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A photograph of a man with a beard and short brown hair, wearing a light blue t-shirt, looking intently at a framed portrait. The portrait depicts a man with a mustache and a white ruff collar, wearing a dark garment. The man's hand is resting on the portrait. The background is a plain, light-colored wall.

Quality Control in Preliminary Examination: Volume 2

Morten Bergsmo and Carsten Stahn (editors)

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Front cover: *Alberto Gandolfi inspects his fresco of Hugo Grotius in Florence. Trained for years in fresco painting and restoration, including at the Accademia di Belle Arti di Firenze, he employs the fresco techniques used since the 1400s in Florence, including preparing ingredients such as the lime plaster himself. An exceptional level of quality control of the preliminary stages is required for the paintings to stand the test of time. Photograph: © CILRAP 2017.*

Back cover: *Section of a Roman street close to where the Statute of the International Criminal Court was negotiated, paved with ‘sampietrini’ cobblestones of trimmed, black basalt-cubes. When each stone is precisely cut and placed, they make up a robust and attractive whole, with the ability to withstand pressure and inundation. Preliminary examination is similarly made up of numerous small steps, each of which should be undertaken with proper quality control. Photograph: © CILRAP 2018.*

The Standard of Proof in Preliminary Examinations

Matthew E. Cross*

The ICC is, at times, a controversial institution. Perhaps the most common allegation is that the Court, and especially the Office of the Prosecutor, has in some way exercised an inappropriate degree of selectivity in the situations where investigations are opened, or the time at which investigations are opened. The Prosecutor’s answer has been to stress that situation selection is an essentially legal question:¹ an investigation *shall* be opened if and when it is determined that the conditions specified in Article 53(1) of the Statute are met. Such an answer is based on the intention of the international community in drafting the Rome Statute, as it is understood. Yet another question necessarily follows from this premise: *when* are the conditions of Article 53(1) met? In other words, what standard of proof is applied, and what are the implications of this standard? That is the focus of this chapter. Only with clarity about this concept can there be a meaningful assessment of the ‘quality’ of any preliminary examination.

Discussion of the standard of proof may seem prosaic, perhaps even trite, to most lawyers. After all, the standard of proof is usually the foundation for legal discussion, its meaning commonly accepted and the underlying assumptions well known and undisputed. But this may not be so

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¹ See also Matilde Gawronski, “The Legalistic Function of Preliminary Examinations”, in Morten Bergsmo and Carsten Stahn (eds.), *Quality Control in Preliminary Examination: Volume 1*, Torkel Opsahl Academic EPublisher, Brussels, 2018, chap. 7.

in the context of preliminary examinations, given the unusual – perhaps even unique – object and purpose of this procedure. To the extent this object and purpose is contested, this may imply favouring different approaches. For example, many (but by no means all) domestic legal systems would accept the principle that all reported crimes should result in an investigation. Such a principle would suggest that any preliminary examination, as the gateway to investigation, should necessarily apply a *very* low standard of proof (in essence, merely looking to whether a criminal complaint exists). Yet it might equally be argued that the ICC cannot properly be compared with national authorities, and that the Statute reflects an inherent principle of selectivity. The Court is not mandated to investigate and prosecute *every* crime within its jurisdiction but, for example, only those which are *admissible* before it. Such a view favours a standard of proof which is somewhat higher, sufficient at least to provide a rational distinction between those situations which meet the conditions in the Statute and those which do not.

It is notable that the Court's (relatively few) judicial decisions addressing Article 53(1) are rarely unanimous.² Suspicions that there may not (yet) be universal agreement about the applicable standard of proof should also be raised by the recent *Comoros* litigation, in which for the first time a Pre-Trial Chamber (by majority) requested the Prosecutor to reconsider her decision not to open an investigation.³ In seeking to appeal the decision, the Prosecutor asserted that the majority had erred not only in its conclusions and the standard of review applied but also in its interpretation of the 'legal standard' in Article 53(1)⁴ – a matter which she

² Notably, and as further discussed below, Judges Kaul, Fernández de Gurmendi, and Kovács (twice) have all reasoned separately in relevant decisions in the Kenya, Côte d'Ivoire, Comoros, and Georgia situations, respectively. Although these separate opinions may not all directly have been occasioned by a difference of opinion concerning Article 53(1), nonetheless they do reveal varying insights into the meaning and application of this provision. The recent *Burundi* decision under article 15(4) is the only one, to date, which has not featured a separate opinion of some kind.

