OTP's intent to frame the evidentiary standards and the jurisdictional/admissibility requirements so as to keep to a minimum the effort needed to convince the Chamber of the necessity and opportunity to authorise the investigation. The reasoning in support of the request is generally in-depth and analytical with regard to jurisdictional issues—in particular jurisdiction *ratione materiae*—while this is not always the case with regard to admissibility, in particular with regard to the assessment of gravity. There is a clear symmetry between the length and complexity of preliminary examination activities—particularly of Phase 3—and the attention dedicated in the requests to the complementarity assessment, i.e. of the existence and adequacy of national proceedings. For that purpose, the Office has shown the tendency to consider and review, out of abundance of caution, the results of national proceedings even when the competent authorities did not appear to

[929] *Ibidem*, par. 147, 151-153, 154-176.
[930] *Ibidem*, par. 152. The position taken by the PTC seems particularly relevant in relation to transitional justice mechanisms entailing forms of truth-seeking that are alternative or complementary to criminal proceedings. The deployment of such mechanisms, in the PTC's view, does not exclude *per se* the admissibility of potential cases at the ICC.
[931] *Ibidem*, par. 192-193 (emphasis in the original text).

enjoy full investigative powers or did not have a genuinely jurisdictional character. The OTP's approach to the documents and materials provided in support of the requests is not devoid of inconsistencies across the different situations, revealing a degree of flexibility and discretion as regards the inferences to be drawn from such information. As regards exquisitely procedural issues, the Office has on at least two occasions sought to maintain the confidentiality of the authorisation procedure, requesting the PTC to entertain it *ex parte* and under seal.

b) The Chambers have so far granted all the requests for authorisation, in general within a few months from the filing of the OTP's submissions. The various authorising PTCs have interpreted their supervisory role with a good measure of self-restraint, limiting any too direct interference on the exercise of prosecutorial discretion in framing the scope of the future investigation, and establishing low evidentiary thresholds for that purpose. With regard to the temporal and subject-matter scope of the authorised investigations, the Chambers moved from the more restrictive approach of the *Kenya* authorisation to a more liberal and proactive one in subsequent decisions. In this regard, the PTCs have sometimes 'manipulated' the jurisdictional parameters, even going beyond the requests of the Office. The dissenting judges have provided alternative views on the scope of the supervisory powers of the Chamber—advocating either for a more stringent oversight or for a an even more generous approach of the PTC—but with limited influence on the overall methodological approach adopted by the majority of the various Chambers. On the average, a rather 'minimalist' attitude towards the exercise of judicial supervision has prevailed in the practice of the competent Chambers.

c) For the above reasons, the OTP-PTC institutional relationship with regard to the authorisation procedure seems to be premised on an overall interpretive agreement on the main legal issues pertinent to the procedure, and have not shown significant instances of open clash among the relevant actors, with the exclusion of minor disagreements on certain procedural issues. Nevertheless, the practice shows that in some circumstances judges have sought to influence the prosecutorial practice as regards the structure and content of article 15(3) requests and the scope of the future investigation. One example relates to the PTC's request to the Office to provide, together with the request for authorisation, preliminary lists of incidents and

perpetrators for the purposes of the admissibility assessment. The OTP has always conformed to the Chamber's request, first formulated in the *Kenya* authorisation decision. This constitutes a clear example of pragmatic prosecutorial *adaptive* practice to the Chamber's requests. By the same token, the Chambers have on some occasions tried to overcome the restrictive approach taken by the OTP as regards the inferences to be drawn from the available information. They did so by 'suggesting' to the Prosecutor to extend the scope of the prospective investigation so as to encompass conducts—or even entire categories of crimes—which had not been comprised in the request or relating to a temporal framework not initially envisaged in the OTP's request. On one occasion this proactive attitude was enacted through the Chamber's request for additional information pursuant to Rule 50(4) of the RPE. The success of this judicial trend aimed at putting the OTP 'on the right track' early in the proceedings, as well as its influence on the OTP's investigative and charging practices can only be tested against the specific choices made by the Prosecutor at those subsequent stages of proceedings in the different situations.

4. Other aspects of prosecutorial discretion beyond the preliminary phase and the OTP-PTC institutional relationship

In the present study the main focus has been on the exercise of prosecutorial discretion and of its judicial supervision at the preliminary and pre-investigation stage of the proceedings at the ICC, consistent with the proposed delimitation of the field of analysis[932]. Nevertheless, it is of immediate evidence that a significant amount of discretion is exercised through the strategic choices and decisions of the OTP at subsequent stages of the proceedings. In addition to that, the effects of the exercise of discretion are not confined to the institutional interplay between the OTP and Chambers, but bear significant consequences on the rights of other subjects participating to the ICC proceedings, such as states, the suspect/accused person and victims. In order to provide a more complete understanding of the many ramifications of the exercise of discretion, the present paragraph briefly addresses these additional substantive and procedural aspects.

[932] See, *supra*, Introduction.

The first aspect worth mentioning relates to the OTP's decisions regarding prosecutions, which determine the shift from the situation to the individual *cases* within an investigation. The discretionary decisions made at the preliminary examination stage and that culminate in the opening of an investigation predetermine—albeit not in a rigidly binding manner—the material, temporal, territorial and personal scope of the prospective investigation. Based on the results of the investigation activities the Office is called to a further, more individualised, exercise of discretion leading to the decision on whom, for what crimes and under what mode of liability to prosecute. The OTP is confronted with the difficult identification of the criteria that must guide these choices, similarly to what happens with regard to the criteria relating to the discretionary selection of situations and the conduct of preliminary examination. With one significant difference: at the *case* stage the Prosecutor bears the sole responsibility for these selection choices, only subject to the confirmatory powers of the PTC[933]. In other words, the OTP—similarly to what happens in case of *proprio motu*—cannot rely on the authority of the referring state or of the UNSC as at the *situational* stage and it must develop its own consistent criteria for the exercise of individualised discretion leading to individual cases. In this sense, the already examined Policy Paper on Case Selection and Prioritisation[934] constitutes an effort to provide a more principled approach towards prosecuting and charging decisions, which might contribute to increase the consistency of the current—sometimes highly unsatisfactory—practice of the Office. Without entering into a detailed analysis of such practice, it should be noted that on various occasions the selection decisions of the OTP have been criticised for their lack of consistency, reasonableness, or legal accuracy and have been on multiple occasions the object of significant 'corrective' interventions of the PTC and TC, whereby judges have sought to fix—or invited the OTP to fix—certain unconvincing initial selection choices. The unfolding of the *Bemba* and *Katanga* cases, as well as the disastrous outcomes of high-profile cases arising out of the *Kenya* situation, are a clear reminder for the OTP of the necessity to increase its efforts in developing a

[933] Reference here is to the supervisory role of the PTC in the context of the procedure for the confirmation of charges. See article 61 of the Statute.
[934] For the analysis of this paper see, *supra*, Part Two, Chapter Two, par. 3.

more effective case selection practice and better case theories[935]. In any event, the discretion of the Office extends well beyond the charging decision, encompassing decisions that concern, *inter alia,* the choice of the evidentiary sources for the purposes of both the confirmation of charges and the trial stage; the leading of evidence; the decisions on appeals; etc. The practice-based methodology of analysis proposed and applied in the present study to the pre-investigation and pre-trial stage might be constructively applied to other areas of exercise of discretion, with a view to compare the law in the books and the law in action and the corresponding trends in the OTP-judges relations.

A second aspect worth mentioning relates to the effects of discretionary choices on subjects *other than* the OTP and judges exercising supervision over the prosecutorial choices. While the OTP and judges are the two main institutional 'terminals' in the dialectic of prosecutorial discretion, their decisions obviously have

[935] As already recalled *supra* (footnote 482), in *Bemba* the OTP developed its case theory around the mode of liability of indirect co-perpetration, but was later forced by the PTC to amend the charges in order to include superior responsibility, under the substantial threat of non confirmation of the charges (see ICC, Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute, *Prosecutor v. Bemba*, *Situation in the Central African Republic*, ICC-01/05-01/08-388, PTC III, 3 March 2009, par. 19-20, 38-39, 46, 49 and ICC, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, *Prosecutor v. Bemba*, *Situation in the Central African Republic*, ICC-01/05-01/08-424, PTC II, 15 June 2009, par. 344, 369, 372, 402-403, 444). The TC then went on to convict the Accused based on the mode of liability 'suggested' by the PTC (see, ICC, Judgment pursuant to Article 74 of the Statute, *Prosecutor v. Bemba*, *Situation in the Central African Republic*, ICC-01/05-01/08-3343, TC III, 21 March 2016, par. 693-742). In any event, the Appeals Chamber, in a momentous decision adopted by majority, finally acquitted Bemba, reversing the TC's findings (see, ICC, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", *Prosecutor v. Bemba*, *Situation in the Central African Republic*, ICC-01/05-01/08-3636-Red, AC, 8 June 2018). Similarly, in *Katanga* the TC completely rejected the OTP's case theory and convicted the Accused only thanks to the legal recharacterisation of the mode of liability pursuant to Regulation 55 of the Regulations of the Court, from indirect co-perpetration to contribution to a group crime pursuant to article 25(3)(d) of the Statute (see, ICC, Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, *Prosecutor v. Katanga*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-3319-tENG, TC II, 21 November 2012 and ICC, Judgment pursuant to article 74 of the Statute, *Prosecutor v. Katanga*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-3436-tENG, TC II, 7 March 2014). As regards the *Kenya* situation, reference is to the OTP's withdrawal of charges against President Kenyatta (see ICC-OTP, Notice of withdrawal of the charges against Uhuru Muigai Kenyatta, *Prosecutor v. Kenyatta*, *Situation in the Republic of Kenya*, ICC-01/09-02/11-983, 5 December 2014) and to the rather convoluted solution provided by the TC to the "no case to answer" motion in the case against Samoei Ruto and Joshua Arap Sang, which brought the case to an end without prejudice to a retrial (see ICC, Decision on Defence Applications for Judgments of Acquittal, *Prosecutor v. Ruto et al.*, *Situation in the Republic of Kenya*, ICC-01/09-01/11-2027-Red-Corr, TC V(A), 5 April 2016). In both cases the Prosecutor's case hypothesis could not be sustained for the purposes of trial, leading to the termination of the proceedings. For a critique of the conduct of the Kenyan PE and investigation see, *infra*, footnote 975.

an impact—and are influenced by—the substantive and procedural rights and position of subjects such as states, the suspect/accused person, and victims. With regard to states, it is clear that the OTP's intervention, both at the pre-investigation and pre-trial phase, impacts on the complementarity regime and may lead to determinations on the conduct of national authorities that disclose inaction, unwillingness or inability to investigate and prosecute crimes within the jurisdiction of the Court. The ICC legal regime, consistent with the priority assigned to national proceedings over international ones, protects states' rights in that regard, assigning them the possibility to challenge the Court's overall jurisdiction and/or the jurisdiction on or admissibility of individual cases, as well as to request the review of the OTP's decision not to open an investigation pursuant to article 53(1) of the Statute. With regard to the suspect/accused, the impact of prosecutorial discretionary decisions is self-evident, considering that the right to a fair and expeditious trial is part and parcel of the institutional construct of international criminal justice[936]. Unfortunately, prosecutorial practice has not always paid sufficient attention to certain fair trial aspects of the proceedings, leading to harsh confrontations with the defence and judges[937]. Examples of this kind may be the excessive length of preliminary examinations and/or investigations, which might infringe upon the right to an expeditious trial; the OTP's discretionary approach towards the use of evidence obtained under condition of confidentiality[938]; or the OTP's practice of alternative/cumulative charging that makes an effective defence particularly challenging, especially if combined with a liberal use of the power to change the legal characterisation of the facts or modes of liability on the part of the Chambers[939].

[936] See the reference to internationally recognized human rights in article 21(3) of the Statute, as well as the individual safeguards provided under articles 22, 23, 24 of the Statute.
[937] See, e.g., the *Lubanga* case where the OTP's behaviour with regard to issues such as the disclosure of evidence obtained under confidentiality agreements and its refusal to comply with the Chamber's orders of disclosure sparked controversy and led to harsh disagreements between the Office and judges, leading to two stays of proceedings. See, ICC, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, *Prosecutor v. Lubanga*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-1401, TC I, 13 June 2008. On the Chamber's use of discretion in the *Lubanga* trial see R. GALLMETZER, *The Trial-Chamber's discretionary power and its exercise in the trial of Thomas Lubanga Dyilo*, in C. STAHN, G. SLUITER, *op. cit.*, 501-524.
[938] *Ibidem*.
[939] See, *supra*, footnote 935. With regard to the issue of Regulation 55 and its potentially detrimental consequences on fair trial rights, see the Minority Opinion of Judge Christine Van den Wyngaert,

A satisfactory balance between the OTP's assertion of discretion in the conduct of proceedings and the rights of the accused can only be the result of the dialectic between prosecutorial choices on one hand and vigorous defence practices on the other, with the necessary judicial supervision of the Chambers. Lastly, with regard to the position of victims it should be noted that the OTP's discretionary decisions—both at the preliminary examination, investigation, trial and appeal stage—bear consequences on their legal position, determining the objective and subjective scope of their participatory rights and, in the event of a final conviction, of the right to obtain reparations. Practice so far has shown that the victims' right to participate to the proceedings at different stages might come in conflict with the Prosecutor's intention to limit the access to relevant information, and that it might be necessary to strike a balance between the victims' right to participate and present their views and the necessary protection of their safety and well-being[940]. Additionally, in light of the Court's pertinent case law, it should always be borne in mind that the right to obtain reparations is limited—subjectively—to the people who can qualify as victims of the specific crimes investigated, charged and for which a final conviction is entered by the Court; and—objectively—to the harm personally suffered as a consequence of such crimes[941]. In other words, the selection choices made by the OTP as early as at the preliminary examination and investigation stage contribute to predetermine—

Prosecutor v. Katanga, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-3436-AnxI, 7 March 2014, par. 50-132.

[940] See, e.g., ICC-OTP, 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 the Republic of Burundi*, ICC-01/17-5-Red, 15 November 2017, par. 10-11, 12.

[941] See article 75 of the Statute and Rule 85 of the RPE. There is a growing body of case law on reparations at the ICC. The first decisions on the matter stem form the *Lubanga* trial, the first in which a final conviction was entered. See ICC, Decision establishing the principles and procedures to be applied to reparations, *Prosecutor v. Lubanga*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2904, TC I, 7 August 2012. With particular emphasis on the subjective and objective limitations of the scope of reparations see ICC, Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2, *Prosecutor v. Lubanga*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-3129, AC, 3 March 2015, par. 8, 184-186, 196-199. Reparation decisions have also been rendered in the *Katanga* and *Al-Mahdi* cases. See respectively ICC, Order for Reparations pursuant to Article 75 of the Statute, *Prosecutor v. Katanga*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-3728-tENG, TC II, 17 August 2017, par. 146-147, 152, 158-161; ICC, Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled "Order for Reparations pursuant to Article 75 of the Statute", *Prosecutor v. Katanga*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-3778-Red, AC, 9 March 2018; and ICC, Reparations Order, *Prosecutor v. Al-Mahdi*, *Situation in the Republic of Mali*, ICC-01/12-01/15-236, TC VIII, 17 August 2017, par. 42-44, 55-56.

together with the Court's decisions—who and to what extent will have the chance to obtain reparations at the very end of the judicial proceedings, years after those initial choices were made. The OTP should carefully take into consideration these long-term projections of its early discretionary selection choices, with a view to reduce the risk of unfair discrimination among victims across different situations and to maximise the restorative potential of judicial reparations [942] .

[942] For instance, the choice made by the Prosecutor in the *Lubanga* trial to confine the charges to the crimes under article 8(2)(e)(vii) of the Statute (conscripting or enlisting or using children under the age of fifteen to participate actively in the hostilities), with the exclusion of sex-related crimes, automatically excluded the people who suffered harm as a result of those conducts from any chance of obtaining judicial reparations under article 75 of the Statute. This limitative effect may also stem from the decisions of the Court as regards the criminal liability of the Accused, such as in the case against *Katanga*, who was found by the TC not guilty as an accessory to the crimes of rape and sexual slavery. For this reason the TC in its reparation decision held that it "[considered] itself to be intrinsically bound by the parameters of the conviction handed down against Mr Katanga, as determined by Trial Chamber II, sitting in its previous composition" and that it "[did] not regard itself as in a position to determine that the physical and psychological harm occasioned by rape and/or sexual violence or gender-based violence during the attack on Bogoro ensued from one of the crimes of which Mr Katanga was convicted" (see ICC, Order for Reparations pursuant to Article 75 of the Statute, *Prosecutor v. Katanga*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-3728-tENG, TC II, 17 August 2017, par. 147, 152). On this issues and the Court's overall strategy in relation to victims see G. CARAYON, J. O' DONOHUE, *The International Criminal Court's Strategies in Relation to Victims*, in *Journal of International Criminal Justice*, vol. 15, issue 3, 2017, 567-591. With regard to the relations between the rights of victims and the accused's fair trial rights see M. TONELLATO, *The Victims' Participation at a Crossroads: How the International Criminal Court Could Devise a Meaningful Victims' Participation while Respecting the Rights of the Defendant*, in *European Journal of Crime, Criminal Law and Criminal Justice*, vol. 20, issue 3, 2012, 315-359.

PART FOUR

A CRITICAL ASSESSMENT OF PROSECUTORIAL PRACTICE AND ITS JUDICIAL REVIEW: COMPARING THE *LAW IN THE BOOKS* AND THE *LAW IN ACTION*

CHAPTER ONE

IS THERE A SIGNIFICANT DISSOCIATION BETWEEN THE STATUTORY MODEL OF PROSECUTORIAL DISCRETION AND JUDICIAL REVIEW AND THEIR PRACTICAL IMPLEMENTATION?

1. Introduction

In Part Two and Three of the work we have carried out, respectively, the *static* analysis of the legal framework for the exercise of prosecutorial discretion and its judicial supervision at the preliminary stage and the *dynamic* analysis of its concrete exercise on the part of the OTP and judges. The purpose of this last part is to put forward a comparison between the two realities, i.e. the *law in the books* and the *law in action*, in order to assess—both quantitatively and qualitatively—the trends of interpretive agreement and disagreement between the involved actors and, ultimately, the most frequent and relevant patterns of convergence or dissociation among the normative formants at the ICC (Chapter One). This analysis is followed by an examination of the possible root-causes for these patterns of agreement/disagreement and convergence/dissociation of formants and of the potentially detrimental consequences of a systemic interpretive confrontation between the OTP and judges within the prosecutorial discretion and judicial review system (Chapter Two). Finally, we shall formulate a few proposals of institutional and normative character that might contribute to rationalise the practices of the OTP and judges as regards prosecutorial discretion, with a view to maximising their

consistency and foreseeability, and ultimately the legitimacy of the Court's overall mandate (Chapter Three).

The comparison between the *static* and *dynamic* dimension of prosecutorial discretion and judicial review builds on the conceptual tools exposed in Chapter One of Part Three, which have also guided the selection and categorisation of the relevant practice, and particularly on the dichotomy 'open clash v. smooth functioning' and the concept of 'dissociation of formants'[943].

2. A quantitative and qualitative analysis through the 'open clash v. smooth relationship' dichotomy

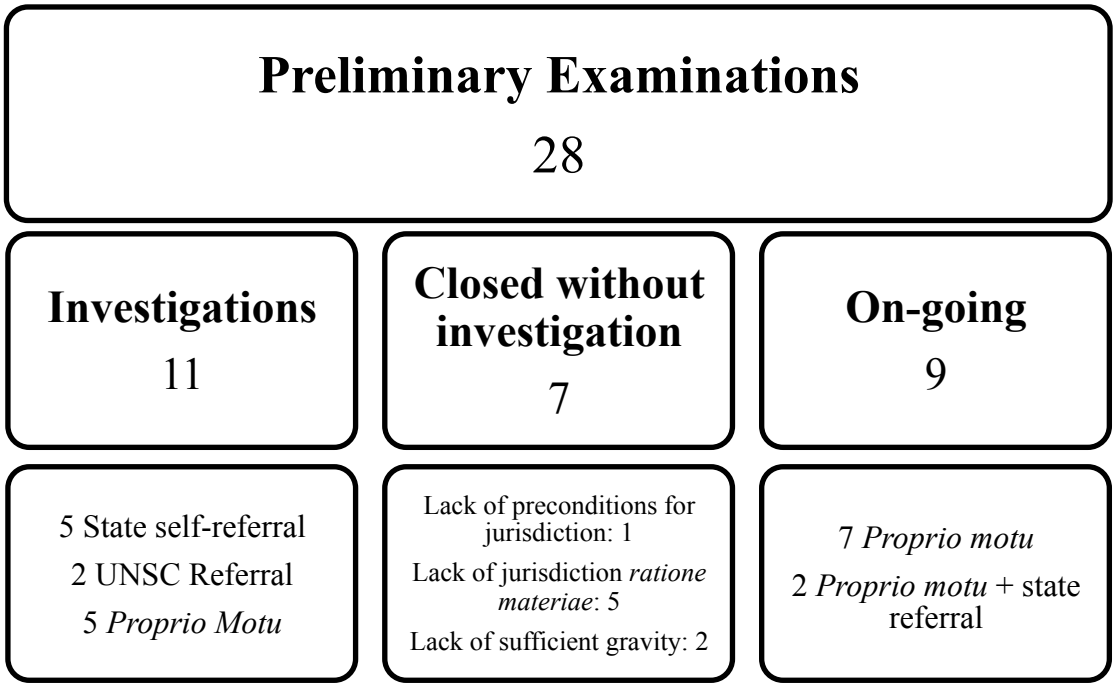
The prosecutorial and judicial practice with regard to the exercise of prosecutorial discretion and judicial review at the preliminary phase collected and systematised in Part Three of this work can at this point be more thoroughly analysed in its quantitative and qualitative dimension. For the purposes of this exposition, data concerning the pre-investigation stage are complemented with additional figures relating to the practice in the field of the confirmation of charges, retrieved from the OTP's strategy and reporting documents, in order to provide a more complete understanding of the main trends in the OTP-judges relations at the pre-trial phase, through the lens of the dichotomy between instances of 'open clash' and of 'smooth relationship'[944].

The following graphs and tables summarise the data concerning the OTP's and Chambers' practice as regards preliminary examination, the opening or authorisation of investigations and the confirmation of charges. The main attempt is that of providing a birds-eye-view on prosecutorial and judicial practices and of underlining the areas in which there seems to be a quantitative prevalence of either interpretive agreement or disagreement between the OTP and judges at the current stage of development of the ICC's practice. It should be borne in mind that it is not

[943] See, *supra*, Part Three, Chapter One, par. 4 and 5.
[944] Reference is to the OTP's Strategic Plan for 2016-2018, with particular regard to the success rate of the Office's charging practices under the new principles of the prosecutorial strategy. It should be noted that the whole practice of the OTP as regards the formulation of charges and the individualised exercise of prosecutorial discretion is not the main focus of the present study, as per the delimitation of the field of analysis. Nevertheless, various references to this issue are contained in previous Parts (see, e.g., *supra*, Part Three, Chapter 2, par. 4).

infrequent that aspects of interpretive agreement and disagreement actually coexist in the same procedures and/or prosecutorial and judicial decisions. Nevertheless, this ambivalence does not preclude the possibility of discerning areas where interpretive agreements prevail over disagreements or vice versa.

Figures on preliminary examinations and the decisions on the opening or not opening of investigations



Notes:

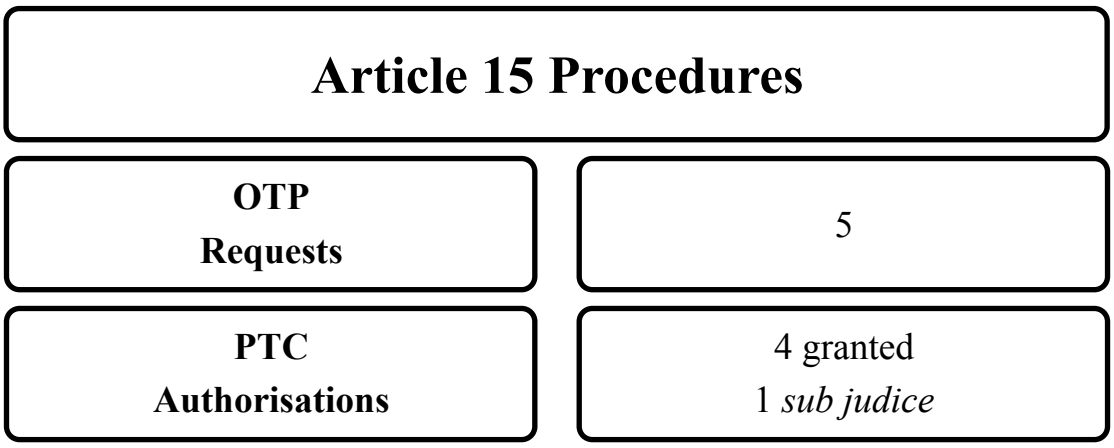
- The total number of 28 PEs considers as separate situations those relating to the same country (e.g. CAR I e II; the first and second situation in Venezuela; etc.); as well as those relating to the same country and that have been closed and reopened (UK/Iraq).