³ International Criminal Court, Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia, Pre-Trial Chamber, Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation, 16 July 2015, ICC-01/13-34 ('*Comoros* Reconsideration Request') (<http://www.legal-tools.org/doc/2f876c/>).

described as being of “near-constitutional importance”, with “the potential to affect all situations currently undergoing preliminary examination”.⁵ She concluded: “To any extent that the standard to be applied by the Prosecution is lower than that suggested by the plain words of the Statute, this may radically affect the scope of the Court’s operations, now and for the years to come”.⁶

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. To the extent that the Prosecutor must

⁴ International Criminal Court, Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia, Appeals Chamber, 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), 27 July 2015, ICC-01/13-35, para. 20 (*‘Comoros Notice of Appeal’*) (<http://www.legal-tools.org/doc/50ca53/>).

⁵ *Ibid.*, paras. 5, 23.

⁶ *Ibid.*, para. 23. By majority, the appeal was dismissed as inadmissible, since the *Comoros* Reconsideration Request was not considered a decision with respect to admissibility in the meaning of Article 82(1)(a) of the Statute. However, the Appeals Chamber emphasised that, consequently, the Pre-Trial Chamber’s views do not bind the Prosecutor in conducting her reconsideration: International Criminal Court, Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia, Appeals Chamber, 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”, 6 November 2015, ICC-01/13-51, paras. 59–60, 64, 66 (<http://www.legal-tools.org/doc/a43856/>). The Prosecutor subsequently published her “final decision”, in which she confirmed her disagreement with the standard of proof adopted by the majority of the Pre-Trial Chamber: International Criminal Court, Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia, Office of the Prosecutor, Notice of Prosecutor’s Final Decision under Rule 108(3), 29 November 2017, ICC-01/13-57, Annex I, paras. 3-4, 8-9, 12-35 (<http://www.legal-tools.org/doc/298503/>). At the time of finalising this chapter, the Government of the Comoros and the Prosecution continue to dispute any binding quality of the legal reasoning in the *Comoros* Reconsideration Request, and the Pre-Trial Chamber is likely to rule further on the matter: International Criminal Court, Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia, Government of the Union of the Comoros, Public Redacted Version of “Application for Judicial Review by the Government of the Union of the Comoros”, 26 February 2018, ICC-01/13-58-Red (<https://www.legal-tools.org/doc/24c550/>); International Criminal Court, Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia, Office of the Prosecutor, Prosecution’s Response to the Government of the Union of the Comoros’ “Application for Judicial Review” (ICC-01/13-58) (Lack of Jurisdiction), 13 March 2018, ICC-01/13-61 (<https://www.legal-tools.org/doc/a17312/>).

undertake a concrete legal assessment which surpasses a clear threshold, this has obvious implications for her approach – particularly in evaluating the available information; her possible actions when confronted with an apparent insufficiency of information; and in the nature and extent of the findings she may make in seeking to open an investigation, or terminating a preliminary examination. Furthermore, although there is no hierarchy of crimes within the Statute – in the sense that no Article 5 crime is *a priori* worthier of investigation than any other⁷ – practical considerations may make some crimes more amenable to identification at the preliminary examination stage than others. An appreciation of the standard of proof also sheds further light on the nature and limits of the discretion afforded to the Prosecutor in situation selection, the applicable standard of judicial review, and the nature and scope of the Pre-Trial Chamber’s oversight functions in this area.

From these considerations, it is concluded that the standard of proof in Article 53(1) may imply a relatively narrow, and essentially procedural, function for preliminary examinations. There is a clear need for comprehensive and reliable reporting of alleged human rights abuses and international crimes, in the fashion successfully implemented by many international bodies and NGOs, but this is not the primary role of preliminary examinations – even though, on occasion and as a matter of her discretion, the Prosecutor may choose to provide a more fulsome analysis than is legally required.