- The number of opened investigations and the scomposition per triggering mechanism take into account the *proprio motu* request in the situation in Afghanistan, which is currently *sub judice* (if granted the total number of opened investigations will increase to 12).

- The UK/Iraq preliminary examination was initially closed partly due to the lack of jurisdiction *ratione materiae* and partly for the lack of the required gravity, thus it may figure in both cathegories.

- In the situations in Palestine and Venezuela, currently on-going, PEs have originally been opened pursuant to *proprio motu* action of the Prosecutor. Nevertheless, in both situations a subsequent referral has been made, respectively, by Palestine and by six states with regard to Venezuela (Argentina, Canada, Chile, Colombia, Paraguay and Peru).

Figures on Article 15 Procedures in case of *proprio motu*



OTP's performances with regard to the confirmation of charges

Confirmation Performance	Previous Strategy 2003-June 2012		Strategies 2012-2015 and 2016-2018[945]	
	Total	%	Total	%
Charges confirmed	50	62.5	277[946]	89.1
Charges not confirmed	30	37.5	34	10.9
Total	80	100	311	100

[945] Data retrieved from the ICC-OTP, Strategic Plan 2016-2018, 16 November 2015, 5 and updated with the more recent decisions on confirmation of charges adopted after November 2015.

[946] The spike in the total number of charges is due to the high number of counts relating to the Article 70 case for offences against the administration of justice in the CAR I situation (42 to 43 counts for the five accused, see ICC-OTP, Public Redacted version of "Document Containing the Charges", 30 June 2014, ICC-01/05-01/13-526-Conf-Anx B1, *Prosecutor v. Bemba et al.*, *Situation in the Central African Republic*, ICC-01/05-01/13-526-AnxB1-Red, 3 July 2014 and ICC, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute, *Prosecutor v. Bemba et al.*, *Situation in the Central African Republic*, ICC-01/05-01/13-749, PTC II, 11 November 2011) and the exceptionally high number of charges brought in a single case against Ongwen. In this latter case the Chamber confirmed a total of 70 counts, only declining to confirm certain allegations of crimes against a person who put forward evidence that the Chamber considered irreconcilable with the remaining evidence. Nevertheless, the number of these unconfirmed charges remains unknown due to their confidential nature and the redactions both in the Document Containing the Charges and the confirmation decision (see, ICC-OTP, Public Redacted Version of Document Containing the Charges, *Prosecutor v. Ongwen*, *Situation in Uganda*, ICC-02/04-01/15-375-AnxA-Red, 22 December 2015, par. 66-127; ICC, Decision on the confirmation of charges against Dominic Ongwen, *Prosecutor v. Ongwen*, *Situation in Uganda*, ICC-02/04-01/15-422-Red, PTC II, 23 March 2016, par. 28, 135, 158). For this reason the confidential unconfirmed charges are not counted in these total numbers.

Main areas of 'open clash' and 'smooth relationship' between the OTP and judges

Open Clash	Smooth Relationship
Trial Management measures (e.g. status conferences and requests for additional information at the preliminary examination and investigation phase).	Request and authorisation procedure under article 15(3) and (4) of the Statute (standard of review, evidentiary threshold, scope of PTC's supervision).
Scope of prosecutorial discretion under article 53(1) of the Statute and of the review under article 53(3)(a) of the Statute (standard of review, gravity, supervisory role of the PTC).	Lack of remedy against decisions not to open a preliminary examination or investigation for subjects other than the referring entity (especially in Reg. 46 procedures)
Obligations regarding disclosure and confidentiality.	Scope and application of the interests of justice clause.
Admissibility of a request for a preliminary ruling on jurisdiction (legal basis and pre-preliminary nature of the request).	Admissibility of a request for a preliminary ruling on jurisdiction (principle to establish jurisdiction *ratione loci*).

This last table concerning the prevalence of episodes of interpretive disagreement (open clash) and agreement (smooth functioning) requires further elaboration in order to justify the inclusion of certain specific procedures or patterns of practice in the respective field.

With regard to issues on which significant patterns of interpretive disagreement between the OTP and Chambers exist at the current state of development of the ICC's practice, a few considerations seem warranted in relation to the areas identified above. The PTC's use of the power to convene status conferences or to ask additional information at the preliminary examination and/or at the investigation stage—especially in the case of apparent prosecutorial delay or inaction—has produced some of the clearest examples of open clash between the

OTP and judges (particularly the PTC)[947]. Although the number of these contrasts is not very high in absolute terms[948], the incompatibility of the interpretive claims advanced by the relevant actors has been on some occasions particularly acute, with the OTP pushing the limits of its general duty to cooperate in good faith with the PTC and abide by its decisions. Even when the OTP finally decided to provide the required clarifications or accepted to participate in the status conferences, it did so reluctantly and without conceding the existence of any legal duty to act as required by the Chamber[949]. These are clear examples of complex interaction between the OTP and judges, partly of a 'reactive' character—i.e. leading to total or partial non-compliance or non recognition of certain legal duties—partly of 'adaptive' character—i.e. leading to a practice of implicit acceptance of a certain course of action on the part of the OTP or PTC[950]. Analogous observations can be made as regards the OTP's practice concerning confidentiality of information and/or sources of evidence vis-à-vis its statutory and regulatory duties of disclosure. The tendency of the Office to emphasise the confidentiality aspects—allegedly based on the necessity to preserve the integrity of the examination or investigation and the security of victims and witnesses—was at times met with a severe reaction of the Chambers, preoccupied by the necessity to safeguard the rights of the accused and/or the participatory rights of victims[951]. While the Chambers have gradually moved from extremely harsh remedies (such as stays of proceedings) to more nuanced and

[947] See, *supra*, Part Two, Chapter Three, par. 2.1 (particularly footnotes 520-528) for the exact reference to these cases.
[948] The most relevant examples in this field relate, to date, to the situations—or cases within the situations—in the Democratic Republic of the Congo (three decisions of the PTC), Central African Republic I (one decision of the PTC), Uganda (two decisions of the PTC) and Côte d'Ivoire (one decision of the PTC). Exact references to the cases and the OTP's position vis-à-vis the Chambers see, *supra*, footnotes 520-528.
[949] See, e.g., the position of the OTP with regard to the OTP's request of information on the status of the CAR I preliminary examination, unequivocally expressed in ICC-OTP, Prosecution's Report Pursuant to Pre-Trial Chamber III's 30 November 2006 Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic, *Situation in the Central African Republic*, ICC-01/05-7, 15 December 2006, par. 10-11.
[950] For instance, the OTP's strong opposition to the PTC's request to provide an update of the status of preliminary examination in the CAR I situation probably had an influence on other PTCs in different cases, since no other requests of that character have been put forward by preliminary judges at the preliminary examination stage of proceedings. Correspondingly, the use of this trial management power by the PTC may have had an influence on the OTP's subsequent practice with regard to the length of preliminary examinations and on the Office's decision to establish a transparent and periodic reporting on the PE activities.
[951] On this crucial aspect see, *supra*, Part One, Chapter One, par. 1 (especially footnote 33) and Part Three, Chapter Two, par. 4 (especially footnote 937), with particular regard to the *Lubanga* trial.

targeted ones in recent practice, a satisfactory balance between the need for confidentiality and the respect of competing rights is still a matter of controversy between the OTP, defence and victims on the one hand, and judges on the other[952]. Finally, with regard to the scope of prosecutorial discretion under article 53(1) of the Statute and of the PTC's judicial supervision of decisions not to open an investigation, it should be reminded that the current practice is limited to a single OTP-PTC interaction concerning the *Comoros* situation. Nevertheless, based on the decisions adopted in this situation a clear disagreement between the OTP and judges emerged with regard to the most relevant legal issues at stake, such as the discretional or "exacting" character of the criteria listed under article 53(1)(a)-(b), the nature and scope of the Chamber's supervision, or again the approach towards the available information for the purposes of deciding on jurisdiction and admissibility, with particular regard to the construction of the concept of gravity[953]. All instances of practice pertaining to these three areas of disagreement have in common the judges' attempt to *restrict, guide or otherwise influence* the discretionary choices of the OTP, and the Office's resistance to these judicial interferences based on the alleged necessity to preserve its discretion and independence.

With regard to the areas characterised by a substantial convergence of interpretations between the relevant actors, these mainly concern the authorisation procedure under article 15(4) of the Statute, as well as other aspects such as those relating to the exclusion of various procedural actors from any right to challenge preliminary examination decisions, as it emerged in procedures under Regulation 46 of the Regulations of the Court. In the first case, as it clearly appears from the detailed analysis of practice carried out in Part Three, there is a substantial agreement between the OTP and PTCs on all the key legal features of the authorisation procedure[954], although relatively minor differences may still be found especially on

[952] See, *supra*, footnote 33. See also, J. I. TURNER, *Accountability of International Prosecutors*, cit., 391-394 on the evolution of the remedies against the OTP's failure to abide by its disclosure obligations.
[953] Reference is here to the *Comoros* situation and the respective position of the OTP and PTC. For an in-depth analysis of this episode of OTP-PTC clash of interpretations see, *supra*, Part Three, Chapter Two, par. 3.1.3.
[954] See, *supra*, Part Three, Chapter Two, par. 3.2.2 (last part containing preliminary conclusions on the main trends in the prosecutorial and judicial practice pursuant to article 15 of the Statute).

certain procedural issues[955]. In particular, there is a substantial agreement on the criteria that integrate the jurisdictional and admissibility assessment for the purposes of granting the authorisation[956].

This convergence might have contributed to reduce the 'supervisory grip' of the Chamber over the OTP's *proprio motu* decisions. The compatibility of such an 'evolutionary' and rather liberal practice with the drafters' intention to assure appropriate checks and balances on the independent Prosecutor is open to question, as remarked in certain dissenting opinions[957]. With regard to procedures under Regulations 46(2) and (3) of the Regulations of the Court, reference is here to the cases in which the Chamber excluded—in line with the OTP's position—any possibility of judicial review of the Office's decision not to open a preliminary examination, and clearly denied the possibility to challenge decisions under article 53(1) for subjects other than the referring entities[958]. With regard to the procedure for the request of preliminary rulings on jurisdiction *prior* to the opening of a preliminary examination—which was brought by the OTP based on the procedural mechanism of Regulation 46(3)—the recent PTC's decision concerning the alleged crimes of deportation against the Rohingya people provides an additional example of interpretive agreement between the OTP and the PTC on the fundamental underlying legal issue (namely, the possibility to rule on the request and to exercise jurisdiction based on the principle that it is sufficient that at least one element of the crime occurred on the territory of a State Party). Nevertheless, the Chamber utterly disregarded the legal basis relied on by the Office and provided critical remarks on

[955] On issues of confidentiality and victims' protection at this stage the position of the OTP and PTC have at times diverged, without in any case leading to major disagreements between the Prosecutor and judges. See, *supra*, Part Three, Chapter Two, par. 3.2.2 (especially footnotes 920-922).

[956] A general interpretive agreement on the reasonable basis to believe standard, as well as on the assessment of complementarity, gravity and the interests of justice, clearly emerges form the comparison between the OTP's requests and the PTCs' authorisation decisions.

[957] See the Dissenting Opinion of Judge Hans Peter Kaul attached to ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *Situation in the Republic of Kenya*, ICC-01/09-19-Corr, PTC II, 31 March 2010, par. 3, 8-9, 10, 14-15, 18-19, 148-150; and Separate Opinion of Judge Péter Kovács, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in Georgia, *Situation in Georgia*, ICC-01/15-12-Anx-Corr, 27 January 2016, par. 3-4, 5-7, 10.

[958] Reference is here to the proceedings initiated by the supporters of the Egyptian former President Morsi, with regard to their purported declaration of acceptance of the Court's jurisdiction and their attempt to challenge the OTP's failure to open a preliminary examination of the situation. For an in-depth analysis of this peculiar procedure and the OTP's and Court's position on the matter see, *supra*, Part Three, Chapter Two, par. 2.2 (especially footnotes 650-656 for the punctual references to prosecutorial and judicial decisions on the matter).

its procedural behaviour and its qualification of the procedural phase in which the request was put forward as "pre-preliminary". It also strongly suggested—one may think it somehow *ordered*—the expansion of the prospective examination/investigation to additional crimes and stressed the OTP's duty to adopt its decisions without undue delay[959]. This is a clear example of how aspects of interpretive agreement and disagreement between the OTP and judges might coexist in the same decision.

All these cases of convergence have in common the PTC's tendency to *recognise a good measure of deference to the OTP and/or to expand the scope of the OTP's discretion*. Sometimes, the Chambers' decisions have progressively sought to enlarge the margins for the subsequent exercise of prosecutorial discretion, for instance by widening the scope of an authorised investigation compared to the OTP's request. Nevertheless, this judicial 'manipulation' of the material and temporal parameters might sometimes produce more ambiguous results, and be interpreted as a judicial attempt to influence the direction of the prospective investigation, thereby suggesting (sometimes in forceful terms) to the OTP to follow a certain course of action in order to avoid potentially negative consequences at a later stage of proceedings[960].

3. Assessment of the consistency in the course of action of the OTP and judges

After having provided an assessment of the most relevant features of the practice of the OTP and judges and their respective interactions, it seems appropriate to reflect on the internal consistency of such practices, taking into consideration their

[959] ICC, Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", *Application under Regulation 46(3) of the Regulations of the Court*, ICC-RoC46(3)-01/18-37, PTC I, 6 September 2018, par. 75-77, 82-88. The Chamber's position on the inexistence of a pre-preliminary phase of the proceedings (i.e. one that precedes preliminary examinations proper) is in stark contrast with the position taken by the Office in its request and, possibly, with the practice of the OTP as regards the opening of preliminary examinations.

[960] On these 'manipulative' aspects of the authorisation decisions see, *supra*, Part Three, Chapter Two, par. 3.2.2 (particularly footnotes 893, 895-896, 912-913, 931). The same holds true for the PTC's decision on the Rohingya, where the Majority effectively clarified that the Court might assert jurisdiction also on conducts other than deportation, provided that it is established to the applicable threshold that at least one element of those other crimes is committed on the territory of a State Party (Bangladesh in this case). The reference to the OTP's duty to act without undue delay might also be interpreted as a 'warning' to the Office, providing an incentive to expeditiously complete the PE activities and eventually proceed with a request to open an investigation.

inevitably incremental character and the fluidity of the institutional and procedural contexts in which they are developed by the OTP and judges.

With regard to the practice of the OTP as regards the exercise of discretion at the preliminary examination and pre-trial phase, the following observations can be made concerning its overall internal consistency.

First, it should be noted that the OTP's practice at the preliminary examination phase has benefited from the self-imposed proceduralisation, which has contributed to an increased transparency and predictability as regards the conduct and outcomes of PE. Nevertheless, the Office has frequently deviated from its policy and organisational standards, in particular with regard to the length and timing of preliminary examinations in general and of the expected length of the four discrete phases[961]. Nevertheless, the reporting practice of the Office—after the initial incoherencies—has now become consistent and increasingly detailed. Obviously, the proceduralisation of PE cannot eliminate the inherent unpredictability in the development of proceedings across the various situations, which require continuous adaptations and a degree of flexibility on the part of the Office.

Second, the practice of the Office is relatively consistent in the differentiated approach to preliminary examinations activities of situations depending on the triggering mechanism. As it has been clearly demonstrated in Part Three, in particular with regard to their length and timing, there is a trend—with some exceptions—towards very short or short examinations in case of UNSC and state referrals, and for sometimes significantly longer PE in case of *proprio motu*[962]. As already explained, the reasons for such differences are both institutional—for instance regarding the OTP's relationship with the UNSC and states—and situation-specific, i.e. related to the particular factual and legal circumstances surrounding each situation.

Third, the practice of the Office is relatively consistent in the interpretation and application of certain criteria laid down in article 53(1) for the purposes of a

[961] On the variability in the duration of preliminary examinations across various situations and, within each PE, of the different phases see, *supra*, Part Three, Chapter Two, par. 2.3 and the tables collecting the data on the length of these activities. On the discrepancy between the expected average duration and the actual duration of the different phases see footnotes 688, 690-691 containing references to the Report on the Basic Size of the Office.
[962] See, *supra*, the tables of pages 193-194 and the discussion of their data.

decision on the opening or not opening of an investigation. The OTP's steady trend is to consider the evidentiary standards and applicable thresholds as low and flexible as possible, in order to simplify the Office's burden of the proof and increase the flexibility of its decision-making. In this sense the OTP's position on the "reasonable basis to believe" standard, as well as on the structure of the admissibility test *sub specie* complementarity, seems to be increasingly consistent[963]. The same holds true for the Office's strict and virtually unchanged position on the interests of justice[964]. To the contrary, an area in which the OTP's practice reveals inconsistencies and lack of clarity concerns the elusive role of gravity as a selection tool and key component of the admissibility test. While in the context of article 15(3) requests issues of gravity are generally dealt with in a rather perfunctory fashion, in the only decision so far not to open an investigation on grounds of insufficient gravity the Office has put forward a more nuanced application of the criterion, underlining its inherently discretional and selective character[965]. It is precisely this approach that has led to the interpretive contrast with the *Comoros* PTC. Besides the strictly legal application of the concept, a recent empirical study suggested that the OTP's substantive understanding of gravity—especially for the purposes of selecting situations—might have been on some occasions premised on imprecise factual assumptions leading to double standards and possible inconsistencies in the selection decisions[966].

Fourth and last, with regard to the article 15 authorisation procedures, the procedural behaviour of the Office seems sufficiently consistent, both in relation to

[963] See, *supra*, Part Three, Chapter Two, par. 3.2.2.
[964] See ICC-OTP, Policy Paper on the Interests of Justice, September 2007, 3-4 and *supra*, footnote 802 for precise references to the extremely limited discussion of issues pertaining to the interests of justice in the OTP's requests for authorisation (in conformity with the restrictive approach adopted in the dedicated policy paper).
[965] This position is expressed especially in the ICC-OTP, Article 53(1) Report, *Situation on the Registered Vessels of Comoros, Greece and Cambodia*, 6 November 2014 and in the ICC-OTP, Final decision of the Prosecution concerning the "Article 53(1) Report" (ICC-01/13-6-AnxA), dated 6 November 2014, *Situation on the Registered Vessels of the Comoros, Greece and Cambodia*, ICC-01/13-57-Anx1, 30 November 2017.
[966] See the empirical study of A. SMEULERS, M. WEERDESTEIJN, B. HOLA, *The Selection of Situations by the ICC: An Empirically Based Evaluation of the OTP's Performance*, in *International Criminal Law Review*, vol. 15, issue 1, 2015, 1-39. The Authors propose an interesting empirical methodology to assess the overall degree of gravity of national situations where a significant number of international crimes and/or gross violations of human rights has allegedly been committed, leading to a ranking of the gravest country-situations around the world. By comparing this quantitative analysis with the OTP's discretionary choices, they conclude that the Office has not always in practice recognised gravity as a fundamental criterion inspiring its selection choices (for instance with regard to the Kenyan situation).

the drafting standards for the requests of authorisation and the main tenets of their reasoning. Nevertheless, there is a degree of variability in the respective importance assigned to the various jurisdictional, admissibility and procedural issues, which mainly relate to the underlying factual and legal specificities of the situations under consideration. With regard to the inferences to be drawn from the materials and information supporting the requests, the Office has on some occasions acted more restrictively—sometimes in an unjustified manner—than on others, as aptly observed by the authorising PTCs[967]. Lastly, the OTP proved consistent in the practice of providing the required documents to support the requests for authorisation, in line with the requests of the PTC[968].

Turning the attention to the consistency of the PTCs' practice in the exercise of their powers of judicial supervision, it should preliminarily be reminded that the scope and justification of these powers are not identical in all situations and procedures envisaged by the Statute and applicable rules and regulations. Nevertheless, it is still possible to discern areas in which the Chambers' practice seems more consistent and others were interpretive contrasts or issues not yet fully clarified exist—or might emerge in the future—across the different procedures and among the different Chambers.

From the practice analysed in Part Three a clear asymmetry emerges with regard to the PTCs' approach towards judicial review of discretionary choices under article 53(3)(a) and 15(4) of the Statute. With regard to the judicial review of prosecutorial decisions not to proceed with an investigation, the decisions adopted so far by the Pre-Trail Chamber reveal the judges' intention to conduct a substantive and somehow intrusive judicial control over the OTP's inferences leading to the decision not to open an investigation, with particular attention to the aspect of gravity in the *Comoros* situation. To the contrary, the approach of the various authorising PTCs has been significantly more deferential towards the OTP's requests, with a relatively less stringent control over the inferences leading to the Prosecutor's

[967] See ICC, Decision on the Prosecutor's request for authorization of an investigation, *Situation in Georgia*, ICC-01/15-12, PTC I, 27 January 2016, par. 35 and ICC, Public Redacted version of the "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi", ICC-01/17-X-9-US-Exp, 25 October 2017, *Situation in the Republic of Burundi*, ICC-01/17-9-Red, PTC III, 9 November 2017, par. 141.
[968] See, *supra*, footnotes 842-843.

determination to proceed with an investigation, in particular on issues of admissibility. In other terms, there seems to be on some occasions an *inverse correlation* between the depth of judicial control exercised by the Chamber and the effects of the review decision envisaged by the statutory and regulatory texts. A more pervasive control is exercised in the context of a decision not binding as to the results of PE (pursuant to article 53(3)(a)), while a less pervasive control is exercised in the context of a binding decision (pursuant to article 15(4) of the Statute). Interestingly, the same asymmetry exists as regards the Chambers' understanding of the selection function of gravity. While the Chamber—following the OTP's practice—attaches relatively limited consideration to gravity in the context of authorisation decisions, it centred its review of the OTP's no-action decision in the Comoros situation on arguments of gravity (based on the arguments put forward by the Comoros).

In relation to the practice concerning article 15(4) authorisations, the various Chambers (including the dissenting judges)—while sharing a common position on the most relevant aspects of the procedure—have at times put forward partially conflicting interpretations, with particular regard to issues such as the possibility to modify the scope of the authorised investigation and the possibility to go beyond the requests of the Office; the judgement on the OTP's approach to the evidentiary materials; and the requirements of confidentiality vis-à-vis the rights of victims[969]. In this vein, the more recent practice of the PTCs seems to move away from the *Kenya* precedent, adopting a progressively more liberal and proactive approach to these issues. In any event, the practice of the various Chambers is not always consistent, for instance as regards the permissible extension of the jurisdictional parameters, as regards both the material and temporal scope of the authorised investigation[970]. On at least one occasion, the Chamber departed from the previous (and subsequent) practice with regard to the analytical review of jurisdictional parameters, in an isolated attempt to simplify the judicial review and cut back on the length of the

[969] See, *supra*, Part Three, Chapter Two, par. 3.2.2.

[970] See ICC, 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 the Republic of Côte d'Ivoire*, ICC-02/11-14, PTC III, 3 October 2011, par. 179; ICC, Decision on the Prosecutor's request for authorization of an investigation, *Situation in Georgia*, ICC-01/15-12, PTC I, 27 January 2016, par. 35; ICC, Public Redacted version of the "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi", ICC-01/17-X-9-US-Exp, 25 October 2017, *Situation in the Republic of Burundi*, ICC-01/17-9-Red, PTC III, 9 November 2017, par. 141, 192-193.

authorisation decision[971]. In any event, the lack of a shared and overarching approach to various issues relevant to this procedure is further demonstrated by the fact that out of the four authorisations granted so far only the one relating to the situation in Burundi was the result of a unanimous decision.

With regard to the scarce practice under article 53(3)(a) of the Statute, it should be noted that the *Comoros* PTC put forward its own autonomous assessment of gravity, alleging that both jurisdiction and admissibility are to be considered "exacting legal requirements", and that only evaluations concerning the interests of justice imply real discretion on the part of the OTP. Nevertheless, given the absence of other instances of practice in this area, it is not certain that other reviewing PTCs will uphold an analogous reasoning with respect to the assessment of gravity and complementarity, were the OTP to deny the opening of an investigation on this basis in the future. By the same token, the actual scope and intensity of the *ex officio* and binding judicial review of decisions not to proceed based solely on the interests of justice pursuant to article 53(3)(b) of the Statute still needs to be tested[972].

4. Assessment of the dissociation of formants

At the beginning of Part Three we have formulated the hypothesis that the ICC's system of prosecutorial discretion and of its judicial review could be empirically approached with a view to study the potential *dissociation of formants* of the considered legal system[973]. After having collected and analysed the relevant practice and assessed the quantitative and qualitative dimension of the patterns of 'open clash' and 'smooth relationship' between the OTP and judges, it is now appropriate to put forward a normative assessment of the areas or specific issues where there seems to be an observable discrepancy between the statutory (and more generally textual) formant and the prosecutorial/judicial formant.

[971] See, *supra*, footnotes 904, 914-915 regarding the simplified analysis of jurisdiction in the *Georgia* authorisation decision.
[972] On the different scope of these procedures—and the corresponding different intensity of the supervisory powers of the Chamber—see ICC, 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", *Situation on the Registered Vessels of the Comoros, Greece and Cambodia*, ICC-01/13-51, AC, 6 November 2015, par. 58-60.
[973] See, *supra*, Part Three, Chapter One, par. 5.

The first example of dissociation of formants relates to the procedure under article 15(3) and (4) of the Statute. In this regard, the combination of the OTP's and PTCs' practice has substantially reduced the actual scope of judicial supervision over prosecutorial selection choices; a judicial oversight whose introduction proved indispensable in order to reach a compromise in Rome on the *proprio motu* powers of the independent Prosecutor[974]. While the various authorising Chambers continue to maintain that the authorisation procedure is designed to ensure the respect (or re-establishment) of legality in the unlikely event of frivolous, abusive and/or politically motivated decisions of the Office, the extremely narrow construction of the supervisory role of the Chamber and the low evidentiary standards applied have contributed to dilute the *substantive* supervisory character of the procedure. While one dissenting judge has criticised the rather liberal practice of the various PTCs for being even too intrusive vis-à-vis the OTP, the more rigorous approach called for by other dissenting judges has its merits in assigning a more stringent filtering role to the PTC[975]. The lengthy and analytical style of the authorisation decisions is not *per se* the indicator of an in-depth supervision, and Judge de Gurmendi is right in lamenting the fact that the various PTCs are at times simply duplicating the OTP's assessment[976]. Deviations from the general self-restraint of the PTC—such as in the shaping of the scope of jurisdiction—mainly go in the direction of *expanding*, and not of restricting, the OTP's discretion in the future conduct of an investigation. The above observations therefore disclose the existence of a normative discrepancy

[974] On the negotiating history and the compromise leading to the adoption of article 15 of the Statute see, *supra*, Part Two, Chapter One, par. 2.

[975] See, e.g., Dissenting Opinion of Judge Hans Peter Kaul attached to ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *Situation in the Republic of Kenya*, ICC-01/09-19-Corr, PTC II, 31 March 2010, par. 3, 8-9, 10, 14-15, 18-19, 148-150 and Separate Opinion of Judge Péter Kovács, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in Georgia, *Situation in Georgia*, ICC-01/15-12-Anx-Corr, 27 January 2016, par. 3-4, 5-7, 10. In retrospect, the more rigorous position advocated by judge H. P. Kaul might have been far-sighted, considering the difficult unfolding of the proceedings relating to the Kenya situation and the substantial breakdown of the OTP's case theories against Kenyatta and Ruto. With regard to the conduct of the Kenyan preliminary examination and investigation, and their disastrous outcomes C. M. DE VOS, *'Magical Legalism' and the International Criminal Court: A Case Study of the Kenyan Preliminary Examination*, in M. BERGSMO, C. STAHN (eds.), *Quality Control in Preliminary Examinations: Vol.* 1, cit., 283-284, 308-310 speaks of "hubris", "poor quality of preparation undertaken by the Office", and "overconfidence".

[976] See *Corrigendum* to Judge Fernández de Gurmendi's separate and partially dissenting opinion to the Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, *Situation in the Republic of Côte d'Ivoire*, ICC-02/11-15-Corr, 6 October 2011 par. 15-16.

between the apparently more demanding statutory and regulatory model of judicial supervision—also taking into consideration the negotiating history—and the more liberal practice of the relevant actors. Nevertheless, from these empirical observations does not necessarily flow a negative value judgement on the current status of the *law in action* in this area. It could be argued—especially from the point of view of a national observer used to a higher degree of prosecutorial discretion—that the current balance of power between the OTP and Chambers better fits the institutional realities of the ICC legal system, and that a more stringent judicial supervision would result in undue delays and unnecessary restrictions on the work of the Office. Yet, it could also be argued that had the Chambers adopted the more rigorous approach to authorisations advocated by Judge Kaul in the *Kenya* dissent, the limited resources of the ICC could have been better deployed in more promising situations compared to the Kenyan one, whose almost complete breakdown has been particularly detrimental to the Court's legitimacy.

A second example of dissociation of formants relates to the exercise of judicial review under article 53(3)(a) of the Statute, as it emerges from the *Comoros* situation and the ensuing clear contraposition between the OTP and judges. While it is possible to agree on many of the PTC's observations and critiques to the OTP's decision not to proceed with an investigation and on the request for reconsideration, it seems that the rather confrontational approach adopted by the Chamber—in light of the non-binding effect of the request as to the outcomes of PE—is not entirely in line with the purpose and function of the review procedure under article 53(3) of the Statute. In particular, the Chamber's insistence in framing the jurisdictional and admissibility parameters as "exacting legal requirements" devoid of any discretional character seems an excessive attempt to curb the OTP's margin of appreciation when deciding not to open an investigation; one hardly compatible with a system premised on tempered prosecutorial discretion[977]. In this sense the OTP's decision to confirm

[977] See ICC, Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation, *Situation on the Registered Vessels of the Comoros, Greece and Cambodia*, ICC-01/13-34, PTC I, 16 July 2015, par. 13-15. The AC, in an important *obiter dictum*, somehow tempered the clear-cut position of the PTC, holding that "the distinction between the powers of the Pre-Trial Chamber under article 53 (3) (a) and (b) reflects a conscious decision on the part of the drafters to *preserve a higher degree of prosecutorial discretion* regarding decisions not to investigate based on the considerations set out in article 53 (1) (a) and (b) of the Statute" (see ICC, Decision on the admissibility of the Prosecutor's appeal against the "Decision on the request of the

its previous determination represents a clear reaffirmation of its discretion and, possibly, of the rationale behind the statutory design of the checks and balances procedure as regards *nolle prosequi* decisions[978].

A third and last example of dissociation of formants relates to the interests of justice as a possible discretional tool to deny the opening of an investigation or prosecution. As already underlined on multiple occasions the OTP's understanding of this general clause—substantially shared by the Chambers—has so far literally sterilised in many respects the potential contribution of the OTP and of the Court at large to national peace, reconciliation and transitional processes[979]. While the primary objective of the Court is undoubtedly to mete out justice on the most responsible for the gravest international crimes, the inclusion of the interests of justice as a potentially countervailing argument in order not open an investigation or prosecution shows the drafters' intention to allow the ICC's organs to accommodate a more complex and comprehensive idea of justice, not limited to the administration of international criminal justice alone[980]. While the OTP's choice not to make use of this

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Union of the Comoros to review the Prosecutor's decision not to initiate an investigation", *Situation on the Registered Vessels of the Comoros, Greece and Cambodia*, ICC-01/13-51, AC, 6 November 2015, par. 59, emphasis added). In other words, it seems that the appellate judges recognise that a certain degree of discretion is exercised also with regard to the components of the jurisdiction and admissibility test, and is 'guaranteed' by the non-binding character of the PTC's review decision pursuant to article 53(3)(a) of the Statute. On the potentially negative consequences of the PTC's approach, see A. LUBIN, *op. cit.*, 118, according to whom "The PTC in essence sought to place itself as a second-tier prosecutor. However, the Chamber's approach may only encourage the OTP to offer less reasoning, as such detailed reporting is not required under the Statute or the Rules. If the OTP provides no robust legal analysis of its decisions, there is nothing to micromanage, and that will be a detrimental blow to transparency and predictability".

[978] Nevertheless, on the potential issues connected with the reasoning put forward by OTP in its final decision upon reconsideration, see K. J. HELLER, *A Potentially Serious Problem with the Final Decision Concerning the Comoros*, Opinio Juris, 1 December 2017 (available at http://opiniojuris.org/2017/12/01/33365/, last accessed 6 November 2018).

[979] For arguments in favour of a more active role of the ICC in promoting these processes see K. A. RODMAN, *Why the ICC Should Operate Within Peace Processes*, in *Ethics & International Affairs*, vol. 26, no. 1, 2012, 59-71 and K. A. RODMAN, *Is Peace in the Interests of Justice? The Case for Broad Prosecutorial Discretion at the International Criminal Court*, cit., 99-126.

[980] On the relationship between the Court's jurisdiction, prosecutorial discretion and the possibility to consider the relevance of national peace processes (with particular regard to amnesties) see R. J. GOLDSTONE, N. FRITZ, *"In the Interests of Justice" and Independent Referral: The ICC Prosecutor's Unprecedented Powers*, in *Leiden Journal of International Law*, vol. 13, issue 3, 2000, 655-667 and K. AMBOS, *The Legal Framework of Transitional Justice: A Systematic Study with a Special Focus on the Role of the ICC*, cit., 78-86. On the same lines, arguing for a more active role of the Prosecutor in the interpretation and application of the interests of justice clause see C. GALLAVIN, *Article 53 of the Rome Statute of the International Criminal Court: In the Interests of Justice?*, in *Kings College Law Journal*, vol. 14, issue 2, 2003, 179-198. See also the analysis of this provision based on a rigorous VCLT approach by T. DE SOUZA DIAS, *'Interests of justice': Defining the scope of Prosecutorial*

clause is understandable—and motivated by the intention to avoid the *ex officio* and binding review of the PTC—the current practice of both the Office and PTCs unveils an example of dissociation from to the object and purpose of the statutory regime with regard to the interests of justice, in what seems a tacit agreement for its non-application.

All the abovementioned hypotheses of dissociation between the statutory and the prosecutorial/judicial formants as regards the exercise and supervision of prosecutorial discretion at the preliminary stage have in common one feature: they all suggest the existence of a *general presumption in favour of the opening of an investigation*. Be it through the mild exercise of supervision at the authorisation stage, the attempts of intrusive review under article 53(3)(a), or the substantial neutralisation of the interests of justice clause, the combined effects of the current practices seem to create a gap between the *law in the books law* and the *law in action*. It cannot be denied that the normative design of the ICC rests on the one hand on the principle of complementarity—i.e. on the precedence of national proceedings over international ones and on the only residual intervention of the Court—and, on the other, on a *tempered prosecutorial discretion*—i.e. one that is subject to various forms of judicial supervision—in the adoption of the most relevant selection decisions at the preliminary stage. Contrary to this general textual and contextual framework, and due to the apparently contradictory approaches of the Chambers in the different supervisory procedures, the system seems to increasingly lean towards *tempered legality*, where in case of doubt—in light of the limited information available at the preliminary examination stage—the opening of an investigation is always warranted and represents the best course of action[981]. Irrespective of the

discretion in Article 53(1)(c) and (2)(c) of the Rome Statute of the International Criminal Court, in *Leiden Journal of International Law*, vol. 30, issue 3, 2017, 731-751.

[981] The *Comoros* reviewing PTC clearly expressed this position with the following words: "In the presence of several plausible explanations of the available information, the *presumption* of article 53(1) of the Statute, as reflected by the use of the word "shall" in the *chapeau* of that article, and of common sense, *is that the Prosecutor investigates in order to be able to properly assess the relevant facts*. Indeed, it is precisely the purpose of an investigation to provide clarity. Making the commencement of an investigation contingent on the information available at the pre-investigative stage being already clear, univocal or not contradictory creates a short circuit and deprives the exercise of any purpose. Facts which are difficult to establish, or which are unclear, or the existence of conflicting accounts, are not valid reasons not to start an investigation but *rather call for the opening of such an investigation*. If the information available to the Prosecutor at the pre-investigative stage allows for reasonable inferences that at least one crime within the jurisdiction of the Court has been committed and that the case would be admissible, the Prosecutor shall open an investigation, *as only*

reconcilability of these structural developments with the governing texts, it is alleged that the current institutional, administrative and not least financial structure of the OTP (and of the whole Court) is not in the condition to sustain such a dramatic transformation of its mandate. There is therefore the need to pursue a more satisfactory balance between the recognition of the necessary margin of appreciation and discretion to the OTP, the material and institutional limitations of the Court, the rights of states under the principle of complementarity and the need to assure meaningful international justice for heinous crimes.

The above considerations confirm the assumption that in the fragmentary and stratified legal framework of the ICC the actual practices of the involved actors—and in particular their *dialectical combination* through the respective patterns of adaptive or reactive behaviours—may contribute to confirm, complement, integrate or even contradict the results of a static analysis of the textual provisions, revealing the inherently creative e transformative role played by such practices.

by investigating could doubts be overcome" (ICC, Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation, *Situation on the Registered Vessels of the Comoros, Greece and Cambodia*, ICC-01/13-34, PTC I, 16 July 2015, par. 13, emphasis added).

CHAPTER TWO

THE POSSIBLE EXPLANATIONS AND THE POTENTIAL ADVERSE CONSEQUENCES OF THE DISSOCIATION BETWEEN THEORY AND PRACTICE AND OF THE OTP-JUDGES DISAGREEMENTS

1. Possible explanations for the dissociation of formants and the OTP-Judges confrontation

In the previous Chapter a comparison between the static and dynamic dimension of prosecutorial discretion and judicial review at the ICC has been carried out, revealing the existence of areas of both interpretive agreement and disagreement between the OTP and judges as well as of patterns of potential dissociation between the textual/statutory formant and the prosecutorial/judicial formant with regard to the latitude of prosecutorial discretion and of its judicial review at the pre-trial stage of proceedings at the ICC. It is therefore appropriate to reflect on the causes of these empirical phenomena, which dig their roots in the institutional design of the ICC's prosecutorial system, in the procedural mechanisms that ensure its application and, last but not least, in the specific manner in which the involved actors have so far interpreted their mandate under the Statute. Given their complex nature, only a multifactorial analysis will make it possible to provide plausible explanations for the phenomena under consideration. The following analysis proceeds first to analyse the *objective/normative* explanations—i.e. those connected to the limits and *lacunae* of the applicable legal texts—and then to examine the *subjective* explanations, i.e. those connected to the role played by the OTP and judges based on the trends in their respective practices, having regard to the influence exercised by their 'constituencies'.

1.1 The inadequacy of the statutory and regulatory framework

In the first and second part of this work we have analysed the international institutional and political premises leading to the adoption of the Statute, underlining

their fundamental influence on the normative design of the mechanism for the exercise of prosecutorial discretion and judicial review thereof. The results of the comparison between the law in the books and law in action seem to confirm the preliminary observations on the main features of this system, and particularly its open, fragmentary and incremental character[982].

The provisions of the Statute relating to prosecutorial discretion and its judicial review did not prove capable of providing in all circumstances a sufficiently clear guidance for the Prosecutor's selection choices and the judicial supervision decisions, both having regard to the indications of principle (such as those contained in the Preamble)[983], and to the more specific ones relating to the latitude of the powers and duties of the Prosecutor and judges at the pre-trial stage[984]. In particular, the statutory provisions on the evidentiary standards and the criteria for the selection of situations and cases revealed their insufficient precision and undisputable "constructive ambiguity"[985]. Notwithstanding the existence of areas of broad agreement, the uncertainty surrounding the most plausible interpretation of these standards contributed to spark significant interpretive disagreements on key issues such as the assessment of situational gravity for the purpose of admissibility or the scope of the supervisory procedures under article 53(3)(a) of the Statute. Alongside provisions that leave a wide margin for interpretation and integrative practice due to their—sometimes intentional—generic formulation, there are areas in which the primary normative texts are simply silent. One example may be the almost complete absence of practical indications on the manner in which the OTP should commence and conduct preliminary examinations, a *lacuna* only partially remedied through the RPE and applicable Regulations[986]. In these areas the practice of the Office plainly *created* if not the rules at least 'patterns of regularities'—i.e. of relatively consistent

[982] See, *supra*, Part Two, Chapter One. On these general features of ICL see M. COSTI, E. FRONZA, *op. cit.*, 18-21.
[983] See, *supra*, Part Two, Chapter One, par. 3.1.
[984] See, *supra*, Part Two, Chapters One, Two and Three.
[985] See C. KRESS, *The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise*, cit., 603, 605.
[986] On the importance of regulatory texts on the exercise of prosecutorial discretion see, *supra*, Part Two, Chapter One, par. 4. It should be noted that the Regulations of the OTP and the Court are adopted—and can be modified—by the same subjects who are called to apply them (namely the Prosecutor and judges).

courses of action on specific legal issues—contributing to a certain degree of foreseeability of the OTP's action[987].

The regulatory texts, namely the RPE and the applicable Regulations, do provide on certain issues a more detailed and specific set of rules concerning the micro-choices of the OTP and judges, but cannot alleviate the inconsistencies or *lacunae* of the primary source, also in light of their hierarchically subordinated position vis-à-vis the Statute[988]. Nevertheless, the Chambers have used—with mixed results—some of these provisions to influence or limit the exercise of prosecutorial discretion at the preliminary stage of the proceedings[989]. On the other hand, some of these provision have been the object of notable cases of non-compliance on the part of the OTP, in the absence of adequate procedural remedies other than stays of proceedings and the threat of disciplinary action against the Prosecutor or the individual trial attorneys acting on her behalf[990].

It seems reasonable to conclude that the structural ambiguity of the applicable rules couldn't in any event have provided a complete and coherent framework for the adoption of both prosecutorial discretionary and judicial supervision decisions, and in some cases might have provided an incentive not to explore certain courses of action (such as those allowed under the interests of justice clause). While it could be argued that this degree of flexibility and adaptability to changing circumstances is a positive and indispensable feature of the system, the analysis of practice and of the episodes of dissociation of formants suggests that the *integrative practices* have yet to produce a satisfactory balance between the needs for flexibility and predictability. Nevertheless, as we shall see in last chapter of this work, to propose ambitious

[987] For instance what we have here referred to as 'proceduralisation' of preliminary examinations has contributed to create these 'regularities' in the practice of the Office. See, *supra*, Part Three, Chapter Two, par. 2.1. On the distinction between 'rule' and 'regularity' see L. GRADONI, *L'attestation du droit pénal international coutumier dans la jurisprudence du Tribunal pour l'Ex-Yougoslavie. « Régularités » et « règles »*, in M. DELMAS-MARTY, E. FRONZA, É. LAMBERT-ABDELGAWAD (eds.), *Les sources du droit international pénal. L'expérience des Tribunaux Pénaux Internationaux et le Statut de la Cour Pénale Internationale*, Paris, 2004, 28-32.

[988] See article 51(4) and (5) of the Statute. See also, *supra*, footnotes 417-419 for a detailed analysis of the internal hierarchy between the various sources of procedural rules.

[989] This is particularly true for the Chamber's power to request additional information to the OTP based on Regulations 28(1)-(2), 48(1) of the Regulations of the Court and Rule 50(4) of the RPE.

[990] For instance, it took the OTP two full years to reach a final decision concerning the *Comoros*, after the review decision of the PTC, notwithstanding the fact that Rule 108(2) of the RPE requires the Prosecutor to do so "as soon as possible". On the disciplinary sanctions for prosecutorial misconduct or non-cooperation see, *supra*, Part One, Chapter One, par. 1 (especially footnotes 31-33).

normative changes of the primary normative texts does not seem, for various reasons, the most viable solution to their main deficiencies.

1.2 The (inevitable) inadequacy of prosecutorial policies, strategies and guidelines

As clarified in Part Two, the OTP has progressively put forward a number of strategy and policy documents, as well as regulations and guidelines which have a bearing on the exercise of prosecutorial discretion and may give substance to the generic statutory—and sometimes even regulatory—provisions. As largely anticipated in their static analysis, a comparison of these documents with the practice of the Office—combined when available with that of the Chambers—clearly confirmed that they could in no way be expected to compensate for the inconsistencies of the normative texts. This is not only due to their eminently non-binding nature, but also to the fundamental reasons leading to their adoption, namely the OTP's need to guarantee greater transparency of its decision-making process and to reassure the Chambers on the impartiality and even-handedness of preliminary examination activities. Those advocating for the introduction of policy documents containing rigid criteria for the selection and prioritisation of situation and cases failed to consider that it was very unlikely that the Prosecutor would have imposed on herself any such constraints, especially when the primary legal texts allow her significant margins of discretion. Besides this pragmatic argument, even from the point of view of the sources of the ICC's legal regime, it seems highly implausible that acts of *soft law* adopted by the Office in the exercise of its administrative independence could make rigid what the legally binding documents had created flexible.

In other words, notwithstanding the importance of these documents for the purposes of assessing the OTP's performances and the consistency of its choices—as well as the degree of spontaneous observance of the stated policy—their practical impact should not be overstated. They are but one additional layer of the ICC's expanding normative fabric, and they frequently limit themselves to record the

OTP's discretionary practice, instead of pre-emptively providing clear guidelines for future action[991].

1.3 The Prosecutor's 'constituencies' and self-perception of the Office's institutional role

Alongside the objective normative reasons that may provide an explanation for the patterns of dissociation of formants and those of open clash between the OTP and judges, also *subjective* institutional factors might shed light on the empirical phenomena emerged from the analysis of practice. In other words, certain trends in this practice may be explained on grounds of the OTP's and judges' attempt to assert their institutional role vis-à-vis the other actors of the ICC legal process, in line with an implicit or explicit prosecutorial or judicial philosophy or interpretive approach. Moreover, with particular regard to the OTP—and to a lesser extent judges—the institutional self-perception that contributes to shape its policies and discretionary decisions cannot be entirely divorced from the expectations and demands of the Court's many 'constituencies'. These include states (both State Parties and third states); international organisations of universal and regional character; NGOs; victims; as well as the national and international 'community of jurists' comprising national and international judges, lawyers and academics[992].

While it cannot be doubted that the OTP's action is first and foremost based on genuinely legal considerations, underestimating the relevance of the inputs coming from these diverse constituencies would be an exercise of abstraction, for the assessment of the OTP's overall discretionary practice cannot be conducted *in vacuo*. Nevertheless, a sociological inquiry on these issues is clearly beyond the scope of the present study and has already been the object of extensive elaboration in literature[993].

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[991] On policy papers see, *supra*, Part Two, Chapter Two, par. 3 and Part Three, Chapter Two, par. 2.1

[992] On the concept of 'constituency' with regard to the activity of the ICC, see F. MÉGRET, *In who's name: The ICC and the search for constituency*, in C. M. DE VOS, S. KENDALL, C. STAHN (eds.), *Contested Justice: The Politics and Practice of International Criminal Court Interventions*, Cambridge, 2015, 23-45, as well as the other contributions in the same volume. With particular regard to the constituency of victims of international crimes and their representation at the ICC see S. KENDALL, S. NOUWEN, *Representational Practices at the International Criminal Court: The Gap Between Juridified and Abstract Victimhood*, in *Law and Contemporary Problems*, vol. 76, 2014, 235-262.

[993] On the separate but connected issue of the legitimacy of the Court as an international institution see, e.g., the contributions of A. FICHTELBERG, *Democratic Legitimacy and the International Criminal*

Suffices here to underline that the OTP's selection choices are some of the most visible manifestations of the Court's activity and are therefore subject to incessant international *ex ante* and *ex post* scrutiny[994]. This requires the Office to exercise a good measure of 'legal diplomacy' as well as the awareness of the institutional consequences of its decisions. Crucial in this sense is also the way in which the Office's decisions are communicated to the public through the Court's media and outreach facilities[995].