It follows from the application of a standard of proof that a preliminary examination – insofar as its external, public results are concerned – will not simply be an account of suspicions or allegations of crime, but a *selective* assessment of those allegations which meet the standard of proof. Accordingly, the public conclusion of a preliminary examination will not necessarily be a reliable guide to the contours of the subsequent investigation. Frequently, there may be alleged (or even unknown) crimes which cannot be substantiated to the Article 53(1) standard in the preliminary

⁷ See Rome Statute of the International Criminal Court, 17 July 1998, Preamble, Articles 5, 53 (‘ICC Statute’) (<http://www.legal-tools.org/doc/7b9af9/>); International Criminal Court, Situation in the Central African Republic, *Prosecutor v. Jean-Pierre Bemba Gombo*, Office of the Prosecutor, Prosecution’s Final Submissions following the Appeal Hearing, 19 January 2018, ICC-01/05-01/08-3597 A A2 A3, para. 25 (<http://www.legal-tools.org/doc/70e8cd/>).

examination stage, but which can be established by investigative measures thereafter. Conversely, it is only when a preliminary examination is closed *without* proceeding to open an investigation that the Prosecutor may be obliged – at least for situations referred to the Court – to give a reasoned analysis explaining the basis for her view that the available information does not support *any* alleged crime, to the requisite standard of proof. This is necessary in order to allow the Pre-Trial Chamber to undertake any review which might be triggered, applying an appropriate standard of scrutiny.

22.1. Interpreting Article 53(1) of the Statute: Defining the Standard of Proof

In its *chapeau*, Article 53(1) states generally that:

The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute.

In making this determination, Article 53(1) further requires that:

- a) the information available provides “a reasonable basis to believe” that a crime within the jurisdiction of the Court has been committed;⁸
- b) there is at least one potential case which would be admissible, in the meaning of Article 17 (that is, complementarity and gravity);⁹ and

⁸ *Ibid.*, Article 53(1)(a).

⁹ *Ibid.*, Article 53(1)(b). Although this provision refers to “the case”, this means a “potential case”: International Criminal Court, Situation in the Republic of Kenya, Pre-Trial Chamber, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, ICC-01/09-19, para. 50 (*Kenya Article 15 Decision*) (<http://www.legal-tools.org/doc/338a6f/>); International Criminal Court, Situation in the Republic of Côte d’Ivoire, Pre-Trial Chamber, 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, 3 October 2011, ICC-02/11-14, paras. 190–91 (*Côte d’Ivoire Article 15 Decision*) (<http://www.legal-tools.org/doc/7a6c19/>). It suffices, moreover, if the admissibility of at least one “potential case” is established to the requisite standard: International Criminal Court, Situation in Georgia, Pre-Trial Chamber, Decision on the Prosecutor’s request for authorization of an investigation, 27 January 2016, ICC-01/15-12, paras. 39, 46, 50 (*Georgia Article 15 Decision*) (<http://www.legal-tools.org/doc/a3d07e/>).

- c) there are not “substantial reasons to believe” that opening an investigation would be contrary to the interests of justice.¹⁰

From the plain text of these provisions, the last analysis – the “interests of justice” assessment – is clearly different in nature from the other two. The first two address the Prosecutor’s appreciation of the *facts* as they presently exist; the last is directed to the Prosecutor’s anticipation of the *consequences* of any investigation and an evaluation of whether those consequences are consistent with the notion of ‘justice’.

The text of the Statute further illustrates the distinction of the “interests of justice” assessment from the other criteria, not only by setting a different test (“substantial reasons” rather than “reasonable basis”), but also by providing a different oversight structure.¹¹ Likewise, both the Pre-Trial Chamber and the Prosecution have recognised Article 53(1)(c) as a more overt exercise of prosecutorial discretion.¹²

For these reasons, Article 53(1)(c) should be treated differently from Article 53(1)(a) and (b), and does not represent the straightforward application of a standard of proof to given information. In this chapter, therefore, it is recognised as a distinct and separate exercise of discretion, as a final restraint on the first two criteria (which are largely law- and fact-driven), but it is not considered within the discussion of the ‘standard of proof’ as such.

By contrast, Article 53(1)(a) and (b) – the jurisdiction and admissibility analyses – should be understood to be based on the *same* legal standard: whether or not there is a “reasonable basis” to believe the relevant facts exist, based on the information available. Unlike Article 53(1)(a), Article 53(1)(b) does not itself make any direct reference to the standard upon which the Prosecutor shall determine the facts relevant to whether a potential case is or would be admissible at the preliminary examination stage. Yet four cogent reasons support the view that these pro-

¹⁰ ICC Statute, Article 53(1)(c), see *supra* note 7.

¹¹ *Ibid.*, Article 53(1), 53(3).

¹² See *Comoros Reconsideration Request*, para. 14, see *supra* note 3 (contrasting the “discretion” in Article 53(1)(c) with the “exacting legal requirements” of Article 53(1)(a) and (b)); Office of the Prosecutor, *Policy Paper on the Interests of Justice*, September 2007, p. 1 (referring to the “exercise of the Prosecutor’s discretion” in Article 53(1)(c)) (<http://www.legal-tools.org/doc/bb02e5/>).

visions apply the same approach to different criteria.¹³ First, both provisions are equally subject to the *chapeau* of Article 53(1), which refers to the requirement of a “reasonable basis to proceed”.¹⁴ Second, notwithstanding their different wording, both Article 53(1)(a) and (b) have a similar purpose: requiring an assessment of certain facts based on the available information – which is different from Article 53(1)(c). Third, the text of Article 53(1)(b), by referring to a conditional assessment of admissibility (“would be”) manifestly does not require an absolute assessment. Fourth, if Article 53(1)(b) does not apply a “reasonable basis” standard, it is very hard to discern what alternative standard would be applied for the factual assessments which are no less inherent in determinations of complementarity and gravity than of jurisdiction.¹⁵

¹³ See also *Kenya* Article 15 Decision, “Dissenting Opinion of Judge Hans-Peter Kaul”, para. 17, see *supra* note 9.

¹⁴ Notably, in concluding the negotiations for the ICC Statute, the diplomatic conference declined to adjust the reference to “reasonable basis” in the *chapeau* of Article 53(1), even though the question had been raised whether a broader term might be needed to capture the three criteria in what would become Article 53(1)(a) to (c). Consequently, it can be inferred that the drafters saw the concept of a “reasonable basis” as the threshold underlying all relevant determinations in Article 51(1). See M. Cherif Bassiouni, *The Legislative History of the International Criminal Court: an Article-by-Article Evolution of the Statute*, vol. 2, Transnational Publishers, 2005, pp. 337 (reproducing the Drafting Committee’s 1998 draft, Article 54, which was the result of the diplomatic negotiations at Rome, stating that “[t]he Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed”), 338 (reproducing the Preparatory Committee’s 1998 draft, Article 54, which was the basis for the diplomatic negotiations, stating that “the Prosecutor shall [...] initiate an investigation unless the Prosecutor concludes that there is no reasonable basis for a prosecution”, accompanied by a note: “The term ‘reasonable basis’ in the opening clause is also used in the criteria listed in paragraph 2(i). If the latter is retained, a broader term in the opening clause might be necessary in order to cover all the criteria listed under paragraph 2”) (hereinafter ‘Bassiouni’). Cf. Manuel 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*, 2013, vol. 12, no. 1, p. 49, at p. 61 (hereinafter ‘Ventura’).

¹⁵ See also, for example, International Criminal Court, Office of the Prosecutor, *Policy Paper on Preliminary Examinations*, 1 November 2013, paras. 46–58 (complementarity assessments are based on ascertaining the relevant facts, and applying the law to them) (*‘Policy Paper on Preliminary Examinations’*) (<http://www.legal-tools.org/doc/acb906/>); Giuliano Turone, “Powers and duties of the Prosecutor”, in Antonio Cassese *et al.* (eds.), *The Rome Statute of the International Criminal Court: a Commentary*, Oxford University Press, Oxford, 2002, p. 1152 (describing the “fluctuating” nature of the admissibility assessment) (hereinafter ‘Turone’).

Consistent with the case law of the Court, and the general approach in public international law, provisions of the Statute should be interpreted according to the principles set out in the Vienna Convention.¹⁶ Accordingly, this analytical framework should be adopted to consider the meaning of the “reasonable basis to believe” standard in Article 53(1).