The OTP's quest for legitimacy and the necessity to defend its role from allegations of bias and double-standards—or other forms of legal or political criticism—have certainly played a role in co-determining the course of action of the Office in the exercise of discretion, also based on some hard lessons learned from the early practice of the Office. The necessity to take into consideration this multifaceted international reality—including the necessity to rely on state cooperation for the enforcement of virtually all of the Office's decisions—might at least partially explain certain oscillations and inconsistencies in the practice of the Office, as well as the

Court: A Liberal Defence, in *Journal of International Criminal Justice*, vol. 4, issue 4, 2006, 765-785 and M. GLASIUS, *Do International Criminal Courts Require Democratic Legitimacy?*, in *European Journal of International Law*, vol. 23, issue 1, 2012, 43-66. Of particular interest is the concept of "discursive legitimacy", referred to by M. J. STRUETT, *The Politics of Discursive Legitimacy: Understanding the Dynamics and Implications of Prosecutorial Discretion at the International Criminal Court*, in S. C. ROACH (ed.), *Governance, Order, and the International Criminal Court: Between Realpolitik and a Cosmopolitan Court*, Oxford, 2009, 113 who describes it as a "communicatively rational discourse about the rules of international criminal law and the fairness of their application in practice". Fundamental in this debate is also the contribution of M. DELMAS-MARTY, *Le droit pénal comme éthique de la mondialisation*, in *Revue de Science Criminelle et de Droit Pénal Comparé*, no. 1, 2004, 1-10, reflecting on the potential role of ICL in the construction of a set of globally shared values.

[994] See for instance the reporting activity of some of the most internationally active NGOs, such as Human Rights Watch or Amnesty International, with regard to the work of the Court. These organisations have put forward in the past years various reports, statements and documents relating both to general issues and to specific categories of crimes or country situation (the reports are available, respectively, at https://www.hrw.org/publications and https://www.amnesty.org/en/search/?q=icc, last accessed 6 November 2018).

[995] The Court's structure comprises an Outreach Unit, within the larger Public Information and Documentation Section. This office has put forward some reports on outreach activities (from 2007 up to 2010). See also the ICC-Registry, Public Information and Outreach Engaging with Communities Report of activities in the situation related countries, Period: From January 2011-October 2014 and ICC, Integrated Strategy for External Relations, Public Information and Outreach, 18 April 2007. For a discussion on some relevant aspects of the outreach activities see the debate among experts on https://iccforum.com/outreach (last accessed 6 November 2018).

progressive changes in its strategic objectives and the development of new administrative and procedural practices[996].

On some occasions the Office considered it necessary to defend its discretionary prerogatives not from *external* actors, but from *internal* ones, such as in those cases in which it criticised any allegedly unwarranted interference of judges called to exercise supervisory powers. Given the 'variable geometry' of the Chambers' practice in the exercise of judicial oversight, the Office has always tried to adapt to the different procedural contexts so as to maximise the flexibility of its action.

All these things combined might therefore account for the external perception of the lack of consistency of certain prosecutorial choices, or contribute to explain the patterns of interpretive disagreement among the OTP and judges on the one hand, and the OTP and international stakeholders on the other[997].

1.4 Judges' role and the lack of an overarching 'judicial strategy' as regards the exercise of judicial supervision

The role played by the judiciary in the development of the current practice as regards prosecutorial discretion and judicial review thereof proved relevant and is marked by the apparently contradictory approaches adopted by the Chambers in the exercise of their supervisory powers within the different procedures calling for the intervention of judges[998]. While patterns of judicial practice have gradually stratified, consolidating areas of major agreement or disagreement with the OTP's

[996] For instance, the main tenets of the prosecutorial policy have significantly changed during the years, based on the previous experience and the necessity to adapt the strategy to the progressive expansion of the work of the Court. See, *supra*, Part Two, Chapter Two, par. 2. In this sense J. IVERSON, *Disarming the Trap: Evaluating Prosecutorial Discretion in Preliminary Examinations beyond the False Dichotomy of Politics and Law*, in M. BERGSMO, C. STAHN (eds.), *Quality Control in Preliminary Examinations: Vol. 2*, cit., 153 argues against the purportedly false dichotomy between politics and law, alleging that a pragmatic approach to the analysis of practice requires the recognition that the "Prosecutor's choices are *not* determined entirely by law or politics".

[997] As regards the criticism of international actors, one might recall—as far as states and international organisations of regional character are concerned—the political controversies concerning the relationship between the ICC and the African Union or some African states (on this subject see, *supra*, footnote 46), or the recent harsh criticism expressed by certain NGOs on the acquittal of Mr Bemba Gombo (see, e.g., Fédération Internationale des Droits de l'Homme (FIDH), Press release, Acquittal of Jean Pierre Bemba on appeal: an affront to thousands of victims, 8 June 2018, available at: https://www.fidh.org/en/region/Africa/central-african-republic/acquittal-of-jean-pierre-bemba-on-appeal-an-affront-to-thousands-of, last accessed 6 November 2018).

[998] See, *supra*, Part Four, Chapter One, par. 3.

interpretation of the relevant standards, the overall perception remains that—also due to the almost complete lack of practice in certain areas—the judges' review has been based more on a case-by-case approach, rather then on a comprehensive and systematic judicial strategy. There exist differences across Pre-Trial Chambers on the limits and scope of the judicial supervision and the possibility of a more active/directive role of judges at the preliminary examination and investigation stage of the proceedings[999]. These differences are mainly due to the variable composition of the Chambers and the differing cultural approaches to judicial review of judges coming from diverse legal orders and professional backgrounds[1000]. In addition, the absence of a forum to resolve such discrepancies and to provide a more principled guidance already at the situational stage of proceedings—due to the exhaustive character of the provisions relating to the possibility of appeal—makes it difficult to rationalise this judicial practice[1001].

With regard to the influence of constituencies on the work of the Court's main bodies, the position of judges is substantially different from that of the OTP, considering that only the latter is a *party* to the proceedings; a position only partially mitigated—but not radically transformed—by the OTP's statutory duty to assist the Court in the establishment of the truth and the judicial-like guarantees of the OTP's independence[1002]. Nevertheless, while judges are not necessarily under the immediate 'fire' of the international public opinion's criticism, their decisions with regard to the supervision of the OTP's discretionary choices frequently come under severe scrutiny *par ricochet*, as a result of certain restrictive selection decisions of the Prosecutor. It can be argued that it is for this reason that some PTCs have made use

[999] *Ibidem*.
[1000] For instance, the dissenting opinions in the context of article 15 authorisation procedures were put forward by judges coming from civil law jurisdictions (Germany, Hungary, Argentina), systems that generally admit various forms of judicial supervision of prosecutorial choices. Interestingly, the views of the dissenting judges are not necessarily aligned with regard to the latitude and scope of the PTC's supervisory powers, given that they have alternatively argued for a more extended or restricted role of judges at this procedural juncture. Nevertheless, all such opinions seem to share the view that the Pre-Trial Chamber is permitted to interact with the OTP in co-determining the scope of the prospective investigation, especially with regard to its material and temporal scope.
[1001] See article 82(1) of the Statute. As regards the absence of a judicial forum to resolve these interpretive disputes and its consequences on the OTP-PTC relations, see ICC-OTP, Final decision of the Prosecution concerning the "Article 53(1) Report" (ICC-01/13-6-AnxA), dated 6 November 2014, *Situation on the Registered Vessels of the Comoros*, *Greece and Cambodia*, ICC-01/13-57-Anx1, 30 November 2017, par. 14.
[1002] See article 54(1)(a) of the Statute. On this crucial issues see, *supra*, Part One, Chapter One, par. 1, especially footnotes 25-27.

of their discretion to redefine and judicially expand the scope of the Prosecutor's requests for authorisation to investigate, or prompted her to modify the initial case theory or the original charges, both with regard to the crimes and the modes of liability.

In conclusion, the current *practical* 'distribution of power' in the relations between the OTP and Chambers, in the light of the inevitable imperfections of the normative framework and of the competing demands of the Court's other actors and stakeholders, seems to provide a plausible explanation for the empirical phenomena—the patterns of agreement/disagreement and of dissociation of formants— ascertained in the previous chapters.

2. The (potentially detrimental) consequences of the dissociation of formants and of the episodes of open clash/smooth relationship between the OTP and judges

After having analysed the possible explanations for the areas of dissociation of formants and the main patterns of interpretive agreement/disagreement between the OTP and judges in relation to the exercise of prosecutorial discretion, it is necessary to reflect on the substantive institutional consequences of these empirical phenomena. International organisations—especially those centred on the activity of judicial or quasi-judicial organs—are dynamic institutions whose degree of effectiveness can only be measured having regard the concrete outcomes of the practices of their actors. In this perspective, it would be methodologically wrong to assume that the mere existence of any discrepancy between the law in the books and the law in action necessarily brings about negative consequences on the overall functioning of the legal system under consideration. Moreover, it should be noted that there is not a necessary correlation between interpretive agreements and convergence of formants on the one hand, and between interpretive disagreements and dissociation of formants on the other. To the contrary, it could very well be the case—as shown in the previous chapters—that the prosecutorial/judicial formants distance themselves from the statutory formant *as a result* of the interpretive agreements between the OTP and judges on certain issues[1003].

[1003] See, *supra*, Part Four, Chapter One, par. 2.

In any event, it is alleged that the current state of affairs at the ICC with regard to the exercise of prosecutorial discretion and its judicial review poses some serious challenges to the present and future viability of the ICC's legal system that need to be analysed with a view to reducing their potentially detrimental effects.

2.1 Lack of cooperation between OTP and judges in case of interpretive disagreement

The first potential consequence of the consolidation of patterns of interpretive disagreement on certain substantive and procedural issues is the ensuing lack of cooperation between the OTP and judges in the discharge of their respective duties. This has already happened on various occasions in the practice of the Court, with particular regard to situations in which the OTP reacted to certain decisions of the Chambers that threatened to interfere with its discretion[1004]. While it is understandable that the Prosecutor seeks to defend what she perceives as 'reserved prerogatives' vis-à-vis the Chambers, she must always consider that taking this approach to its extreme consequences—especially in the absence of dedicated dispute settlement procedures—might bring about inevitable negative consequences such as delays (impacting on the reasonable duration of the proceedings); challenges from other procedural actors (such states, the defence for the suspect/accused or victims) or prompt judges to adopt exceptional and invasive remedies to overcome the OTP's non compliance with their previous decisions. This rather confrontational approach might also prove counterproductive in prospective situations and generate additional tensions that have on some occasions resulted in explicit—and sometimes arguably excessive—reprimands of the Chambers directed to the Office[1005]. The negative consequences of these episodes of institutional contraposition are not only internal to the system, but may have an external projection. In particular they may give the impression—especially to external unqualified observers—that the OTP is simply reluctant to abide by the Court's decision, or to the contrary that judges

[1004] See, *supra*, footnotes 950-951 for exact references to these cases.
[1005] See, e.g., the expressions used by the preliminary judges in ICC, Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation, *Situation on the Registered Vessels of the Comoros, Greece and Cambodia*, ICC-01/13-34, PTC I, 16 July 2015, par. 51.

intend to curtail the Office's discretionary action and reduce the impact of the Court's work. While the organs of the Court shouldn't act under the pressure of external influences, it is nevertheless necessary to reduce to a minimum the occasions of unwarranted controversy and enhance the efforts aimed at carefully explaining to the public the reasons for any interpretive disagreement[1006].

2.2 The oscillation between excessive judicial deference and excessive interventionism and its consequences

In the previous chapters we have seen how the current trends in the practice of the Pre-Trial Chambers reveal significant oscillations between patterns of clear deference towards the OTP's discretionary decisions and, to the contrary, instances of significant judicial interference with the Prosecutor's discretion[1007]. Both excessive judicial deference and interventionism might have adverse consequences on the overall balance of the system of prosecutorial discretion and deepen the dissociation between the statutory formant and the prosecutorial/judicial formant of the legal system considered. Obviously, defining what might constitute an 'excess' of judicial deference or interference is not straightforward, and such an assessment must be carried out on the basis of a comparison between the normative structure of the checks and balances mechanism and the concrete outcome of its practical application.

[1006] An excessive public exposure of these interpretive disagreements does not help shaping an effective communication strategy that fosters the legitimacy of the Court's work. For instance, the recent and contested appeal decision in *Bemba* resulted in a public exchange of statements between the OTP and the Presidency, which did little to enhance the cohesion of the Court as an international judicial institution, and clearly demonstrates the influence of constituencies on the public projection and communication strategies of these two bodies. In its post-judgment statement, the OTP publicly criticised the approach taken by the Majority to the appellate review, relying on arguments contained in the opinion of the dissenting judges, and making frequent references to the expectations of justice of the victims (see ICC-OTP, Statement of ICC Prosecutor, Fatou Bensouda, on the recent judgment of the ICC Appeals Chamber acquitting Mr Jean-Pierre Bemba Gombo, 13 June 2018, available at: https://www.icc-cpi.int/Pages/item.aspx?name=180613-OTP-stat, last accessed 6 November 2018). Following the OTP's statement, the ICC President Chile Eboe-Osuji put forward a rather 'clinical' statement, recalling the fundamental principles underpinning the functioning of the Court—among which the necessary respect for the independence/impartiality of judges—indirectly criticising the OTP's outspoken position with regard to the AC's final decision, and underlining that the responsibility of the OTP and the Judiciary "must remain separate and independent functions" (see ICC, Presidency, Statement of the President of the Court in relation to the case of Mr Jean-Pierre Bemba Gombo, 14 June 2018, available at: https://www.icc-cpi.int/Pages/item.aspx?name=180614-pres-stat, last accessed 6 November 2018).

[1007] See, *supra*, Part Four, Chapter One, par. 3-4.

An excess of deference towards prosecutorial discretionary choices might significantly weaken the function of the system of judicial supervision, thereby transforming its legal nature from that of substantive filtering mechanisms to routine administrative-like procedures[1008]. In this sense, an excessive judicial deference might be the by-product of the almost complete interpretive agreement between the prosecution—which generally aims at maximising its margin of discretion—and judges, on issues such as the low character of evidentiary standards for the opening of investigations[1009]. Paradoxically, a deferential approach might also result from decisions in which judges go *ultra petita* in considering the OTP's requests based on prosecutorial discretion, thereby judicially enlarging the margins for the future exercise of such discretion[1010].

Also an excess of judicial interventionism might introduce imbalances in the functioning of the system. Sometimes the judges' interference with prosecutorial discretion might take the form of attempts to rectify the OTP's course of action, introducing alternative situation and/or case hypotheses. This has happened in practice on various occasions, both at the preliminary stage (especially in the context of the confirmation of charges) and even at the trial stage, especially based on Regulation 55 of the Regulations of the Court[1011]. In these cases it could be questioned whether under the Statute and applicable regulatory texts the ICC judges had the authority to directly or indirectly fix the defects of the OTP's selection decisions, so as to put the investigation or prosecution 'on the right track' for the subsequent procedural steps. Some have argued that the peculiar legal and institutional environment of the ICC—as well as its operational constraints—require a more directive role of judges as early as at the preliminary stage and the

[1008] This risk was underlined, for instance, in the Dissenting Opinion of Judge Hans Peter Kaul attached to ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *Situation in the Republic of Kenya*, ICC-01/09-19-Corr, PTC II 31 March 2010), par. 18-19.
[1009] On this agreement, especially in the context of article 15 authorisation procedures see, *supra*, Part Four, Chapter One, par. 2.
[1010] See, e.g., the PTCs' attitude towards the extension of the jurisdictional parameters of authorised investigations, already examined, *supra*, in Part Three, Chapter Two, par. 3.2.2 and Part Four, Chapter One, par. 2.
[1011] See, e.g., the procedural unfolding of the *Bemba* and *Katanga* trials (see, *supra*, footnotes 482, 935).

introduction of inquisitorial elements in the criminal procedure at the ICC[1012]. Nevertheless, while on some occasions the Chambers' intervention on specific prosecutorial choices might have been justified in terms of judicial economy or in order to protect the competing rights of other procedural actors, it cannot be denied that the hybrid character of the ICC's procedural regime—combining elements of both the adversarial and inquisitorial legal traditions—does not go as far as to introduce a penetrating judicial power of review on the merits of most prosecutorial choices, which largely remain an exclusive responsibility of the OTP[1013]. An excess of activism in correcting the choices of the OTP—however wrong or questionable they may be—risks of transforming the structure of the criminal procedure envisaged by the Statute and regulatory texts, thereby altering the delicate compromises which form their conventional basis. As already explained above, besides the effects of this judicial oscillations on the structure of the ICC's criminal procedure, it can also be argued that excessive deference or interventionism may impact on the overall predictability and legal certainty of the system vis-à-vis other procedural actors such as states, the suspect/accused and victims.

2.3 Inefficiency in the use of the Court's resources

As we have seen in the previous chapter, the combined effect of the PTCs' deferential approach as regards the authorisation procedures and the more intrusive one with regard to the review of decisions not to proceed, seems to suggest a shift from *tempered discretion* to *tempered legality* at least with regard to an alleged presumption in favour of the opening of investigations at the conclusion of preliminary examinations[1014]. If this trend will prevail in the future practice the whole system of prosecutorial discretion and judicial review might become increasingly *permeable*—i.e. incapable of operating a sufficient selection of incoming

[1012] In this vein, arguing in favour of the creation of investigating chambers at the ICC in order to overcome the alleged procedural issues affecting the functioning of adversarial systems in ICL see, e.g., J. DE HEMPTINNE, *op. cit.*, 402-428.
[1013] In this sense see K. AMBOS, *Treatise on International Criminal Law, Vol. III, International Criminal Procedure*, cit., 384-385. See also F. GUARIGLIA, G. HOCHMAYR, *Article 57, Functions and Powers of the Pre-Trial Chamber*, cit., 1423-1424 on the OTP-PTC contrasts as regards the interpretation of article 57(3)(c) of the Statute and the possible expansion of the PTC's supervisory and directive powers.
[1014] See, *supra*, Part Four, Chapter One, par. 4.

situations—leading either to an inefficient use of the financial and human resources of the OTP and the Court at large, or to the need for a significant expansion of budgetary appropriations.

The OTP's performance objectives contained in the Strategic Plan and some of the ensuing selection choices—including charging practices—seem difficult to reconcile with the current human, financial and administrative capabilities of the Office and the Court at large[1015]. In this context it should be noted that the Office advanced a proposal for a budget increase for 2018 (roughly 2.2 million €, a 4.9% increase compared to the budget for 2017), which the ASP only granted for half of the requested figures[1016]. Moreover, the so-called Basic Size Model—indispensable to meet the OTP's strategic objectives—is still far from being actually implemented, and has not been formally endorsed by the ASP for the purposes of the annual budgetary decisions[1017].

An additional source of concern as regards the future efficient use of resources comes from the potential—and likely unintended—consequences of the OTP-PTC *querelle* as regards the *Comoros* situation. In fact, while the Office has ultimately decided to confirm its previous decision not to open an investigation, the Final Decision of late 2017 contains a passage that might bear highly problematic consequences on the OTP's future decisions under article 53(1) of the Statute. As suggested by one commentator, it seems that the OTP believes that the opening of an investigation is required whenever *at least one potential case* within a given situation

[1015] See ICC-OTP, Strategic Plan 2016-2018, 16 November 2015, par. 69 and ICC-ASP/14/21*, Report of the Court on the Basic Size of the Office of the Prosecution, 17 September 2015, par. 21-25, whereby the OTP envisages the yearly expected output (total number of examinations during the year, new situations, active investigations, hibernated investigations, pre-trial procedures, trial procedures, appeals). It should be noted that charging decisions such as the one concerning Mr Ongwen (70 charges confirmed, see *supra*, footnote 946), go against the idea of introducing manageable cases and will probably make it difficult for the OTP to meet the stated performance objectives.

[1016] See ICC-ASP/16/10, Proposed Programme Budget for 2018 of the International Criminal Court, 11 September 2017, par. 225-226, for the proposal of budget increase formulated by the Office; and ICC-ASP/16/Res.1, Resolution of the Assembly of States Parties on the proposed programme budget for 2018, the Working Capital Fund for 2018, the scale of assessment for the apportionment of expenses of the International Criminal Court, financing appropriations for 2018 and the Contingency Fund, 14 December 2017, 1, for the ASP's allocation of resources.

[1017] *Ibidem*, 7. With regard to the Basic Size model the ASP "*stresses* that the approval by the Assembly of the budget for 2018 *is not to be understood as an endorsement of its budgetary implications* as the budget for each year should be considered on its own merits as it is prepared by the Court on the basis of the actual needs foreseen for the specific year, and it is considered and approved by the Assembly on an annual basis" (emphasis added).

appears sufficiently grave to be admissible[1018]. This position would imply that every situation referred to the Office—especially those with a sufficiently wide territorial and temporal scope—where even a single potential case fulfils the jurisdictional and admissibility criteria, *must* be investigated, thereby allocating adequate resources to that end. This would not only represent a renewed incentive for states to improperly use the power of referral, but would likely overwhelm the OTP's workload with additional situations, well beyond the current human and financial capabilities of the Office. If this were the correct interpretation of the OTP's position stemming from the *Comoros* Final Decision, the Office would necessarily have to update its budgetary and human resources plans to cope with the potential expansion of its future activities. In any event, a clarification from the Office on this point, preferably in the sense of excluding a duty to open an investigation based on the *one potential admissible case* litmus test, would be useful in order to prevent future disagreements with the PTC.

From the above considerations it seems clear that the combination of prosecutorial and judicial practice as regards the scope and limits of discretion at the pre-trial stage bears significant consequences not only on the actual functioning of the legal framework, but also on overarching administrative, budgetary and resource-related aspects, which are of paramount importance for the orderly activity of the Court.

[1018] See K. J. HELLER, *A Potentially Serious Problem with the Final Decision Concerning the Comoros*, cit., referring to ICC-OTP, Final decision of the Prosecution concerning the "Article 53(1) Report" (ICC-01/13-6-AnxA), dated 6 November 2014, *Situation on the Registered Vessels of the Comoros*, *Greece and Cambodia*, ICC-01/13-57-Anx1, 30 November 2017, par. 11, 332.

CHAPTER THREE

REDUCING THE GAP BETWEEN THE *LAW IN THE BOOKS* AND THE *LAW IN ACTION* AND MINIMISING THE CONSEQUENCES OF SYSTEMIC INTERPRETIVE DISAGREEMENTS

1. Introduction

In the previous chapter we have analysed the possible explanations and (potentially detrimental) consequences of the interpretive disagreements between the OTP and judges, as well as the more general phenomenon of the dissociation of formants with regard to the exercise of prosecutorial discretion and its judicial control, as they emerge from the ICC's practice. The present chapter aims at complementing the work of critical assessment of this practice by proposing normative, institutional and administrative adjustments that may help reducing the current gap between the law in the books and the law in action, as well as to rationalise the existing interpretive disagreements in order to foster an increased predictability and consistency of both prosecutorial selection and judicial review decisions.

It should preliminarily be clarified that while interpretive disagreements and patterns of dissociation of formants might be partially traced back to the inadequacy, lack of precision or *lacunae* of the Statute and of the other normative texts, proposing their amendment as an easy and pragmatic solution would be unrealistic and in some cases even politically impracticable. In this work we have demonstrated that the concrete outcomes of the exercise of prosecutorial discretion and its judicial review are the result of the complex interaction between the normative texts and the actual practice of the involved actors. Consequently, with the exception of relatively minor procedural issues, no quick-fix of the current trends in the ICC's practice could reasonably be enacted merely by means of amendments to the legal texts[1019].

[1019] Obviously the relative 'rigidity' of the legal texts—hence the likelihood of their amendment—differs across the spectrum. For instance, regulatory texts (such as the RPE and other Regulations) are much easier to change than the Statute. For this reason, proposals for amendment to the normative texts are put forward in par. 4 only with regard to regulatory sources.

For this reason—without ruling out the possibility that certain amendments or integrations, especially to the regulatory texts, could contribute to the enhancement of the coherence of prosecutorial and judicial practice—the present chapter concentrates on a number of correctives that could be enacted *de lege lata*, through the refinement, integration or rethinking of certain prosecutorial and judicial interpretive practices.

2. The OTP's role and the necessity of enhancing the consistency of prosecutorial choices

The analysis of prosecutorial practices—and of their interactions with judicial ones—suggests that efforts need to be intensified in order to foster the consistency of prosecutorial choices at all stages of the pre-investigation and pre-trial phase. Considering the integrative and creative function performed by the organisational and procedural practices autonomously established by the Office throughout the years, it is purported that such practices need to be tweaked, rationalised and partially revised to address their current main inconsistencies and to increase the effectiveness of the OTP's discretionary choices.

As it will be seen in the following paragraphs, the improvements needed span from adjustments to the strategy/policy documents, to organisational and institutional developments, to working methods and procedural good practices capable of favouring a more constructive and less confrontational OTP-judges relation. Of course, none of these measures alone can guarantee the results aimed for, and only a synergy between these adjustments on the prosecutorial side and those that will be proposed as regards the judicial side of the equation of prosecutorial discretion could contribute to the increased coherence of the system.

2.1 The consolidation of prosecutorial strategy and policy documents

The analysis of prosecutorial strategies and policy papers revealed that especially the latter suffer from fragmentation, overlapping and even internal

contradictions, thereby reducing their ability to shape prosecutorial choices[1020]. Notwithstanding the observations concerning the relatively limited role of policy papers in predetermining the OTP's concrete behaviour and selection decisions, it is alleged that a consolidation and rationalisation of these documents would be beneficial in providing a more coherent framework for the exercise of prosecutorial discretion[1021].

As regards the prosecutorial strategy, while the current one has certainly improved upon the preceding ones on various aspects—leading for instance to better results in terms of confirmation of charges—close monitoring of its implementation should be carried out on a continuous basis, in order to establish the realistic prospects of its fulfilment. The OTP will soon put forward an updated strategy for the years 2019-2021 together with an analysis of the results of the previous three years. It can nevertheless be observed that the objectives envisaged by the incumbent strategy were posited based on the prospect of implementation of the Basic Size Model, which is far from being completed[1022]. Therefore, adjustments to future performance objectives, especially with regard to the feasible caseload of the OTP and the Court based on the ASP's budget allocations seem warranted[1023]. In addition to that, the possibility to formulate a long-term multiannual strategy, instead of a three-year one, deserves to be carefully considered by the Office.

With regard to the policy papers and their proliferation in recent years, they surely require simplification and harmonisation. These documents have accumulated over a period of at least ten years without undergoing any systematic work of revision or harmonisation, notwithstanding the significant changes in the underlying prosecutorial strategy. They consist of roughly two hundred pages containing unnecessary duplications and inconsistencies in terms of content, purpose and

[1020] See, *supra*, Part Two, Chapter Two, par. 3.
[1021] In this sense see K. AMBOS, *Treatise on International Criminal Law, Vol. III, International Criminal Procedure*, cit., 135.
[1022] See, *supra*, Chapter Two, par. 2.3 of this Part.
[1023] It should be reminded that the ASP has not yet endorsed the Basic Size Report for the purposes of budget allocations. See ICC-ASP/16/Res.1, Resolution of the Assembly of States Parties on the proposed programme budget for 2018, the Working Capital Fund for 2018, the scale of assessment for the apportionment of expenses of the International Criminal Court, financing appropriations for 2018 and the Contingency Fund, 14 December 2017, 7.

style[1024]. It is therefore desirable that the OTP carries out in the near future a work of systematisation and simplification of these documents, possibly by creating a single and uniformly drafted master document, comprising an exposition of the general principles common to the current discrete papers, followed by issue-specific sections. Such unified policy document should then be periodically updated according to any changes in the underlying strategy, as well as to reflect judicial developments stemming from the Court's decisions that have a bearing on the exercise of prosecutorial discretion. Of course, the proposed harmonisation does in no way prevent the Office from elaborating additional issue-specific policies to complement the existing ones. Moreover, the results of the implementation of the specific policies within the unified policy document could form the object of a dedicated periodic reporting activity, in order to monitor their efficacy.

It is argued that this work would not only show the renewed OTP's commitment towards a more transparent decision-making process, but would also make it easier to assess the effectiveness and internal consistency of prosecutorial discretionary choices and to monitor the Office's overall performances.

2.2 The duty to provide reasons for (all) prosecutorial discretionary choices

Elsewhere in this work we have seen that interpretive disagreements among the different actors of the ICC's legal process are to a certain extent physiological, provided that they do not result in the systematic failure to comply with the respective legal obligations[1025]. The absence of adequate legal avenues to resolve certain interpretive disagreement makes it necessary to engage in an open institutional dialogue between the involved actors, in order to put to test the plausibility of their competing interpretive claims. Such potentially constructive

[1024] For instance, the Policy Paper on Preliminary Examinations and the more recent one on Case Selection and Prioritisation contain almost identical expositions of the general principles of independence, impartiality and objectivity guiding the action of the Office. The same holds true for the elaboration on jurisdiction, admissibility and the interests of justice, with only minor adaptations in light of the different scope of selection decisions at the situation and case stage of the proceedings. The two policy papers, which deal with strictly connected policy issues, could easily be harmonised and condensed in a single document. Also the drafting style of the papers varies greatly across the spectrum, with the most recent papers on children and sex and gender-based crimes adopting a broader and more analytical approach when compared to earlier papers such as those on victims and the interests of justice.

[1025] See, *supra*, Chapter One of this Part.

dialectic can only take place if those actors commit to provide detailed and transparent reasoning for their discretionary decisions, even when a duty in that sense is not expressly stipulated by the pertinent rules or regulations[1026].

With regard to the OTP's role in this dialectical process, it should be underlined that the Office has progressively moved from a relatively opaque decision-making—one in which reasons for certain decisions were either not provided to the public or in any event very limited—to a more transparent and constructive way of putting forward its discretionary decisions, especially those based on negative discretion (i.e. decisions *not to* proceed with further prosecutorial action)[1027]. It is advised that this approach to decision-making be continued and reinforced in the future practice of the Office, as the recent final decision regarding the *Comoros* situation seems to suggest[1028].

Even when regulatory texts do not expressly require that a prosecutorial discretionary decision state its reasons, this obligation might be implicit in the general principle of due diligence and constructive cooperation among the different articulations of the Court[1029]. In any event, stating the reasons for a decision allows the OTP, even in the absence of further judicial review, to publicly clarify its principled position on specific legal issues, thereby indicating to the judges its

[1026] On some cases the legal texts expressly stipulate such a duty. See, e.g., Regulation 49(1)(b) of the Regulations of the Court with regard to the duty to provide reasons for the request of authorisation pursuant to article 15(3) of the Statute; Rule 49(1) of the RPE concerning the reasons in support of a decision not to ask for authorisation to investigate pursuant to article 15(6) of the Statute; Rule 105(3) and (5) and Rule 106(2) of the RPE concerning the OTP's duty to provide reasons when notifying its decision not to initiate an investigation or to start a prosecution pursuant to, respectively, article 53(1) and (2) of the Statute; Rule 108(3) of the RPE on the notification of the OTP's final decision on the investigation, pursuant to a PTC's request for reconsideration adopted under article 53(3)(a) of the Statute. To the contrary, nothing is said with regard to the OTP's decision to include or not to include a situation in the list of preliminary examinations.

[1027] See the more recent reporting activity on preliminary examinations and the issuance of detailed public reports in case of *nolle prosequi*. See, *supra*, Part Three, Chapter Two, par. 2.4.

[1028] See, e.g., ICC-OTP, Final decision of the Prosecution concerning the "Article 53(1) Report" (ICC-01/13-6-AnxA), dated 6 November 2014, *Situation on the Registered Vessels of the Comoros*, *Greece and Cambodia*, ICC-01/13-57-Anx1, 30 November 2017, par. 14.

[1029] See B. D. LEPARD, *How Should the ICC Prosecutor Exercise His or Her Discretion? The Role of Fundamental Ethical Principles*, in *The John Marshall Law Review*, vol. 43, issue 3, 2010, 564, who considers the duty to provide and share the reasons for discretionary decisions an aspect of the more general obligation of transparency in decision-making, and qualifies it as a "fundamental ethical principle" that must guide the action of the Prosecutor. More generally on the importance of prosecutorial ethics and their influence on the perception of legitimacy of the Court, see A. HEINZE, F. SHANNON, *Prosecutorial Ethics and Preliminary Examinations at the ICC*, in M. BERGSMO, C. STAHN (eds.), *Quality Control in Preliminary Examinations: Vol. 2*, cit., 26-32, with particular emphasis on the Codes of Conduct adopted by the Office in recent years. See also F. FOKA TAFFO, *op. cit.*, 230-233 who speaks of the ethical principles of "bonne foi", "loyauté" and "intégrité".

preferred interpretation of the underlying provisions and on which the Prosecutor might rely in future cases. Documents stating the reasons for discretionary decisions therefore constitute *practice* of the Office that might be relevant for or relied on by other procedural actors in future cases. For this reason the Office should pay careful attention to the drafting of any document constituting an exercise of discretionary powers, and avoid exposing itself to contradictory legal interpretations of the relevant statutory and regulatory provisions. In any event, as already recalled elsewhere in this work, the normative—or merely deontological—duty to state the reasons for discretionary decisions could play a positive role and trigger constructive interpretive dynamics in the OTP-judges relations only if it is based on a clear and consistent prosecutorial strategy and policy. Failing such an underlying framework to guide the exercise of discretion—as it happened in the first years of the Court's activity—transparent and open reasoning may be a double-edged sword in that it might reveal the flaws and inconsistencies of the OTP's strategy or in its understanding of specific legal issues, thereby exposing the Office's decisions to critique and judicial review[1030].

In light of the foregoing, it is advised that the OTP should carry on and possibly expand its current practice of in-depth reasoning for its discretionary decisions, but that it does so paying particular attention to the potentially unintended consequences of such reasoning and their influence on future cases[1031]. In particular, the Office should provide greater clarity with regard to the logical inferences between the information gathered during preliminary examinations and the legal assessment ultimately leading to a decision to proceed or not to proceed. This shall make the exercise of the PTC's supervisory functions more straightforward, possibly reducing the incentive for judges to interfere with prosecutorial discretionary choices or to 're-shape' the material or temporal scope of prospective investigations.

[1030] In this vein, see M. M. DEGUZMAN, *Choosing to Prosecute: Expressive Selection at the International Criminal Court*, cit., 298-299. As A. C. RODRÍGUEZ PINEDA, *Deterrence or Withdrawals? Consequences of Publicising Preliminary Examination Activities*, in M. BERGSMO, C. STAHN (eds.), *Quality Control in Preliminary Examinations: Vol. 2*, cit., 355 clearly explains: "For transparency to have a real impact, it must be meaningful, exemplifying appropriate communication and ensuring accountability".

[1031] See, *supra*, Chapter Two, par. 2.3 of this Part (particularly footnote 1018).

2.3 Organisational correctives: Implementing the Basic Size Model and other administrative adjustments

There is no doubt that the internal organisational, administrative and managerial practices of the OTP have a significant impact on the implementation of the Office's strategy and policies. They must therefore be designed and fine-tuned in order to attain the proposed performance objectives and be commensurate to the available human and financial resources. In this sense, we have analysed the OTP's elaboration concerning the resources and organisational adjustments needed to keep up with the implementation of its current prosecutorial strategy, which resulted in the Report on the Basic Size of the Office of 2015[1032]. Notwithstanding the obvious limits of a purely managerial approach towards such complex issues[1033], the Basic Size Model constitutes a reasonable starting point to reflect on the organisational correctives needed to enhance the efficacy and efficiency of the OTP's action, including the consistency of discretionary selection decisions. Nevertheless, it should be observed that to date, little progress has been made in the implementation of the Basic Size Model, mainly due to the lack of a clear endorsement by the ASP[1034].

The Basic Size Model is interesting in that it applies a demand-driven methodology in order to determine the resources needed by the Office to perform "mandated activities", based on an extrapolation of past experience. It should nevertheless be recognised—as the Office does—that reliance on past practice, which was based on a significantly different prosecutorial strategy, is not necessarily helpful in determining the OTP's future needs[1035]. In any event, with regard to the prosecutorial activities relevant to this work—namely preliminary and pre-trial activities—the OTP's predicts to open two new preliminary examinations and to close other two every year. Along these lines, considering the inflow and outflow,

[1032] On the Basic Size Model see, *supra*, Part Two, Chapter Two, par. 5. See also ICC-ASP/14/21*, Report of the Court on the Basic Size of the Office of the Prosecution, 17 September 2015.
[1033] For a critique of the concept of managerialism in international law see M. KOSKENNIEMI, *The Politics of International Law-20 Years Later*, in *European Journal of International Law*, vol. 20, no. 1, 2009, 15-16 and, of the same Author, *International Law, Constitutionalism, Managerialism and the Ethos of Legal Education*, in *European Journal of Legal Studies*, vol. 1, issue 1, 2007, 12-13.
[1034] See ICC-ASP/16/Res.1, Resolution of the Assembly of States Parties on the proposed programme budget for 2018, the Working Capital Fund for 2018, the scale of assessment for the apportionment of expenses of the International Criminal Court, financing appropriations for 2018 and the Contingency Fund, 14 December 2017, 7.
[1035] See ICC-ASP/14/21*, Report of the Court on the Basic Size of the Office of the Prosecution, 17 September 2015, par. 15-18.

the Office should deal yearly with a total of nine preliminary examinations[1036]. To cope with this demand the Office has envisaged an increase of the dedicated staff assigned to the Situation Analysis Section (SAS)—one of the two articulations of the Jurisdiction Complementarity and Cooperation Division (JCCD)—from 13 to 17 analyst posts (excluding the related administrative positions, covered at the divisional level)[1037]. Since this structure is responsible for most of the activities carried out at the preliminary examination stage and on the basis of which the Office makes its early selection decisions—including the drafting of the interim and final reports, as well as field missions and other crucial tasks—it is contended that even with the increase proposed in the Basic Size Model it would be extremely difficult to cope with the current performance objectives. The Report envisages a significantly bigger increase in resources with regard to investigation and trial activities[1038], possibly overlooking the fact that good investigations and trials necessarily stem from a careful selection and analysis at the preliminary examination stage. Hence, a more balanced distribution of the additional human and financial resources across the various articulations of the OTP seems warranted in the perspective of the future implementation and refinement of the Basic Size Model.

In the absence of a thorough implementation of the Basic Size Model—including the proposed adjustments in order to reflect the importance of preliminary examination activities for the development of future proceedings—it shall probably be necessary to amend the prosecutorial strategy for the years to come, scaling down the number of preliminary examinations per year that the Office plans to deal with. Such a retreat on the prospective goals of the Office would nevertheless have the effect of damaging the legitimacy of the Court and would certainly attract international criticism. The OTP might play on this threat to the legitimacy of the Court in trying to persuade the ASP to endorse the Basic Size Model and to support its implementation through adequate financial allocations[1039].

[1036] *Ibidem*, par. 21-23

[1037] *Ibidem*, Annex II, par. 17-19 and Annex III on other administrative issues.

[1038] *Ibidem*, par. 29 (with particular regard to the tables providing detailed numbers on the additional personnel needed for each articulation of the Office), and Annex II par. 23-24, 28-29, 35-46, 47-59, 60.

[1039] On the role and functions of the ASP, also with regard to its budgetary powers vis-à-vis the other organs of the Court, see G. NESI, *The Organs of the International Criminal Court and their Functions in the Rome Statute: The Assembly of States Parties*, in F. LATTANZI, W. A. SCHABAS (eds.), *Essays*

In any event, it can be argued that the current workload of the OTP and of the Court in general is probably already exceeding the administrative and judicial capacity of its main organs. Therefore it is advised that the OTP avoids putting forward an updated strategy envisaging increased numbers as regards both prospective preliminary examinations and investigations in the absence of any actual strengthening of the human and financial resources currently available. At the same time, any development in the practice of the Office and Chambers that may further and excessively increase the workload of the Court—for instance the already mentioned trend towards a presumption in favour of the opening of investigations—should not be encouraged without a careful assessment of the related financial and administrative consequences[1040].

3. The Judges' contribution to the coherence of the system

The overall consistency of the system of prosecutorial discretion and judicial review at the ICC—as clarified throughout this study—does not depend exclusively on the OTP's strategy, policies and actual preliminary examination, investigation and prosecution choices. The contribution of judges, and particularly of preliminary judges, is paramount in the dynamic process of construction of a coherent institutional balance.

The PTCs' approach towards the exercise of supervisory powers does not yet reflect a comprehensive and sufficiently settled judicial strategy and proved to be characterised by certain interpretive inconsistencies[1041]. In any event, practice so far has shown a trend of judicial self-restraint in supervisory decisions with regard to the authorisation proceedings, whereas judicial interventionism seemed more pronounced in the only example of review of a *nolle prosequi* decision.

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on the Rome Statute of the International Criminal Court, *Vol. I*, Ripa di Fagnano Alto, 1999, 233-250 and, of the same Author, *The International Criminal Court: its establishment and its relationship with the United Nations System; its composition, administration and financing*, in F. LATTANZI (ed.), *The International Criminal Court: Comments on the Draft Statute*, Napoli, 1998, 171-191.

[1040] See, *supra*, Chapter One, par. 4 and Chapter Two, par. 2.3 of this Part. On the necessity to strike a balance between the need to investigate and prosecute, and the efficient use of the Court's resources, with particular regard to the concept of proper administration of justice, see F. FOKA TAFFO, *op. cit.*, 184-188.

[1041] See, *supra*, Chapter One, par. 3 of this Part.

The quest for a more predictable exercise of prosecutorial discretion could greatly benefit from an effort of the competent PTCs in order to clarify and consolidate the interpretation of the legal standards for the supervision of prosecutorial choices, thereby overcoming the differences that have emerged among different Chambers on these issues. In addition to that, it is submitted that the practice of the Chambers—including of the AC—could contribute to improve judicial economy and efficiency, for instance by means of accepting and deciding on the OTP's 'pre-preliminary' motions (i.e. filed *prior* to the opening of a preliminary examination) for an anticipatory ruling on jurisdiction and/or admissibility, or by accepting on exceptional basis to adjudicate on the merits of appeals against the PTC's review decisions under article 53(3) of the Statute. Such creative practices, which are not alien to the practice of the Court in other areas of both substantive and procedural law[1042], might then form the basis for amendments to or integrations of the regulatory texts, in the interest of legal certainty and predictability, which might be impaired by persistent interpretive disagreements between the OTP and preliminary judges and between the various Chambers.

3.1 The use of pre-trial management powers and clarifications on the standards of review of prosecutorial choices

The first manner in which the Judiciary could contribute to increase the overall consistency and predictability of the ICC's selection choices would be to elaborate a more coherent approach towards the interpretation of both the legal criteria for the exercise of prosecutorial selection choices and the legal standards for their judicial supervision, when such a review is permitted under the Statute and regulatory texts. As we have seen in the previous chapter there are inconsistencies in

[1042] For instance, the mistrial without prejudice to retrial declared by TC V(A) in the case of Ruto and Sang was a pure judicial creation of the Majority of the Chamber. See ICC, Decision on Defence Applications for Judgments of Acquittal, *Prosecutor v. Ruto et al.*, *Situation in the Republic of Kenya*, ICC-01/09-01/11-2027-Red-Corr, TC V(A), 5 April 2016. On this decision see the analysis of K. J. HELLER, *The Ruto Trial Chamber Invents the Mistrial Without Prejudice*, Opinio Juris, 8 April 2016 (available at: http://opiniojuris.org/2016/04/08/the-icc-invents-the-possibility-of-a-mistrial/, last accessed 6 November 2018); and W. A. SCHABAS, *The Mistrial, An Innovation in International Criminal Law*, PhD Studies in Human Rights Blog, 8 April 2016 (available at: http://humanrightsdoctorate.blogspot.it/2016/04/the-mistrial-innovation-in.html, last accessed 6 November 2018).

the practice of the various Pre-Trial Chambers with regard to—*inter alia*—the PTC's potential directive role at the preliminary stage[1043] and the margin of judicial discretion when authorising the investigation based on the OTP's *proprio motu*[1044]. In addition to that, there are also serious uncertainties on the legal nature and concrete consequences of judicial review of prosecutorial negative decisions pursuant to article 53(3) of the Statute[1045].

With regard to the procedural tools provided for by the regulatory texts in order to guide the exercise of prosecutorial discretion as early as at the preliminary examination stage—such as the power to convene status conferences or to ask additional information—the Pre-Trial Chamber could more frequently make use of these tools, if this is required by reasons of judicial economy or procedural fairness[1046]. Nevertheless, the previous patterns of strong prosecutorial opposition to such measures should be carefully considered, in order to avoid sparking additional controversies and interpretive disagreements that might run contrary to the very reason for the adoption of such pre-trial management measures[1047]. In any event, the awareness that the Chamber is prepared to exercise these powers might be a sufficient incentive for the OTP to carry out preliminary examination activities thoroughly and within a reasonable period of time[1048].

With regard to the exercise of judicial supervision in the context of article 15 authorisation procedures, future Pre-Trial Chambers should make additional efforts to overcome the inconsistencies of their current case law. In fact, while all authorising PTCs have so far adopted a largely shared—and rather liberal—approach to the judicial review of the OTP's request for authorisation, they have at times differed on issues such as the nature and degree of judicial supervision over the

[1043] See, *supra*, Part Two, Chapter Three, par. 2.1 (particularly footnotes 520-528), and Chapter One, par. 2 of this Part.
[1044] See, *supra*, Chapter One, par. 3 of this Part.
[1045] *Ibidem*.
[1046] On these powers and the possible justifications for their use see the analysis carried out, *supra*, in Part Two, Chapter Three, par. 2.1.
[1047] For instance the OTP's refusal to timely abide by a directive decision of the Chamber—premised on insufficiently clear legal basis—might cause additional delays or impinge upon the participatory rights of other parties and participants.
[1048] This might be the case, for instance, with regard to the duration of preliminary examinations, notwithstanding the fact that the OTP continues to maintain that there cannot be specified time limits and that it is not under a duty to provide the Chamber with all the information acquired during preliminary examination—for instance for the purposes of a request of authorisation to investigate—failing a formal request of the Chamber to that end.

OTP's request and most importantly the margins for the judicial 'manipulation' of the material and temporal scope of the authorised investigations[1049]. While all situations have their peculiarities and need to be decided on their merits based on the requests of the Office, the Chambers should provide greater clarity and adopt a more principled approach to these legal standards, also in the interest of a more consistent prosecutorial practice based on judicial feedbacks and a system of incentives and disincentives. In any event, the current trends in the authorisation practices of the Chamber might be considered for certain aspects excessively liberal, due to the deferential approach towards the OTP's assessment of the information and the tendency to expand—rather than constrain and supervise—prosecutorial discretion[1050]. In this sense, the possibility to revert to the more rigorous approach adopted by the *Kenya* PTC—without rejecting other innovations introduced in subsequent decisions—would not necessarily represent a step backwards and might contribute to reduce the degree of dissociation between the textual and the prosecutorial/judicial formants on this matter[1051].