22.1.1. Ordinary Meaning of the Term “Reasonable Basis to Believe” in Article 53(1)

Article 53(1) states that, based on the available information, the Prosecutor must be satisfied of a “reasonable basis” to proceed. More concretely, as specified in Article 53(1)(a), this means a “reasonable basis to believe” certain relevant facts.

There is wide consensus about the meaning of the word “reasonable”, including in the specific context of Article 53(1). To begin with, the dictionary definition of a “reasonable belief” is one which is “in accordance with reason; not irrational, absurd or ridiculous” or which is “based on specific and objective grounds”.¹⁷ Pre-Trial Chambers of the Court –

¹⁶ See, for example, International Criminal Court, Situation in the Democratic Republic of the Congo, Appeals Chamber, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, paras. 6, 33, 40 (<http://www.legal-tools.org/doc/a60023/>); International Criminal Court, Situation in the Republic of Kenya, *Prosecutor v. Ruto and Sang*, Appeals Chamber, Judgment on the appeals of [Mr] William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V (A) of 17 April 2014 entitled “Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation”, 9 October 2014, ICC-01/09-01/11-1598, para. 105 (<http://www.legal-tools.org/doc/e5eb09/>); International Criminal Court, Situation in [REDACTED], *Prosecutor v. [REDACTED]*, Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of [REDACTED], 15 February 2016, ICC-ACRed-01/16, paras. 53, 55–57, 61–62 (<http://www.legal-tools.org/doc/c01204/>); International Criminal Court, Situation in the Republic of Côte d’Ivoire, Pre-Trial Chamber, 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, 3 October 2011, ICC-02/11-15, para. 10 (‘Côte d’Ivoire Article 15 Decision, Separate Opinion of Judge Fernández de Gurmendi’) (<http://www.legal-tools.org/doc/ea2793/>).

¹⁷ “Reasonable”, in *Oxford English Dictionary Online*, meaning A.4.a, example sentence 2 (available on its web site). See also Georghios M. Pikis, *The Rome Statute for the International Criminal Court: Analysis of the Statute, the Rules of Procedure and Evidence, the Regulations of the Court and Supplementary Instruments*, Martinus Nijhoff, 2010, pp. 104 (mn. 256: “good reason”), 264 (mn. 624: “fair[] infer[ence]”), 268 (mn. 636) (hereinafter ‘Pikis’); Morten Bergsmo *et al.*, “Article 53: initiation of an investigation”, in Otto

which are also called upon to apply the Article 53(1) standard when making decisions under Article 15(4), pursuant to Rule 48¹⁸ – have consistently characterised it as a rational or sensible conclusion based on the available information.¹⁹ The late Judge Kaul, for example, stated that it requires “a serious, thorough and well-considered approach”, which would not be

Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd edition, C.H. Beck/Hart/Nomos, 2016, p. 1370, mn. 12 (“due consideration”) (hereinafter ‘Bergsmo *et al.*’).

- ¹⁸ See also *Kenya* Article 15 Decision, para. 21, see *supra* note 9; *Côte d’Ivoire* Article 15 Decision, Separate Opinion of Judge Fernández de Gurmendi, para. 13, see *supra* note 16; International Criminal Court, Situation in the Republic of Burundi, Pre-Trial Chamber, 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, 9 November 2017, ICC-01/17-9-Red, para. 28 (‘*Burundi* Article 15 Decision’) (<https://www.legal-tools.org/doc/8f2373/>).
- ¹⁹ *Kenya* Article 15 Decision, paras. 30 (“reasonable means ‘fair and sensible’, or ‘within the limits of reason’”), 33 (“it is sufficient” that a conclusion “can be supported on the basis of the [...] information available”), 35 (Article 53(1), in the context of Article 15(4), requires “a sensible [...] justification for a belief”), see *supra* note 9; *Côte d’Ivoire* Article 15 Decision, para. 24, see *supra* note 9; *Georgia* Article 15 Decision, para. 25, see *supra* note 9; *Burundi* Article 15 Decision, para. 30, see *supra* note 18. In the context of the ‘beyond reasonable doubt’ standard, see further International Criminal Tribunal for Rwanda, *Rutaganda v. the Prosecutor*, Appeals Chamber, Judgment, 26 May 2003, ICTR-96-3-A, para. 488 (a reasonable possibility is “based on logic and common sense” and has “a rational link to the evidence, lack of evidence, or inconsistencies in the evidence”; it is not “imaginary or frivolous [...] based on empathy or prejudice”) (<http://www.legal-tools.org/doc/40bf4a/>); International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Mrkšić and Šljivančanin*, Appeals Chamber, Judgment, 5 May 2009, IT-95-13/1-A, para. 220 (“a fair or rational hypothesis which may be derived from the evidence” and not any “hypothesis or possibility”) (<http://www.legal-tools.org/doc/40bc41/>); International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Galić*, Appeals Chamber, Judgment, 30 November 2006, IT-98-29-A, para. 259 (“just because there is some possibility, however slight, that an incident could have happened in another way does not in itself raise reasonable doubt”) (‘*Galić* Appeal Judgment’) (<http://www.legal-tools.org/doc/c81a32/>). The ICC Appeals Chamber has cited *Rutaganda* with approval: International Criminal Court, Situation in the Democratic Republic of the Congo, *Prosecutor v. Ngudjolo*, Appeals Chamber, Judgment on the Prosecutor’s appeal against the decision of Trial Chamber II entitled “Judgment pursuant to article 74 of the Statute”, 27 February 2015, ICC-01/04-02/12-271, para. 109 (<http://www.legal-tools.org/doc/1dce8f/>); International Criminal Court, Situation in the Democratic Republic of the Congo, *Prosecutor v. Ngudjolo*, Appeals Chamber, Joint Dissenting Opinion of Judge Ekaterina Trendafilova and Judge Cuno Tarfusser, 27 February 2015, ICC-01/04-02/12-271-AnxA, paras. 54–57 (‘*Ngudjolo* AJ, Dissenting Opinion of Judges Trendafilova and Tarfusser’) (<http://www.legal-tools.org/doc/45f67c/>).

satisfied by “a somewhat generous or only summary evaluation whereby any information, of even [a] fragmentary nature”, suffices.²⁰

Likewise, the drafting history of the Statute suggests that the ‘reasonableness’ standard ultimately employed in Article 53(1) requires something more than a mere “possibility” – a term rejected early in the drafting process²¹ – and at least the existence of “objective criteria”.²² Article 42(1) also contemplates the Prosecutor receiving “*substantiated* information on crimes within the jurisdiction of the Court”.²³

It would seem to follow that while information meeting the Article 53(1) standard need not be comprehensive or conclusive,²⁴ it must amount to something more than an entirely unsupported allegation. In other words, it would not suffice for the Prosecutor to initiate an investigation based merely on her determination that the *allegations* in a referral or Article 15 communication, if true, could satisfy the elements of at least one crime under the Statute. She would, instead, need to be assured that there was at least some factual foundation for those allegations, consistent with the

²⁰ Kenya Article 15 Decision, Dissenting Opinion of Judge Kaul, para. 15, see *supra* note 9. See also Côte d’Ivoire Article 15 Decision, Separate Opinion of Judge Fernández de Gurmendi, para. 43, see *supra* note 16.

²¹ For example, the Preparatory Committee in 1997 opted to replace the term “possible basis” with “reasonable basis”: Bassiouni, pp. 348 (reproducing the Preparatory Committee’s 1997 draft, Article 26, requiring an investigation “unless the Prosecutor concludes that there is no reasonable basis”), 354 (“reproducing the Preparatory Committee’s 1996 draft, Article 27, requiring determination “whether the complaint provides or is likely to provide a [possible] [reasonable] basis”), 363 (reproducing Article 26 of the ILC’s *Draft Code of Crimes against the Peace and Security of Mankind*), see *supra* note 14. See also Bergsmo *et al.*, pp. 1369–1370, mn. 10, see *supra* note 14.

²² By analogy, in the context of then Article 59, concerning the arrest of a suspect: see *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, UN Doc. A/Conf.183/2/Add.1, 14 April 1998, p. 86, fn. 10 (“reasonable grounds [...] embody objective criteria”) (<http://www.legal-tools.org/doc/816405/>).

²³ ICC Statute, Article 42(1) (emphasis added), see *supra* note 7. If read in isolation, the relevant sentence of Article 42(1) could be read disjunctively to suggest that State and UN Security Council referrals need not be “substantiated”, but only communications under Article 15(1) need to be. However, this interpretation is inconsistent with the context of Article 53(1) – also reflected in the constant practice of the OTP – which requires *all* preliminary examinations to be based on a substantive evaluation of the information made available. See Article 53(1); further *infra* note 26.