With regard to the exercise of powers of judicial review pursuant to article 53(3) of the Statute, the paucity of practice—which is limited to the decisions of the PTC in the *Comoros* situation—does not preclude the possibility to formulate proposals that might help future PTCs to overcome the current clash of interpretations between the Office and the Reviewing Chamber. In particular, the most problematic aspect of the *Comoros* review decision revolves around the Chamber's holding that in the context of article 53(1) and (2) decisions true prosecutorial discretion would only be exercised based on the assessment of the interests of justice, whereas both jurisdiction and especially admissibility would

[1049] See, *supra*, Chapter One, par. 2 and 3 of this Part. This comprises the inconsistencies across the different Chambers in the approach concerning the inferences to draw from the information and supporting materials provided by the Office and attached to the request for authorisation, as well as the possibility for the Chamber to go *ultra petita* in authorising the investigation. See, *supra*, footnote 970. On these contrasts and lack of unanimity among judges—reflected in the various dissenting opinions—see M. E. CROSS, *The Standard of Proof in Preliminary Examinations*, in M. BERGSMO, C. STAHN (eds.), *Quality Control in Preliminary Examinations: Vol. 2*, cit., 214-217, who stresses that "Greater clarity about the standard of proof applicable to preliminary examinations will yield some particular benefits, beyond dispelling the myth that the Prosecutor's analysis is purely oriented to delivering some kind of 'preferred' consequence".
[1050] See, *supra*, Chapter One, par. 4 of this Part.
[1051] *Ibidem*.

entail a purely non-discretional application of "exacting legal requirements"[1052]. While one might be sympathetic with the Chamber's willingness to put to test the OTP's decision not to open an investigation on the *Mavi Marmara* incident, the Majority did so by subscribing to an excessively rigid and intransigent position, one that risks of unreasonably curtailing the Prosecutor's margin of appreciation with regard to crucial selection tools such as gravity and complementarity. In addition to that, it can be argued that the *Comoros* PTC—as observed by the OTP in its Final Decision[1053]—while formally subscribing to an error-based review of the OTP's decision, actually conducted a *de novo* review on the merits, overwriting its own autonomous assessment of situational gravity to that of the Office, without even asking the OTP to provide the complete information on which the decision not to proceed was based[1054]. Notwithstanding the non-binding character of the review decision with regard to the outcomes of reconsideration and the OTP's confirmation of its prior decision in the specific situation at hand, it is desirable that future PTCs do not follow the *Comoros* precedent on these points. Following the precedent would determine a twist of the system towards quasi-mandatory investigations, with the consequences already examined in the previous chapter. In particular, future PTCs should depart from the approach of the *Comoros* PTC—following instead the more nuanced position of the AC[1055]—by confirming the at least partly discretional character of the criteria set out in article 53(1)(a) and (b) of the Statute. At the same time they should provide greater clarity and transparency with regard to the standard of review to be applied at the reviewing stage. Were the future Chambers to openly

[1052] See ICC, Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation, *Situation on the Registered Vessels of the Comoros, Greece and Cambodia*, ICC-01/13-34, PTC I, 16 July 2015, par. 14. This position is echoed by scholars who subscribe to the idea of the "purely legalistic nature of preliminary examinations". See, e.g., M. E. GAWRONSKI, *The Legalistic Function of Preliminary Examinations: Quality Control as a Two-Way Street*, in M. BERGSMO, C. STAHN (eds.), *Quality Control in Preliminary Examinations: Vol. 1*, cit., 181-184. A more nuanced—and therefore preferable—position is the one expressed by M. E. CROSS, *op. cit.*, 239-243, who distinguishes the aspect of decision-making based on non-discretionary standards from the necessary recognition of "methodological discretion", i.e. the ability to control and direct the process of analysis at the PE stage.

[1053] See ICC-OTP, Final decision of the Prosecution concerning the "Article 53(1) Report" (ICC-01/13-6-AnxA), dated 6 November 2014, *Situation on the Registered Vessels of the Comoros*, *Greece and Cambodia*, ICC-01/13-57-Anx1, 30 November 2017, par. 51-52.

[1054] *Ibidem*, par. 68.

[1055] See ICC, 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", *Situation on the Registered Vessels of the Comoros, Greece and Cambodia*, ICC-01/13-51, AC, 6 November 2015, par. 59. See also, *supra*, footnote 977.

subscribe to an in-depth *de novo* review of the OTP's decisions not to proceed, they should then consequently ask the OTP to provide all the supporting information and documents, since no review on the merits can be reasonably conducted without access to information only available to the primary finder of fact[1056].

3.2 'Pre-preliminary' rulings on jurisdiction and admissibility as an efficient pre-investigation management tool

Another contribution to the overall predictability and efficiency of the prosecutorial discretion regime might come from the PTCs' readiness to accept and decide on the OTP's requests for 'pre-preliminary' rulings on jurisdiction and/or admissibility, such as the one filed by the Office with regard to the alleged crimes against the Rohingya population across Myanmar and Bangladesh[1057]. The justification for such requests lies in the possibility to obtain an early judicial determination—albeit revisable at a later stage—on the existence of jurisdiction or on the admissibility of potential cases within a given situation, *ahead* of the opening of or during a preliminary examination. The gain in terms of judicial economy of such a procedure is self-evident. If the competent PTC declares at such an early stage—before the institution of any formal preliminary procedure or in its early stage—the lack of jurisdiction or the inadmissibility of the potential cases within a given situation, the OTP could then spare the human and financial resources needed to carry out a lengthy, complex and ultimately futile preliminary examination.

Nevertheless, it must be observed that the unprecedented request put forward by the Office with regard to the alleged crimes against the Rohingya population seems to be premised on the exceptional circumstances of that situation, and in

[1056] It is difficult to disagree with the following passage of the OTP's Final Decision on the Comoros: "Disagreements concerning the evaluation of the available information can only be given very limited weight by the Prosecution when the reviewing body has not had opportunity to examine the available information itself" (ICC-OTP, Final decision of the Prosecution concerning the "Article 53(1) Report" (ICC-01/13-6-AnxA), dated 6 November 2014, *Situation on the Registered Vessels of the Comoros, Greece and Cambodia*, ICC-01/13-57-Anx1, 30 November 2017, par. 68). Against the recognition of the PTC's power to conduct a *de novo* review, see M. E. CROSS, *op. cit.*, 251.

[1057] On the novelty of this procedure in the practice of the Court see, *supra*, Part Three, Chapter Two, par. 2.2. The unprecedented character of this request is recognised by the OTP itself in its submissions (see ICC-OTP, Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, *Application under Regulation 46(3) of the Regulations of the Court*, ICC-RoC46(3)-01/18-1, 9 April 2018, par. 6).

particular the construction of the trans-boundary element of the underlying alleged crime of deportation, which created a substantial legal uncertainty worth resolving prior to the opening of a preliminary examination[1058]. In any event, in the light of the recent Chamber's decision that established the possibility to exercise jurisdiction on the alleged crimes against the Rohingya, the OTP could in the future consider to extend this kind of requests to issues of complementarity and/or gravity, especially in borderline situations marked by controversial factual and legal circumstances. In this scenario clarifications on the material, territorial, personal and temporal scope of a prospective preliminary examination and investigation—as well as on issues of admissibility—would be given *ex ante* and not *ex post*, thereby contributing to put prosecutorial activities on the right track from the beginning and reducing the risk of subsequent interpretive clashes at the time of authorisation of an investigation or judicial review of *nolle prosequi* decisions.

The main issue with this novel approach—considering that the texts do not explicitly envisage nor exclude this kind of requests—is that the OTP, by asking an early pre-preliminary ruling to the PTC, would in essence partly shift from the Office to the Chamber the onus of making an assessment of jurisdiction and/or admissibility in particularly controversial cases. It is debatable whether this scheme of 'responsibility sharing' in the adoption of early prosecutorial discretionary choices is in line with the separation of functions between the OTP and the Judiciary, and with their respective institutional independence. In this vein, the dissenting judge in the decision concerning the Rohingya stressed the fact that the OTP's request at a pre-preliminary stage seems to deviate from the established practice concerning preliminary examinations (what we have referred to as 'proceduralisation'), and

[1058] The doubts on the existence of the Court's jurisdiction revolved around the construction of the constituent elements of the crime of deportation. In particular the question is whether the territorial jurisdiction of the Court is engaged when an essential legal element of the underlying offence—the crossing of an international border—occurred on the territory of a State Party, while the other elements of the crime occurred on the territory of a state that is not a party to the Statute. On the constituent elements of the crime of deportation and the differences with the cognate offence of forcible transfer of population, see J. M. HENCKAERTS, *Deportation and Transfer of Civilians in Time of War*, in *Vanderbilt Journal of Transnational Law*, vol. 26, 1993, 469-496; E. AMATI, E. MACULAN, *I crimini contro l'umanità*, in E. AMATI, M. COSTI, E. FRONZA, P. LOBBA, E. MACULAN, A. VALLINI, *op. cit.*, 373-374; M. C. BASSIOUNI, *Crimes Against Humanity. Historical Evolution and Contemporary Application*, Cambridge, 2011, 381-396. On the Chamber's reasoning concerning the elements of the crime of deportation see ICC, Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", *Application under Regulation 46(3) of the Regulations of the Court*, ICC-RoC46(3)-01/18-37, PTC I, 6 September 2018, par. 52-61.

pointed at the risk that by means of such requests the OTP could "put to the Pre-Trial Chamber hypothetical or abstract questions of jurisdiction" or "even shift the burden of assembling a case onto the Pre-Trial Chamber"[1059]. In his view, the decision of the Chamber was tantamount to an advisory opinion, devoid of any statutory basis[1060]. In any event, it cannot be easily predicted whether future PTCs called to decide on analogous requests will follow PTC I's precedent, thereby trying to influence the scope of a preliminary examination before its formal commencement or, to the contrary, they will call upon the Office to discharge its primary duties with regard to the selection of situations, as well as to the factual and legal assessment of jurisdiction and admissibility[1061].

Be as it may, it is advised that the Chambers should not entirely rule out the possibility of accepting on case-by-case basis such requests, thereby adding an additional instrument to the spectrum of practice-based procedural mechanisms for the promotion of judicial economy.

3.3 Allowing appeals against review decisions on extraordinary basis to solve interpretive disagreements with regard to the power of judicial review

The appeal system of the ICC is characterised by a closed enumeration of the judicial decisions subject to appeal and the Appeals Chamber has on various occasions reaffirmed its rigidity[1062]. At the same time, the Statute precludes the

[1059] See Partially Dissenting Opinion of Judge's Marc Perrin de Brichambaut, *Application under Regulation 46(3) of the Regulations of the Court*, ICC-RoC46(3)-01/18-37-Anx, 6 September 2018, par. 13. The dissenting judge also reasoned that the Chamber—in accepting to decide on the request and in grounding its decision on a legal basis not relied upon by the Office—risked to "usurp the role of the Prosecutor" (*ibidem*, par. 30) and that challenges to the jurisdiction of the Court could have been in any event entertained at a later stage of the proceedings pursuant to article 19(3) of the Statute (*ibidem*, par. 31-32).

[1060] *Ibidem*, par. 33-35. *Contra*, favourably on the introduction of the possibility for the OTP to seek an advisory opinion from the Chamber on issues relevant to the preliminary examination stage, A. LUBIN, *op. cit.*, 145.

[1061] In addition to this, it must be observed that a pre-preliminary decision on jurisdiction would generally address rather theoretical questions, such as the interpretation of certain elements of a crime for the purposes of establishing the Court's territorial and material jurisdiction or, one can speculate, to solve uncertainties on the existence of personal jurisdiction. Differently, issues of complementarity or gravity involve a more concrete and substantive factual and legal analysis, one that is certainly more difficult to produce at such an early stage of the proceedings, prior to a full preliminary examination.

[1062] See article 81 and 82 of the Statute. The latter provision deals with appeals against decisions *other than* those of acquittal, conviction or on sentence, providing an enumerated list of decisions that can be appealed. On the "narrow interpretation" of article 82(1)(a) of the Statute by the AC see V.

possibility to challenge some of the most relevant prosecutorial discretionary decisions at the pre-investigation stage, with the notable exception of negative decisions pursuant to article 53(1) and (2) of the Statute. This rigidity and formalism—resulting more from the restrictive practice of the AC than from the text itself—explain the persistence of certain interpretive disagreements between the OTP and judges, which do not find a forum for authoritative judicial settlement.

In this regard it should be recalled that the AC declined to decide on the merits of the OTP's appeal against the PTC's review decision in the *Comoros* situation, declaring it inadmissible *in limine* based on the settled case law concerning the admissibility of appeals[1063]. Nevertheless, this extremely restrictive approach does not seem to be mandated by the Statute with regard to the possibility to challenge

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NERLICH, *Article 82, Appeal against other decisions*, in O. TRIFFTERER, K. AMBOS (eds.), *op. cit.*, 1957-1959; F. C. ECKELMANS, *The First Jurisprudence of the Appeals Chamber of the ICC*, in in C. STAHN, G. SLUITER, (eds.), *op. cit.*, 538-541. More generally on the appeal system at the ICC see H. BRADY, *Appeal and Revision*, in R. S. LEE (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Ardsley, 2001, 575-595. On the AC's interpretation of the concept of "decision with respect to admissibility" for the purposes of appeal see, ICC, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58', *Situation in the Democratic Republic of the Congo*, ICC-01/04-169-US-Exp, AC, 13 July 2006, par. 18; ICC, Decision on the admissibility of the 'Appeal of the Government of Kenya against the "Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence"', *Situation in the Republic of Kenya*, ICC-01/09-78, AC, 10 August 2011, par. 15-16; ICC, 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", *Situation on the Registered Vessels of the Comoros, Greece and Cambodia*, ICC-01/13-51, AC, 6 November 2015, par. 41-52. Nevertheless, it should be reminded that the AC has on some occasions adopted a more flexible and less formalistic approach towards the admissibility of appeals against certain decisions of the PTC or TC. For instance, with regard to decisions on reparations for the benefit of victims, it declared admissible some of the appeals brought against the first decision on the principles for reparation in the *Lubanga* case (ICC, Decision establishing the principles and procedures to be applied to reparations, *Prosecutor v. Lubanga*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2904, TC I, 7 August 2012). In its admissibility decision the AC reasoned that the Impugned Decision, although it did not formally qualify as an "order for reparations" pursuant to article 75(2) and 82(4) of the Statute and did lack some of the substantive features to qualify as such an order, it could nevertheless *be deemed* in substance a reparation order for the purposes of appeal. See ICC, Decision on the admissibility of the appeals against Trial Chamber I's "Decision establishing the principles and procedures to be applied to reparations" and directions on the further conduct of proceedings, *Prosecutor v. Lubanga*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2953, AC, 14 December 2012, par. 51, 64; ICC, Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2, *Prosecutor v. Lubanga*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-3129, AC, 3 March 2015, par. 29, 35-36.

[1063] See ICC, 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", *Situation on the Registered Vessels of the Comoros, Greece and Cambodia*, ICC-01/13-51, AC, 6 November 2015, par. 41-52.

decisions adopted under article 53(3)(a) of the Statute by a Reviewing Chamber[1064]. In particular, as clearly pointed out by the dissenting judges, the AC could have retained the appeal for decision on the merits by qualifying the PTC's decision as one with respect to admissibility in the sense of article 82(1)(a) of the Statute[1065]. This would have allowed the AC to clarify whether the standard of review applied by the PTC, as well as the reasoning and conclusions for requesting the Prosecutor to reconsider its previous decision, were correct. By refusing to enter into such discussion for procedural reasons, the AC created the conditions for the perpetuation of the disagreement between the OTP and the PTC, which was made explicit in the Office's Final Decision. It is argued that the AC could have entertained the appeal without necessarily departing from its settled case law, considering that based on the current practice the procedure at hand proved to be infrequent (only one case in fifteen years), and does not risk to unreasonably increase the workload of the AC or to open the door to extensive appellate litigation[1066]. Nevertheless, the AC's decision contained some useful indications—albeit *obiter*—with regard to the review scheme of article 53(3) of the Statute, thereby indirectly providing guidance for future practice on this matter. In particular, it clarified that whatever the outcome of the procedure and the standard of review applied by the reviewing Chamber, the Office has the final say on the opening or not opening of the investigation[1067].

[1064] See H. BRADY, *op. cit.*, 578-579. The Author discusses the matter in the light of the states' different positions at the time of the drafting of the Statute, arguing that "The wording of article 82, paragraph 1(a) is capable of being interpreted so as to cover the Pre-Trial Chamber's decision under article 53, paragraph 3(a), when the decision involves jurisdiction or admissibility". She nevertheless concludes that because under this procedure the final decision on the investigation is always for the OTP to make, an appellate review—irrespective of its outcome—would not make any real difference. While this might be true in practical terms, there is still merit in allowing the possibility to challenge the Chamber's decision when it effectively—albeit not explicitly—rules on issues of admissibility, asking the AC to correct any error incurred in by the Chamber. See, *infra*, footnote 1068.

[1065] See Joint Dissenting Opinion of Judge Silvia Fernández De Gurmendi and Judge Christine Van Den Wyngaert", *Situation on the Registered Vessels of the Comoros, Greece and Cambodia*, ICC-01/13-51-Anx, 6 November 2015, par. 9-10, 19-21, 24-27, 29, 31-33, 36-37.

[1066] *Ibidem*. The dissenting judges pointed out that the precedents relied on by the Majority in dismissing the appeal as inadmissible were not pertinent to the case at hand. In particular, those precedents did relate to the admissibility of *actual cases* in the context of an *already opened investigation*, whereas the controversy before the AC in the *Comoros* situation related to the admissibility of *potential cases* in the context of the preliminary examination of a situation.

[1067] ICC, 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", *Situation on the Registered Vessels of the Comoros, Greece and Cambodia*, ICC-01/13-51, AC, 6 November 2015, par. 58-59. The possibility to obtain this clarification—more than the real prospects of success of the appeal—was probably the main drive for the OTP in challenging the Chamber's

It could be counter argued that the AC was better off leaving the issue to the dialectics between the PTC and the Prosecutor, thereby encouraging the OTP to openly clarify its position on the effects of the Chamber's decision. In any event, in the interest of clarity and of the promotion of a less confrontational relationship between the OTP and PTC, it is advisable that the AC shall in future cases accept to adjudicate on challenges such as the one brought by the OTP in the *Comoros* situation, adopting a less formalistic approach towards the admissibility requirements. This could contribute to rectify any excesses and errors in the exercise of judicial review on the part of the PTC, and does not encroach *per se* with the exercise of discretion under article 53 of the Statute, as erroneously purported by the Majority of the AC[1068].

4. Proposals for amendment to the regulatory texts

In concluding the presentation of the suggestions aimed at increasing the consistency of the prosecutorial and judicial practice and at reducing the gap between the law in the books and the law in action in relation to the exercise of discretion—mindful of the observations on the impracticality of major statutory changes—we shall put forward a few proposals for amendment to the regulatory texts (RPE and Regulations of the Court). It is alleged that the proposed amendments might contribute to the development of current practices, providing incentives for a more cooperative relationship between the OTP and judges. The following table presents the original text and the one resulting from the proposed amendments for an easier comparison.

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decision. While losing the case, the OTP was somehow reassured on the latitude of its discretionary powers.

[1068] *Ibidem*. The Majority argued that accepting to decide on the merits of the OTP's appeal against the PTC's decision, qualifying such decision as one with respect to admissibility, would have "[introduced] an additional layer of review by the Appeals Chamber that lacks any statutory basis". The reasoning seems to imply that the OTP decided to appeal the Chamber's decision not in order to protect its discretion, but to have it further restricted through the exercise of appellate review. This does not seem a very plausible reasoning and probably misinterprets the intentions of the Office in challenging the Chamber's decision. In any event, had the AC decided on the merits of the Office's appeal, such decision could only have had the effect of rectifying any error incurred by the PTC, without prejudice to the OTP's right to a final say on the opening of an investigation. In this way, the statutory scheme of judicial review pursuant to article 53(3)(a) and (b) and the Prosecutor's discretion would have been completely preserved.

CURRENT TEXT	PROPOSED AMENDED VERSION
Regulation 30 RoC **Status conferences**	**Regulation 30 RoC** **Status conferences**
	A sub-regulation is added to the text of Regulation 30:
A Chamber may hold status conferences by way of hearings, including by way of audio- or video-link technology or by way of written submissions. The Chamber may require use of standard forms at a status conference as appropriate. Such standard forms shall be approved in accordance with regulation 23, sub-regulation 2.	**1.** A Chamber may hold status conferences by way of hearings, including by way of audio- or video-link technology or by way of written submissions. The Chamber may require use of standard forms at a status conference as appropriate. Such standard forms shall be approved in accordance with regulation 23, sub-regulation 2.
	2. Having regard to the Chamber's functions under article 57(3)(c), a status conference may also be convened at the preliminary examination stage by a Pre-Trial Chamber constituted pursuant to Regulation 46(3) when, taking into account the complexity of the proceedings, the duration of preliminary examination exceeded a reasonable period of time, without a decision of the Prosecutor pursuant to article 53(1). The Chamber may alternatively request the Prosecutor to provide a written update on the activities performed and an estimate of the time needed to complete the preliminary examination. The Chamber shall be precluded from imposing a fixed time limit for the completion of such

	activities.
Regulation 48 RoC **Information necessary for the Pre-Trial Chamber**	**Regulation 48 RoC** **Information necessary for the Pre-Trial Chamber**
1. The Pre-Trial Chamber may request the Prosecutor to provide specific or additional information or documents in his or her possession, or summaries thereof, that the Pre-Trial Chamber considers necessary in order to exercise the functions and responsibilities set forth in article 53, paragraph 3 (b), article 56, paragraph 3 (a), and article 57, paragraph 3 (c).	The words in bold are added to the text of sub-regulation 1: 1.The Pre-Trial Chamber may request the Prosecutor to provide specific or additional information or documents in his or her possession, or summaries thereof, that the Pre-Trial Chamber considers necessary in order to exercise the functions and responsibilities set forth in article 53, paragraph 3 **(a) and** (b), article 56, paragraph 3 (a), and article 57, paragraph 3 (c).
Rule 50 RPE **Procedure for authorization by the Pre-Trial Chamber of the commencement of the investigation**	**Rule 50 RPE** **Procedure for authorization by the Pre-Trial Chamber of the commencement of the investigation**
5. The Pre-Trial Chamber shall issue its decision, including its reasons, as to whether to authorize the commencement of the investigation in accordance with article 15, paragraph 4, with respect to all or any part of the request by the Prosecutor. The Chamber	The words in bold are added to the text of sub-rule 5: 5. The Pre-Trial Chamber shall issue its decision, including its reasons, as to whether to authorize the commencement of the investigation in accordance with article 15, paragraph 4, with respect to all or any part of the request by the Prosecutor. **The Pre-Trial**

shall give notice of the decision to victims who have made representations.	**Chamber shall, as a general rule, limit the authorisation to the legal and factual parameters contained in the Prosecutor's request. If the Pre-Trial Chamber wishes to extend the scope of the authorized investigation beyond the material, temporal, territorial or personal parameters stated in the Prosecutor's request, it shall do so only after having acquired and assessed any pertinent additional information pursuant to sub-rule 4.** The Chamber shall give notice of the decision to victims who have made representations.
Rule 58 RPE **Proceedings under article 19**	**Rule 58 RPE** **Proceedings under article 19**
	The text in bold is inserted as sub-rule 3:
1. A request or application made under article 19 shall be in writing and contain the basis for it.	1. A request or application made under article 19 shall be in writing and contain the basis for it.
2. When a Chamber receives a request or application raising a challenge or question concerning its jurisdiction or the admissibility of a case in accordance with article 19, paragraph 2 or 3, or is acting on its own motion as provided for in article 19, paragraph 1, it shall decide on the procedure to be followed and may take appropriate measures for the proper conduct of the proceedings. It may hold a hearing. It may	2. When a Chamber receives a request or application raising a challenge or question concerning its jurisdiction or the admissibility of a case in accordance with article 19, paragraph 2 or 3, or is acting on its own motion as provided for in article 19, paragraph 1, it shall decide on the procedure to be followed and may take appropriate measures for the proper conduct of the proceedings. It may hold a hearing. It may

join the challenge or question to a confirmation or a trial proceeding as long as this does not cause undue delay, and in this circumstance shall hear and decide on the challenge or question first.	join the challenge or question to a confirmation or a trial proceeding as long as this does not cause undue delay, and in this circumstance shall hear and decide on the challenge or question first.
	3. The Prosecutor may, on exceptional basis, file a request under article 19(3) prior to the commencement of or during preliminary examination, when compelling reasons of judicial economy and the complexity of the underlying legal issues make a judicial determination at that stage necessary for the proper administration of justice. The request shall be assigned to a Pre-Trial Chamber constituted pursuant to regulation 46(3) of the Regulations of the Court. Rule 59 shall apply *mutatis mutandis*. The competent Pre-Trial Chamber may invite the OPCD and OPCV to file observations and states, organizations or other persons to submit observations under Rule 103.
3. The Court shall transmit a request or application received under sub-rule 2 to the Prosecutor and to the person referred to in article 19, paragraph 2, who has been surrendered to the Court or who has appeared voluntarily or pursuant to a summons, and shall allow them to submit written observations to the request or application within a period of time determined by the Chamber.	**4.** The Court shall transmit a request or application received under sub-rule 2 to the Prosecutor and to the person referred to in article 19, paragraph 2, who has been surrendered to the Court or who has appeared voluntarily or pursuant to a summons, and shall allow them to submit written observations to the request or application within a period of time determined by the Chamber.

4. The Court shall rule on any challenge or question of jurisdiction first and then on any challenge or question of admissibility.	**5.** The Court shall rule on any challenge or question of jurisdiction first and then on any challenge or question of admissibility.

The first proposal aims at providing a regulatory basis for convening status conferences at the preliminary examination stage of proceedings or for requesting the OTP to provide a written update on their status, introducing a reasonable balance between excessive activism and self-restraint in the exercise of supervisory powers[1069]. In particular, the proposal recognises the necessity to take into account the complexity of the proceedings when evaluating the reasonableness of the OTP's delay in reaching a decision under article 53(1) of the Statute, something that had been unduly overlooked by PTC III in the *CAR I* situation[1070]. The possibility for the Chamber to request an update on the status of the examination—even beyond the information made public by the OTP through its annual report—goes in the direction of overcoming the 'information asymmetry' between the OTP and the Chamber, which has been aptly criticised as one of the most unsatisfactory aspects of the

[1069] On the necessity to strike a proper balance between these two extremes see D. SCHAFFER, *A Review of the Experiences of the Pre-Trial and Appeals Chambers of the International Criminal Court Regarding the Disclosure of Evidence*, in *Leiden Journal of International Law*, vol. 21, issue 1, 2008, 158, 162-163.

[1070] Reference is to ICC, Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic, *Situation in the Central African Republic*, ICC-01/05-6, PTC III, 30 November 2006, 4: "the preliminary examination of a situation pursuant to article 53 (1) of the Statute and rule 104 of the Rules must be completed within a reasonable time from the reception of a referral by a State Party under articles 13 (a) and 14 of the Statute, *regardless of its complexity*" (emphasis added). The PTC's disregard for the complexity of the preliminary examination activities in evaluating the reasonableness of the OTP's delay in taking a decision on the investigation has been criticised by K. AMBOS, *Treatise on International Criminal Law*, *Vol. III*, *International Criminal Procedure*, cit., 385. According to the Author an assessment of the reasonable length of the proceedings at the preliminary stage can only be made on a case-by-case basis, giving due consideration to the complexity of the proceedings. *Contra*, in favour of a more intrusive and official—as opposed to informal—supervisory role of the PTC already at the preliminary examination stage, H. KUCZYŃSKA, *The Accusation Model Before the International Criminal Court – Study of Convergence of Criminal Justice Systems*, Heidelberg/New York/Dordrecht/London, 2015, 76. It should be noted that in the recent PTC's decision concerning the alleged crimes against the Rohingya, the Majority recalled the decision of PTC III in the *CAR I* situation, as well as stressing the OTP's duty to proceed expeditiously with any activities that might lead to a decision on the investigation. See ICC, Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", *Application under Regulation 46(3) of the Regulations of the Court*, ICC-RoC46(3)-01/18-37, PTC I, 6 September 2018, par. 75-77, 82-88.

system of checks and balances on prosecutorial discretion at the ICC[1071]. The opening reference to article 57(3)(c) of the Statute ensures that the exercise of the PTC's pre-trial management powers is functionally connected to the necessity to protect any relevant competing interests[1072]. The proposed formulation also excludes that a fixed time limit to adopt a decision may be imposed by the Chamber, although an amendment to the RPE, Regulations of the Court or Regulations of the OTP to the effect of introducing a maximum duration for PE cannot be completely dismissed in a perspective *de lege ferenda*[1073].

The second proposal aims at eliminating an evident normative inconsistency between the Regulations and the RPE. In fact, Regulation 48(1) excludes that the Pre-Trial Chamber may request additional information to the OTP for the purposes of exercising its power of review under article 53(3)(a) of the Statute, given that the provision only makes reference to letter (b) of that article. Nevertheless, Rule 107(2) of the RPE explicitly—and quite contradictorily—admits an analogous power for the PTC[1074]. While it could be argued that the exclusion in Regulation 48(1) was a deliberate choice as opposed to an unintended omission, it must be recalled that the Regulations are "subject to the Statute and the Rules", and that these primary sources must prevail in case of discrepancy[1075]. In any event, a coordination of the two texts seems appropriate.

The third proposal aims at addressing the issue, emerged in the practice of the authorising PTCs, concerning the scope of the authorisation vis-à-vis the content of the OTP's request, and more specifically the possibility for the Chamber to go *ultra*

[1071] In this sense see C. STAHN, *Judicial Review of Prosecutorial Discretion: Five Years On*, cit., 267, 271-272, who stigmatises the PTC's complete dependence on the information provided by the OTP for the exercise of meaningful judicial supervision, arguing that "Review under Article 53 (3) is based on a vicious cycle".

[1072] Namely, along the lines of article 57(3)(c) of the Statute, the protection and privacy of victims, the preservation of evidence, the protection of the suspects and of national security information.

[1073] Alternatively, for a less radical solution and leaving the legal texts unchanged, the OTP could make a policy commitment to complete the PE activities within a reasonably predetermined period of time. In favour of such a solution, and indicating a three-year period as a possible maximum time limit, see A. PUES, *op. cit.*, 451-452. The proposal is certainly reasonable, but seems at odds with the OTP's firm stance against the imposition of any time limit to the duration of preliminary examinations.

[1074] The wording of the two provisions is very similar. The power to request additional information is functionally linked to the exercise of the other powers and responsibilities of the Chamber under the Statute. In other words, the information requested must be considered, in the view of the PTC, *necessary* to the exercise of its statutory functions.

[1075] See sub-regulation 1, Regulation 1 of the Regulations of the Court and article 52(1) of the Statute.

petita and authorise the investigation in wider terms than requested by the Office. It establishes that as a general rule the Chamber should remain within the limits of the request, and when it decides not to do so, it must have before it all the necessary information, including through the exercise of its power under sub-rule 4, thereby assuring that the Chamber's decision finds sufficient factual basis in the materials in the possession of the Office and of other participants, once they are shared with the Chamber[1076].

The fourth and last proposal aims at providing an explicit regulatory basis for the procedure to obtain a pre-preliminary decision on jurisdiction and/or admissibility at the Prosecutor's request, prior to the opening of or during the early stages of a preliminary examination. Obviously, the proposal to introduce such a rule might gain momentum after the PTC's decision to declare admissible and grant most of the OTP's request concerning the alleged crimes against the Rohingya. Nevertheless, it is proposed that the new rule clearly stipulates that the legal basis for such requests would be article 19(3) of the Statute and not, as purported by PTC I clearly acting *ultra petita*, article 119(1) or the general principle of *Kompetenz-Kompetenz*. The judges themselves might consider the possibility to introduce a provisional amendment to the RPE or formulate a proposal for its amendment along these lines[1077]. Irrespective of the Chambers' decision on the specific case and of future case law on other similar requests, the proposal is worth discussing in the event of future amendments of the RPE by the ASP[1078].

In conclusion, it is reiterated that only a mix of the policy, administrative, interpretive and legislative practices and innovations proposed above could reasonably contribute to more balanced and less confrontational relations between

[1076] In addition to that, it could be argued that the PTC—when authorising the investigation *ultra petita*—should be required to provide a 'reinforced' reasoning in order to justify the extension of the authorisation to incidents or specific conducts (or legal characterisation thereof) not specifically covered by the Prosecutor's request.
[1077] The judges, acting by a two-thirds majority, may introduce such a provisional rule, pursuant to article 51(3) of the Statute, or propose its adoption —acting by absolute majority—pursuant to article 51(2)(b) of the Statute. On the "quasi-legislative" power endowed to judges in the adoption and amendment of procedural rules, see G. BOAS, J. L. BISCHOFF, N. L. REID, B. D. TAYLOR III (eds.), *International Criminal Law Practitioner Library, Vol. III. International Criminal Procedure*, Cambridge, 2011, 41-44.
[1078] See article 51(2) of the Statute, which requires a decision by a two-thirds majority of the members of the ASP for the adoption of amendments to the RPE.

the OTP and judges, in the interest of the legitimacy and full respect of the substantive and procedural components of the rule of law at the ICC.

CONCLUDING REMARKS

At the conclusion of this enquiry on prosecutorial discretion and its judicial review in the context of pre-trial procedures at the ICC, it is appropriate to briefly summarise the fundamental logical steps of the analysis and present its main findings.

The analysis started from the assumption that, in the realm of international criminal law, prosecutorial discretion performs a fundamental and structural function of selection, one whose *raison d'être* can only in part be traced back to the traditional rationales adduced at the domestic level either in favour or against its adoption as a cornerstone of the criminal justice system. The *uniqueness* of international criminal justice—a consequence of the normative and institutional environment of international law[1079]—contributes to make the concept of prosecutorial discretion all the more elusive to define and slippery to approach in rigorous legal terms. Things are made even more complicated by the inextricable relation between discretion and judicial control, which cannot be understood in isolation from each other.

In order to clarify the semantic contours of these intertwined concepts it has been necessary to resort to historical and comparative analysis. The *diachronic* and *synchronic* enquiry into the different manifestations of prosecutorial discretion and judicial control across the successive generations of international and

[1079] It is maintained that the normative, institutional and procedural speciality of ICL and its enforcement when compared to domestic criminal law systems cannot be discarded on grounds of the fact that—in essence—it undeniably deals with the ascertainment of individual criminal responsibility with a view to imposing penalties; something that has not been historically associated with the functions of classic public international law. Some scholars, on the contrary, are of the view that the idea of a conceptual and normative autonomy of international criminal law is untenable, and that this phenomenon can be explained on the basis of a domestic analogy, as a transposition—*mutatis mutandis*—of the justification, functions and procedures of domestic criminal law systems to the international legal order. In this sense, see PASTOR D. R., *El poder penal internacional. Una aproximación jurídica crítica a los fundamentos del Estatuto de Roma*, Barcelona, 2006, 57-63. For this Author the consequence in terms of 'legal culture' of this position is that: "el derecho debe tender fundamentalmente a limitar y controlar la administración de ese poder penal internacional . . . Si la jurisdicción internacional ha tomado—y esto es indiscutible—una institución del derecho interno, ajena por definición al derecho internacional, tiene que tomarla con todo su significado y con los alcances que la cultura jurídica [ha desarrollado] de modo que no es argumentalmente afinado suponer que una vez que el sistema penal se ha "internacionalizado" pueda ser analizado con otra metodología que la propia del derecho penal . . . como si su estructura específica se hubiera modificado mágicamente con la aprobación de un tratado [como el Estatuto de Roma]" (*ibidem*, 63). On the same lines, see A. GIL GIL, *Derecho Penal Internacional*, Madrid, 1999, 20.

internationalised mechanisms for the enforcement of ICL revealed the *dynamic and historically determined* character of these legal concepts. In particular, it has been clarified that international criminal justice, during its evolutionary trajectory, gradually moved from the idea of subordination of the Prosecutor to the political will and instructions of the Powers creating international tribunals (such as the IMT and IMTFE), to an increasing attention for the safeguard of the institutional independence and impartiality of the prosecuting bodies. Symmetrically, the latitude of judicial supervision over prosecutorial discretionary choices has in general been expanded, notwithstanding the profound differences in the institutional and procedural structure of the legal regimes considered. The *horizontal comparison* carried out in Part One of the work eventually underlined—by means of contrastive legal analysis—the complex and composite character of the legal regime created by the Rome Statute in respect of—*inter alia*—prosecutorial discretion and judicial review thereof.

At an overall look, the system of the ICC is premised on a fragile institutional balance between the recognition of a wide margin of discretion to the Prosecutor—who unlike his or her counterpart at the *ad hoc* tribunals is allowed to select both *situations* and *cases*—and the necessity to guarantee adequate judicial scrutiny of discretionary choices. A pragmatic compromise between, on the one hand, the need to build a strong and independent international judicial institution and, on the other hand, to preserve state sovereignty and the functional connection of the Court with the UN system, came at the expense of clarity on the actual content and latitude of prosecutorial discretion and judicial review thereof[1080]. The vague character and constructive ambiguity of the few pertinent statutory provisions were instrumental in reaching the consensus necessary to bring the work of the Rome Conference to a positive conclusion. Consequently, the normative framework was designed from the beginning to leave the solution of the most contentious aspects concerning the exercise of discretion and its judicial review to the *practice* of the Court's main actors, namely the OTP and judges, ensuring a wide margin of flexibility of the system.

[1080] In this vein, see M. E. CROSS, *op. cit.*, 237 who stresses that "transparent respect for [the rights of states] – while maintaining full independence, both of opinion and action – is highly important for the effective operation of the Prosecutor, and the success of international criminal justice more broadly".

For this reason the research focused on the inherently *integrative*, *transformative* and *creative* role played by prosecutorial and judicial practices at the preliminary examination and pre-trial stage of the proceedings, with a view to comparing the *static* statutory and regulatory framework with its *dynamic* implementation on the part of the relevant actors.

In order to carry out the proposed comparison it was first and foremost necessary to provide a thorough *static* analysis of the statutory provisions that constitute the legal basis for prosecutorial discretion and judicial review thereof, as well as of the regulatory provisions governing the practicalities of their exercise. To this preliminary normative analysis was dedicated most of Part Two of the work.

The initial observations on the fragmentary, ambiguous and incomplete nature of the statutory framework were confirmed by the analysis of the relevant provisions and of their systemic interactions. The Statute does not provide clear guidance on the exercise of discretion at the pre-trial stage of the proceedings, especially as regards the procedural stage that precedes the formal opening of an investigation (i.e. the preliminary examination). The key provisions of article 15(3) on the OTP's *proprio motu* powers, and 53(1) and (2) on the grounds for a Prosecutor's decision not to open an investigation or prosecution are centred on unclear evidentiary standards and vague normative criteria, whose progressive definition and clarification could only be the result of the dialectical interpretive practices of the OTP and judges in concrete situations. A growing body of regulatory provisions (RPE, RoC, Regulations of the OTP, Regulations of the Registry) has gradually provided additional details on the practical exercise of discretion and control thereof. However, these texts could not make up for the *lacunae* or the lack of clarity of the Statute's provisions.

In particular, the definition of the broad lines of an overarching prosecutorial strategy—as well as of issue-specific policies—were almost completely left to the OTP's practice to develop. Therefore, it has been necessary to study the numerous prosecutorial documents that *integrate and complement*—although by means of non-binding and mainly internal administrative-like sources—the statutory and regulatory framework. For the purposes of this analysis the most relevant among such

documents are the triennial Strategic Plan (previously referred to as Prosecutorial Strategy) and the Policy Paper on Preliminary Examinations. The successive strategies adopted since the establishment of the Court unveiled significant changes in the overall 'prosecutorial philosophy', reflecting the evolving institutional circumstances, the lessons learned from past experiences and the influence of the increasing body of judicial practice on many issues relevant to prosecutorial discretion. The Policy Paper on Preliminary Examinations—building on the previous practice of the Office—shed light on the manner in which the OTP carries out its preliminary analysis, and in particular on the incremental four-phased procedure followed in order to reach a decision on the opening of an investigation. In addition, the relatively recent adoption of a Report on the Basic Size of the OTP provided the opportunity to reflect on the necessary correlation between the human and financial resources of the Office and the delivery of the results anticipated in the prosecutorial strategy. These documents, regardless of their soft law character, are also a clear manifestation of the broad administrative independence endowed to the OTP and constitute useful benchmarks to evaluate the consistency of the OTP's action and its ability to meet the self-imposed performance objectives.

With regard to the other term of the 'equation' of prosecutorial discretion, namely judicial supervision and control over discretionary choices, analogous observations can be made on the vagueness and incomplete character of the pertinent statutory and regulatory provisions. Given the limitation of the study to the pre-trial phase of the proceedings, attention was mainly focused on the supervisory role of the Pre-Trial Chamber at this stage. The static analysis of the applicable principles and rules pointed to the conclusion that the supervisory role of the PTC is not premised on a 'monolithic' general power of judicial review of the OTP's decisions but, to the contrary, on powers that are *procedure-specific* and *objective-driven*. As a consequence, the supervisory role of judges consists in the sometimes-combined exercise of *directive* and *management* powers; *authorisation* powers; as well as of *persuasive*, *corrective*, *confirmative* and *protective* powers. This supervisory role is in general—and with only few exceptions of *ex officio* review—of a *reactive* character, i.e. premised on a specific request of the subjects expressly entitled to elicit judicial control based on the Statute and RPE. Overall, the static balance of

power between the OTP and PTC at the preliminary stage clearly leans in favour of the Office. Nevertheless, going beyond a formalistic understanding of the OTP-PTC relationships, the exercise of supervisory powers may in concrete circumstances substantially influence the Prosecutor's selection choices by means of incentives, disincentives or warnings on the consequences of taking a certain course of action.

Based on the static analysis carried out in Part Two, in Part Three the study sought to introduce a few structural hypotheses on the practical consequences of the ICC's normative framework, which were then tested through an in-depth and systematic review of the relevant *dynamic* prosecutorial and judicial practice. These three propositions may be summarised as follows:

1) The dynamics of prosecutorial discretion and judicial review may determine in the practice areas of substantial interpretive disagreement (*open clash*) or interpretive agreement (*smooth relationship*) between the OTP and judges, whose existence, latitude, causes and potential consequences need to be carefully assessed.

2) The abovementioned patterns of agreement and/or disagreement might give rise to identifiable instances of *dissociation of formants*, namely the existence of a certain degree of discrepancy between the statutory/regulatory formant on the one hand, and the prosecutorial/judicial formant on the other. The frequency and depth of said instances of dissociation need to be quantitatively and qualitatively assessed with a view to establishing the overall degree of normative coherence of the ICC legal system.

3) The system of checks and balances with regard to the exercise of prosecutorial discretion and its judicial review (when available) is generally premised on the *direct proportionality* between the degree of discretion embedded in a certain prosecutorial choice and the intensity of judicial control over that choice.

The relevant prosecutorial and judicial practice was then collected, categorised and analysed following the 'natural' logical and chronological order of the proceedings according to the Statute and regulatory texts (i.e. preliminary examinations; decisions made at the end of PE in the sense of requesting or not requesting judicial authorisation for the opening of an investigation in case of

proprio motu; decisions on the opening or not opening of an investigation with regard to the other triggering mechanisms; judicial control over these prosecutorial decisions and appellate proceedings thereof). Based on the analysis of the current body of practice it has been clarified that:

- The conduct of preliminary examinations has been the object of a phenomenon here referred to as *proceduralisation*, i.e. the establishment of a four-phased incremental procedure where each phase is devoted to a specific legal or factual analysis. Things can only move forward when the OTP considers that the requirements of the previous phase are satisfied based on the applicable standards. This proceduralisation was a creation of the practices and policies of the Office.
- With regard to the *directive* role of the PTC during preliminary examination, there have been various examples of judicial interventionism, mainly through the exercise of the power to convene status conferences or to request additional information. Most of these were met with severe disagreement by the OTP and led to institutional confrontation between the Office and PTCs.
- On one occasion (concerning the alleged crimes against the Rohingya people across Myanmar and Bangladesh) the PTC accepted to rule on an unprecedented OTP's pre-preliminary request for the ascertainment of jurisdiction. This procedure, not expressly envisaged nor excluded by the texts, might have a significant impact on the future prosecutorial practice and on the OTP-PTC relations at the pre-preliminary and preliminary stage.
- The timing for the opening and the duration of preliminary examinations varies according to various factors, including the triggering mechanism used in each situation. State referrals and UNSC's referrals generally correlate to short or very short PEs, whereas *proprio motu* procedures normally correlate to longer PEs. The complexity and uncertainty of the legal or factual circumstances of a specific situation may contribute to significantly extend the duration of Phase 2 and 3 of the PE (respectively devoted to the assessment of jurisdiction and admissibility).
- The OTP has on various occasions concluded the PE with a decision not to proceed with the investigation or to ask for judicial authorisation to open one,

based on the lack of preconditions for the exercise of jurisdiction (Palestine); the lack of jurisdiction *ratione materiae* (Venezuela, Iraq/UK, Honduras, Republic of Korea, Gabonese Republic); and inadmissibility *sub specie* insufficient gravity (Union of the Comoros). The Office has yet to decline the opening of an investigation based on complementarity or the interests of justice.

- The only refusal to proceed with an investigation based on article 53(1)(b) of the Statute in the Comoros situation led to the first—and to date only—example of judicial review of a *nolle prosequi* decision, which culminated in a severe disagreement between the OTP and PTC on the standard of review and the scope of prosecutorial discretion under article 53(1) of the Statute. The competent PTC exercised an in-depth review of the OTP's negative decision, deconstructing the Prosecutor's assessment of gravity and ultimately asking her to reconsider the previous decision. The Office later confirmed the original decision after the AC's refusal to rule on the merits of the OTP's appeal against the Chamber's reconsideration decision.
- With regard to *proprio motu* procedures the OTP presented—up to date—the PTC with a request for authorisation to investigate on five occasions. On four occasions the competent Chamber granted the request. One request—relating to the situation in Afghanistan—is currently *sub judice*.
- The PTC's approach towards the exercise of supervisory powers at the authorisation stage has been, in general and with few exceptions, rather liberal and inspired by a remarkable degree of deference towards the prosecuting body. The relevant evidentiary standard ("reasonable basis to believe") was construed as the lowest of the entire statutory framework. The supervision on the OTP's assessment of jurisdiction and admissibility has on most cases been little more than a duplication of the analysis contained in the Office's request. The Chambers have exercised on some occasions influence as regards the scope of the prospective investigation. Judges have gradually sought to expand the material and temporal scope compared to the requests of the OTP, extending the authorisation to sets of facts or conducts not expressly referred to by the Office.

In Part Four the *law in action* resulting from the practice of the OTP and judges—and their interrelation—was then compared to the *law in the books*, with a view to establish whether the three hypotheses formulated at the opening of Part Three had any empirical foundation.

With regard to the hypothesis sub 1), it has been possible to identify the following areas of interpretive agreement (*smooth relationship*) and disagreement (*open clash*) between the OTP and judges.

- Smooth functioning:
    - Authorisation procedures pursuant to article 15(3) and (4) of the Statute. In particular concerning the evidentiary standard applicable, the criteria under article 53(1) of the Statute and the (limited) scope of the PTC's judicial supervision.
    - Exclusion of any remedy against the decision to put or not to put a situation on preliminary examination, resulting from the Court's case law in procedures activated under Regulation 46 of the RoC.
    - Possibility to request a preliminary ruling on admissibility prior to or during preliminary examination.
    - Very narrow construction of the interests of justice clause as a potential tool for denying the opening of an investigation or prosecution.
- Open clash:
    - Chambers' use of pre-trial management tools (status conferences, requests of additional information, etc.).
    - Scope of prosecutorial 'negative' discretion under article 53(1) of the Statute, with particular regard to the discretional or exacting character of the jurisdiction and admissibility assessment; the scope of gravity as a selection criterion in relation to potential cases within a situation; the legal nature and the standard of the PTC's judicial review pursuant to article 53(3)(a) of the Statute.
    - Confidentiality and disclosure obligations at the preliminary examination and pre-trial stage.

With regard to the hypothesis sub 2), it was possible to identify at least three main areas of dissociation between the *statutory formant*—resulting from a textual, contextual, purposive and historical interpretation of the relevant provisions—and the *prosecutorial/judicial formant*:

- Function and latitude of judicial oversight pursuant to article 15(4) of the Statute. The current practice—resulting from the interpretive agreement between the OTP and PTCs—has gradually reduced the 'supervisory grip' of the PTC, making the authorisation procedure increasingly administrative-like, potentially expanding the OTP's discretion with regard to the scope of the prospective investigation.
- Scope and intensity of judicial review pursuant to article 53(3)(a) of the Statute. In the only instance of practice so far the PTC effectively conducted a *de novo* review of the OTP's decision not to proceed, putting forward an excessively rigid interpretation of jurisdictional and admissibility criteria and suggesting—contrary to a reasonable interpretation of the provision—that true prosecutorial discretion is exclusively exercised under the interests of justice clause.
- 'Sterilisation' of the discretionary and selection function of the interests of justice clause. The OTP's extremely restrictive understanding of the content and scope of this discretionary clause—somehow reinforced by the PTCs' case law—effectively excludes any reasonable prospects of its concrete application.

These examples of dissociation of formants all seem to suggest the emergence, by means of practice, of a *general presumption in favour of the opening of an investigation* whenever at least one potential case within a given situation is deemed admissible. This state of affairs—although instable and subject to change—seems hardly compatible with the principle of complementarity and the overall institutional design under the Statute, as well as with the resource constraints under which the OTP and Chambers must carry out their mandate.

With regard to the hypothesis sub 3), it should be noted that the ambivalence and inconsistency of certain interpretive choices and institutional behaviours of the OTP and judges allow to conclude that the general principle of direct proportionality between the degree of discretion of a prosecutorial decision and the degree of judicial control is not always verified in practice. In particular, there are situations in which the opposite principle of *inverse proportionality* seems to more faithfully describe the relations between the OTP and judges. More specifically:

- When the Chamber enjoys a wider supervisory power (e.g. at the authorisation stage), it usually exercises a relatively superficial and less stringent judicial review.
- When the Chamber enjoys a narrower supervisory power (e.g. in the review procedure under article 53(3)(a) of the Statute), it exercises an in-depth and more rigorous judicial review.

This might also suggest that *positive discretional decisions*, i.e. those leading to further action of the Office and activation of the Court's jurisdictional machinery, somehow possess a less discretionary character compared to *negative discretional decisions*, i.e. those leading to a discontinuance of the proceedings. Or, to put it differently, that as a consequence of the trend towards a general presumption in favour of the opening of an investigation, negative discretional decisions are perceived as a *more troubling and less physiologic* manifestation of prosecutorial discretion at the ICC; one that needs stronger justification and more rigorous supervision.

Both the practice of the OTP and the PTCs show elements of structural ambivalence. As regards the OTP, while the Office has generally assumed a strong stance vis-à-vis the Chambers in order to protect its margin of appreciation and preserve its discretion in the widest possible terms, it has on some occasions—such as in the case of the request for a pre-preliminary ruling on jurisdiction in the situation relating to the Rohingya—sought guidance from the PTC as to the possible exercise of discretion, in the direction of a shared exercise of the power to adopt selection decisions. By the same token, some instances of the Chambers' practice are

clearly ambivalent in than on the one hand they *materially extend* the possibility of exercise of prosecutorial discretion, but on the other hand they seek to *guide and influence* it, providing suggestions—which are sometimes more akin to instructions—to the OTP on the most appropriate course of action to follow.

The current status of prosecutorial and judicial practice, as it emerged from the empirical analysis and comparison between the law in the books and the law in action, was then assessed with regard to its potentially detrimental consequences. It has been clarified that the possible adverse consequences of some of the current trends in the practice of the OTP and PTC are:

- The lack of cooperation between the relevant institutional actors, in particular in the form of the OTP's refusal to comply with—or take in due consideration—the Court's decisions. This might cause unwarranted delays to the detriment of the rights of other parties and participants (such as suspect/accused persons, victims, states).
- The lack of a reasonable degree of legal certainty and predictability of the overall system of prosecutorial discretion and judicial review. While it would make little sense to require absolute consistency as regards the *outcomes* of discretionary action and supervision thereof, a reasonable degree of consistency should at least be required with regard to the *criteria and procedures* that guide the exercise of discretion and judicial supervision.
- The inefficiency in the use of the limited human and financial resources available.

In an attempt to tackle these potential—and to some extent already occurring—negative consequences, suggestions were formulated in order to reduce the frequency and intensity of interpretive disagreements, as well as the most evident instances of dissociation of formants. The proposals span from policy suggestions to administrative, organisational and procedural adjustments for both the OTP and the Judiciary, including possible amendments to regulatory legal texts.

With regard to the Prosecutor's side, the following recommendations were formulated:

- Consolidation and rationalisation of the strategic and policy documents, coupled with a continuous monitoring on their implementation.
- Full commitment to the duty to provide reasons for prosecutorial discretionary decisions in order to foster transparency, but with a view to carefully consider the potentially unintended consequences of transparent decision-making in the absence of underlying clear and consistent strategy and policy principles.
- Working with the ASP for the implementation of the Basic Size Model, including through adjustments with regard to the allocation of resources for preliminary examination analysis (currently under-sized).

With regard to the judges' side, the following recommendations were formulated:

- Careful use of pre-trial management tools, when necessitated for the purpose of ensuring procedural fairness and providing incentives to the OTP in order to carry out reasonably expeditious PE and investigations.
- Clarification and increased consistency in the construction and application of the legal criteria at the basis of prosecutorial discretionary choices and on the standards for their judicial review, through the adoption of an intermediate position between excessive deference and excessive interventionism.
- Willingness to accept and decide on pre-preliminary and preliminary requests on issues of jurisdiction and/or admissibility, as an effective procedural tool to foster judicial economy.
- Adoption on the part of the AC of a less restrictive approach towards the admissibility of appeals against the PTC's supervisory decisions with respect to prosecutorial discretionary choices, in order to provide greater clarity and solve certain OTP-PTC interpretive disagreements.

In conclusion, the analysis carried out in this work confirmed that the theoretical problem of prosecutorial discretion and judicial review thereof in international criminal law, and at the ICC in particular, is not susceptible of permanent and conclusive solutions. Its conceptual boundaries remain uncertain and

difficult to grasp. It is one of the classical problems of international criminal law in which the inherent tension between the *criminal* and the *international* component is most visible and shows extensive theoretical and practical ramifications[1081].

For this reason the search for an ideal model for the exercise of prosecutorial discretion and judicial review thereof at the ICC is not only a sterile exercise of legal abstraction, but also a missed opportunity to effectively address the pragmatic compromises necessary to make the current system work satisfactorily. The mere reproduction at the international level of domestic schemes of reasoning—although relativized through comparative law analysis—premised as they are on the sophisticated articulation and separation of state's public authorities and functions, fails to provide a solid ground for the analysis of the normative structures of international criminal law and procedure[1082]. Prosecutorial discretion in ICL makes no exception to this general methodological observation. Therefore, it needs to be studied *iuxta propria principia*. With regard to the ICC, the limited margin for comprehensive statutory and regulatory reforms makes it imperative to understand the dynamics of prosecutorial and judicial practice as the main drives of the consolidation, adaptation, integration and transformation of the normative framework at the ICC.

[1081] The complex relation between these two genetic components of ICL is eloquently explained by A. GARAPON, *Crimini che non si possono né punire, né perdonare. L'emergere di una giustizia internazionale*, Bologna, 2004, 36-38. In his words (own translation from Italian): "The idea of international criminal justice encompasses two fields of law that are *a priori* incompatible. In traditional legal thinking, in fact, international law and criminal law are mutually exclusive. They do not make use of the same scale: the former only deals with states, the latter only with individuals. The first is a body of law that coordinates sovereign and independent entities, the second is a fundamental feature of any sovereign state". The inherent tension between the two logics is further clarified in the following terms: "International law rests on the model of battle, war and reconciliation; criminal law on that of transgression, justice and expiation. From this flows the clash between two logics – the moral punitive discourse of criminal law on the one hand, the pragmatic and restorative reason of international law on the other" (*ibidem*, 40). Other scholars consider that more than a mediation and a mutual integration between the 'internationalist' and 'criminalist' components of ICL, the starting point of any analysis of this branch of law should be the recognition of its inherently and predominantly criminal character—purportedly modelled on domestic criminal law—with regard to its justification, policy objectives, procedures. In this sense, see D. R. PASTOR, *op. cit.*, 57-64.

[1082] See M. DELMAS-MARTY, *Les forces imaginantes du droit. Tome 1: Le relatif e l'universel*, Paris, 2004, 15. As the eminent French jurist explains, the contribution of comparative analysis to the development of international criminal law depends on a radical application of comparative methodological instruments that goes beyond the mere juxtaposition of the different national legal traditions. In her words: "Il faut repérer les différences et trouver une grammaire commune qui permette soit un mise en compatibilité (harmonisation), soit une véritable fusion (hybridation)". On the risks of an uncritical transposition to the international legal order of the national schemes of criminal justice, see A. GARAPON, *op. cit.*, 44-46.

The composite model of criminal procedure introduced with the Rome Statute, fraught with ambiguities and *lacunae*, requires a constant search for pragmatic compromises and balances to be reached through the *institutional dialogue* between the Prosecutor and judges. This expression is a rather politically correct formula to describe the sometimes-harsh tensions and dialectical contrapositions among these actors[1083]. But these disagreements are not only—to some extent—physiologic; they are necessary. Provided that they do not become systemic and completely jeopardise legal certainty, they are the sign of a live and functioning system of checks and balances.

Nevertheless, a system of permanent international criminal justice with universal aspirations cannot afford to navigate the complexities of prosecutorial discretion and judicial review through a purely case-by-case approach. The needs of flexibility and adaptability of prosecutorial action must necessarily be reconciled with those of predictability, impartiality, and respect for "internationally recognized human rights" that all organs of the Court—and not only judges—must always uphold in discharging their duties and responsibilities[1084]. Throughout this work we have seen that at the current state of development prosecutorial discretionary and judicial supervisory practices at the ICC are not always principled, consistent and reasonably predictable. The system has yet to find a stable and satisfactory equilibrium.

What is the role of scholars vis-à-vis these dynamics of international practice? The methodological proposal of this work lays in the recognition that scholars might contribute to the development of ICL and to the legitimacy of the ICC

[1083] It is not necessary to delve into the scholarly debate on the connected but distinct issue of the international and multilevel 'judicial dialogue', on which copious literature exists. Suffices here to underline that the metaphor of dialogue does not always faithfully reflect the actual dynamics of the interactions between the institutional actors of a given legal system, such as the prosecutors and judges of international criminal tribunals. In very positive terms on the institutional construction of a "community of courts" in international criminal law, see W. W. BURKE-WHITE, *A Community of Courts: Toward a System of International Criminal Law Enforcement*, in *Michigan Journal of International Law*, vol. 24, issue 1, 2002, 86-101.

[1084] See article 21(3) of the Statute. This is one of the most evident aspects of the "paradoxical" relationship between criminal law and human rights, where the latter are at the same time "shield" against the exercise of punitive power, and "sword" in that their protection demands an increasingly pervasive use of criminal law. On this issue see F. TULKENS, *The Paradoxical Relationship between Criminal Law and Human Rights*, in *Journal of International Criminal Justice*, vol. 9, issue 3, 2011, 577-595.

only if they stay away from two extreme—and equally inconclusive—approaches. The first, a sort of 'Ivory Tower Syndrome', consists in confining the analysis either to the theoretical justifications of a general or specific legal construct (in our case prosecutorial discretion and judicial review thereof), or to limit it to an unconstructive and nihilistic critique of the inconsistencies of its application, without delving into its practicalities in a good faith attempt to understand the strategic reasoning behind prosecutorial and judicial decisions. The second is the tendency to approach practice in a purely descriptive and instrumental way, alternatively using it to confirm one's interpretation of the relevant norms, or simply discarding it as erroneous when in contrast with the scholar's views. International prosecutorial and judicial practice—in the broad sense adopted for the purposes of this study—*must be taken (more) seriously*. In this work it has been suggested that one possible way to do so consists in carefully comparing the law in the books and the law in action in order to identify the most relevant empirical trends in this practice and the related institutional consequences, and to identify—if any—the patterns of dissociation between the legal formants of the legal system. Such a critical assessment can then form the empirical basis for *realistic* proposals for the progressive development, integration, correction, and improvement of the practices of the legal order under consideration. Only in this way can the structural fuzziness and indeterminacy of ICL be reconciled with the need for a reasonable degree of (international) legal certainty.

The success or failure of international criminal justice—both as a collective intellectual project and as a global institutional aspiration—rests on this relentless process of continuing experimentation and on the constant dialectic between the theoretical and the empirical, the universal and the relative. The quest for the 'right measure' (*métron*) in the exercise of the international punitive power, on which the legitimacy of international criminal law largely depends, makes it necessary to resort to the creative capacity of the "imagining forces of law". In the words of MIREILLE DELMAS-MARTY

> Faut-il néanmoins renoncer à une formule qui témoigne en tout cas d'un effort d'imagination pour trouver des réponses, même imparfaites, à l'ineffectivité des normes pénales à vocation universelle? Plutôt que la rejeter, mieux vaut

> sans doute l'améliorer … le relativisme n'est pas réaliste et [le] réalisme serait de faire appel aux *forces imaginantes du droit* pour sortir de l'impasse. Les faiblesses [du droit pénal international], qu'il s'agisse des concepts flous ou des normes ineffectives, ouvrent peut-être une autre voie pour tenter de construire ensemble une *future communauté de valeurs*, en faisant le pari que le flou, le doux et le mou seraient comme les garde-fous de cette complexité-là; *il faut se nourrir de l'incomplétude des idées, pour ne pas subir la force des choses*[1085].

[1085] See M. DELMAS-MARTY, *Les forces imaginantes du droit. Tome 1: Le relatif e l'universel*, cit., 214-215 (emphasis added).

ADDENDUM

Between November 2018 and February 2019, after the manuscript of this dissertation was handed over to the referees, there have been certain procedural developments at the ICC concerning the *Situation on the Registered Vessels of the Comoros, Greece and Cambodia*, which have a direct bearing on some of the fundamental issues examined in this work. A succinct analysis of said developments is therefore warranted, with a view to assess whether the most recent prosecutorial and judicial practice fits in the interpretive framework proposed in this study.

As already recalled, the Union of the Comoros had attempted to challenge the OTP's Final Decision of late 2017 through which the Office—upon reconsideration—confirmed its previous decision not to open an investigation on the *Mavi Marmara* incident[1]. They did so on the assumption that the OTP's Final Decision was itself a (second) article 53(1) decision, and that the Office had reiterated the same errors originally ascertained by the PTC in its 2015 request of reconsideration, substantially ignoring the reasoning put forward by the Chamber[2].

The PTC, in its new composition—deciding by Majority, Judge Kovács partly dissenting—largely granted the Comoros' grounds for review[3]. At the outset, the Majority sharply criticised the language used by the OTP in the Final Decision as "unbefitting of a legal document"[4], stigmatising the Office's attitude and its "decision to willfully refrain from complying with the 16 July 2015 Decision"[5]. More specifically, in the view of the Majority the OTP arrogated itself the right to "independently determine the appropriate basis for her reconsideration"[6], in an attempt to alter the "distribution of authority between the Pre-Trial Chamber and the

[1] See, *supra*, 227-228.
[2] See Public Redacted Version of "Application for Judicial Review by the Government of the Union of the Comoros", *Situation on the Registered Vessels of the Comoros*, *Greece and Cambodia*, ICC-01/13-58-Red, 23 February 2018, par. 11, 12, 29-30.
[3] See ICC, Decision on the "Application for Judicial Review by the Government of the Union of the Comoros", *Situation on the Registered Vessels of the Comoros, Greece and Cambodia*, ICC-01/13-68, PTC I, 15 November 2018 and Partly Dissenting Opinion of Judge Péter Kovács, *Situation on the Registered Vessels of the Comoros, Greece and Cambodia*, ICC-01/13-68-Anx, 15 November 2018.
[4] See ICC, Decision on the "Application for Judicial Review by the Government of the Union of the Comoros", *Situation on the Registered Vessels of the Comoros, Greece and Cambodia*, ICC-01/13-68, PTC I, 15 November 2018, par. 82.
[5] *Ibidem*, par. 83.
[6] *Ibidem*, par. 85.

Office of the Prosecutor"[7]. The Majority asserted in the clearest terms that its previous request for reconsideration constitutes a "judicial decision" binding on the OTP, which had acquired the status of *res judicata* as a result of the AC's decision on the inadmissibility of the OTP's appeal pursuant to article 82(1)(a) of the Statute[8]. From this flow three fundamental consequences. First, the OTP is obliged to comply with the Chamber's request and to carry out the reconsideration "*in accordance with the decision issued by the Pre-Trial Chamber*"[9]. Doing otherwise would "clearly contravene the judicial role of the Chambers and, in particular, the supervisory role of the Pre-Trial Chambers over the Prosecutor's actions"[10]. Second, the PTC's request must form the basis for the OTP's reconsideration[11]. In other words, the Office, in order to provide meaningful reasons for its final decision pursuant to Rule 108(3) of the RPE, must address the specific issues and errors identified by the Chamber in its review decision[12]. Third, as a result of the OTP's flawed approach to reconsideration, the Office's 2017 Decision cannot be considered "final" within the meaning of Rule 108(3) of the RPE, "until the Prosecutor has carried out her reconsideration *in accordance with* the 16 July 2015 Decision"[13]. Therefore, the Chamber remains seized of the matter in the exercise of its "continued oversight role"[14]. In conclusion, the PTC ordered the OTP to carry out a new reconsideration in accordance with the 2015 Decision and considering the already significant length of the proceedings it felt compelled to set a six-month deadline for its completion[15].

The OTP decided to approach the PTC under article 82(1)(d) of the Statute in order to seek a leave to file an interlocutory appeal, with a view to obtain from the

[7] *Ibidem,* 86.
[8] *Ibidem*, par. 90, 91-92, 94.
[9] *Ibidem*, par. 96, 98, 109 (emphasis in the original text).
[10] *Ibidem*, par. 98-99. In this connection, the Majority stressed that "the phase of the proceedings does not affect the distribution of authority under the Statute" and that the "oversight role of the Pre-Trial Chamber over the parties to the proceedings, including the Prosecutor, is in [no] way reduced at the early stages of the proceedings". The Chamber also made reference, in its contextual analysis, to the judges' power to adopt disciplinary measures pursuant to article 71 of the Statute and Rule 171 to sanction any misconduct including the deliberate refusal to comply with its directions, in order to confirm the OTP's duty to comply with the Chamber's previous decision (*ibidem*, par. 102-104).
[11] *Ibidem*, par. 110.
[12] *Ibidem*, par. 113, 117.
[13] *Ibidem*, 114 (emphasis added).
[14] *Ibidem*, 116.
[15] *Ibidem*, par. 117-121. The Majority stressed the fact that the OTP's delay in putting forward its (purportedly) final decision had been clearly "irreconcilable with the Prosecutor's duty to reconsider her decision 'as soon as possible'" (par. 120).

AC a final solution on the interpretive disagreements between the Office and the Pre-Trial Chamber[16]. It identified three issues eligible for certification and additionally requested the PTC to impose a stay on its previous decision pending deliberation on the request for leave to appeal[17].

The PTC granted leave to appeal for the second and third of the issues identified by the OTP, namely: a) "Whether the Pre-Trial Chamber may find that a decision by the Prosecutor further to a request for reconsideration . . . cannot be considered to be final within the meaning of rule 108(3) of the Rules of Procedure and Evidence in circumstances in which the Prosecutor has not, in the view of the Pre-Trial Chamber, carried out her reconsideration in accordance with the aforementioned request"[18]; and b) "Whether the Prosecutor, in carrying out a reconsideration … is obliged to accept particular conclusions of law or fact contained in the Pre-Trial Chamber's request, or whether she may continue to draw her own conclusions provided that she has properly directed her mind to these issues"[19]. It nevertheless denied to stay the previous decision[20]. Recently, the AC denied the OTP's request[21] for suspensive effect of the Impugned Decision. As a consequence the OTP remains bound to produce a new Final Decision by 15 May 2019, subject to the AC's determination on the appeal[22].

The OTP has put forward an extensive and carefully drafted appeal brief[23], requesting the AC to quash the PTC's decision insofar as it erroneously established

[16] See ICC-OTP, Request for Leave to Appeal the "Decision on the 'Application for Judicial Review by the Government of the Union of the Comoros'", *Situation on the Registered Vessels of the Comoros*, *Greece and Cambodia*, ICC-01/13-69, 21 November 2018. At par. 6, the OTP writes that it decided to follow this course of action in order to "[demonstrate] the Prosecution's sincere respect for the Pre-Trial Chamber and desire to resolve constructively the legal ambiguities that have arisen".
[17] *Ibidem*, par. 9, 11, 13, 22-24.
[18] See ICC, Decision on the Prosecutor's request for leave to appeal the "Decision on the 'Application for Judicial Review by the Government of the Union of the Comoros'", *Situation on the Registered Vessels of the Comoros, Greece and Cambodia*, ICC-01/13-73, PTC I, 18 January 2019, par. 39-45. The PTC partly reformulated the issue compared to the OTP's original formulation.
[19] *Ibidem*, par. 46-52.
[20] *Ibidem*, par. 54-55.
[21] See ICC-OTP, Prosecution's omnibus request for extension of pages, extension of time, and suspensive effect, *Situation on the Registered Vessels of the Comoros*, *Greece and Cambodia*, ICC-01/13-74, 21 January 2019, par. 12-15.
[22] See ICC, Decision on the Prosecutor's request for suspensive effect, *Situation on the Registered Vessels of the Comoros, Greece and Cambodia*, ICC-01/13-81, AC, 31 January 2019, par. 10-12. The AC dismissed as "unconvincing" the OTP's argument that carrying out the required reconsideration pending a decision on the appeal would be excessively resource-consuming.
[23] See ICC-OTP, Prosecution Appeal Brief, *Situation on the Registered Vessels of the Comoros*, *Greece and Cambodia*, ICC-01/13-85, 11 February 2019.

that the OTP is bound, in carrying out the reconsideration, to accept the Chamber's reasoning (including its conclusions on specific issues of fact or law); and that the OTP's "final decision" could be set aside as invalid, thereby requesting an additional reconsideration based on the PTC's reasoning[24].

At the time of writing the appeal is still *sub judice* and this addendum cannot benefit from a final clarification of the AC on the correct interpretation of the relevant provisions of the Statute and RPE as regards the delimitation of powers between the OTP's discretion and the Chamber's supervisory role[25]. Nevertheless, it is submitted that the ongoing litigations in the *Comoros* situation clearly confirm the pattern of deep interpretive disagreement among the OTP and Chambers[26], as well as the already discussed dissociation between the textual and the judicial formant[27], with regard to the function and latitude of judicial review under article 53(3)(a) of the Statute.

In particular, it is clear that the Prosecutor is determined to defend at all costs her purportedly inherent discretionary powers vis-à-vis the 'intrusions' of the PTC. More specifically, the Office seeks to protect its right to have the last word on the opening of the investigation, preserving a *substantive* margin of appreciation in the fulfilment of its *procedural* obligation to reconsider its previous decision pursuant to an article 53(3)(a) request. To the contrary, the PTC—notwithstanding the change in its composition—has confirmed its determination to exercise tight supervision on the OTP's negative decisions, requiring the Office to strictly follow its judicial reasoning in order to comply with the duty of reconsideration. In other words, besides the strictly legal issues concerning the construction of gravity and the exact scope of the

[24] *Ibidem*, par. 123 containing the conclusions of the OTP on the two grounds of appeal and the relief sought.
[25] One cannot avoid to observe that had the OTP correctly approached the PTC under article 82(1)(d) of the Statute already in 2015, or had the Appeals Chamber declared admissible the OTP's appeal pursuant to article 82(1)(a) of the Statute—as suggested in this work and argued by the two dissenting judges—a clarification on the exact nature and content of the duty of reconsideration would have probably been given as early as in 2016, with considerable saving of time and resources. These decisions have simply postponed the solution of the fundamental issues that are now forming the object of the appellate proceedings. Nevertheless, the behaviour and decisions adopted by the OTP, PTC and AC in the past three years have been very instructive in confirming the trends in their interpretive stances and institutional relations.
[26] See, *supra*, Part Four, Chapter One, par. 2.
[27] See, *supra*, Part Four, Chapter One, par. 4.

duty of reconsideration, the OTP has considered that opening an investigation on the *Mavi Marmara* incident would divert human and financial resources from other more promising investigations, given the difficulty to produce viable prosecutions and trials. Preliminary judges, on the contrary, have reasoned that irrespective of issues of resources, efficiency or of the prospects of viable prosecutions, an investigation is *in any event* warranted in order to ascertain the facts and, ultimately, deliver the right to truth and justice to the alleged victims. In so doing they have significantly narrowed down (almost to the point of excluding it) the concrete margin of discretion of the OTP, leaving the impression that they would only be satisfied were the OTP to change the outcome of its decision and finally open an investigation.

The two positions do not seem to be logically reconcilable and any attempt of the AC to strike a balance between these competing normative claims will produce a result that necessarily leans towards one of the two 'poles of attraction' of prosecutorial discretion and judicial supervision. Therefore, the appellate decision is likely to have significant institutional consequences on the future practice of both the OTP and PTCs.

Ultimately, the *Comoros* situation exemplifies the normative dilemma of any legal regime premised on the recognition of a margin of discretion subject to judicial supervision: Where to draw the line between reasonable and unreasonable exercise of discretion? To what extent judicial authorities can interfere with discretionary decisions with a view to guarantee an acceptable degree of legal certainty (and/or protect the rights of other interested subjects) without completely defeating the purpose of discretion and depriving the system of a reasonable degree of flexibility?

These questions can only partly be answered in purely static and legalistic terms and need to be approached in a practice-based and dynamic way, in order to interpret the patterns of the concrete institutional behaviour and reciprocal relations among the actors of the legal system considered. This is what this work has modestly attempted to achieve.

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