²⁴ Kenya Article 15 Decision, para. 27, see *supra* note 9; Côte d’Ivoire Article 15 Decision, Separate Opinion of Judge Fernández de Gurmendi, para. 31, see *supra* note 16; Georgia Article 15 Decision, para. 25, see *supra* note 9.

general practice of the Pre-Trial Chamber under Article 15(4).²⁵ Nothing in the Statute or the Rules supports any distinction in the application of Article 53(1) between referred and *proprio motu* preliminary examinations, once formally commenced.²⁶

By contrast, in *Comoros*, the majority of the Pre-Trial Chamber suggested that the Prosecutor must, in her preliminary examination, accept as true allegations which are not “manifestly false”.²⁷ This view, expressed in the context also of the majority’s assertion that the Article 53(1) assessment “does not necessitate any complex or detailed process of analysis”,²⁸ would seem to support a more formalistic approach, focusing on the characteristics of an individual referral, communication, or piece of information, and not on an overall assessment of whether the inference to be drawn – for example, an element of a crime – is reasonable.²⁹

The majority did not address relevant previous jurisprudence on these issues, and it is unclear whether it viewed its analysis as following or departing from this prior case law. In *Georgia*, however, the same majority cited all this jurisprudence together, implying that these opinions are consistent.³⁰ Yet, on their face, it is difficult to see how this is so. It is thus appropriate to consider these interpretations of the standard of proof in Article 53(1) in the context of the Statute more broadly, and the object and purpose of these provisions. In particular, however, it is hard to see how

²⁵ *Kenya* Article 15 Decision, Dissenting Opinion of Judge Kaul, para. 18 (“the Prosecutor must demonstrate his determination under Article 53(1)(a) of the Statute and substantiate it with adequate material”), see *supra* note 9.

²⁶ *Policy Paper on Preliminary Examinations*, paras. 12, 27, 35, see *supra* note 15.

²⁷ *Comoros* Reconsideration Request, para. 35, see *supra* note 3.

²⁸ *Ibid.*, para. 13.

²⁹ In other contexts, this approach is not correct. The applicable standard of proof should be applied to the legal elements which must be satisfied, and should not be applied in isolation to specific pieces of evidence. See, for example, *Ngudjolo* AJ, Dissenting Opinion of Judges Trendafilova and Tarfusser, paras. 34, 40–41, see *supra* note 19; *Galić* Appeal Judgment, para. 218, see *supra* note 19.

³⁰ *Georgia* Article 15 Decision, para. 25, see *supra* note 9. Judge Kovács again wrote separately, disagreeing with the majority on the extent to which the Pre-Trial Chamber should, under Article 15(4), undertake an independent review of the available information.

this approach can be reconciled with the duty to *evaluate* the information available, which implies some kind of substantive analysis.³¹

The *Georgia* decision is also notable for its reference, in the context of admissibility under Article 53(1)(b), to “reasonable doubts” as to whether the Russian authorities were “unable” to investigate in the meaning of Article 17.³² This may simply have been a recognition of a factual ambiguity. But if the term is afforded legal significance, it suggests that the majority considered the standard of proof under Article 53(1)(b) to be *higher* than that under Article 53(1)(a) – on the “reasonable basis to believe” standard, the existence of a “reasonable doubt” is irrelevant:³³ what matters is whether there is a reasonable basis to believe a given fact; the possibility that there is also a reasonable basis to doubt that fact is immaterial. Such an approach by the *Georgia* majority would also seem to be inconsistent with the approach of the same majority in *Comoros*, where they emphasised (still in the context of admissibility, albeit sufficient gravity rather than complementarity) that “reasonable alternative explanations” did not matter, provided that *one* reasonable explanation supported the requirements of Article 53(1).³⁴ The incidence of such linguistic ambiguities only underlines the need for clarity in the interpretation of Article 53(1).

22.1.2. Context of the Standard of Proof in Article 53(1)

The “reasonable basis to believe” standard is undoubtedly a “low” standard,³⁵ and the lowest “evidentiary threshold” in the Statute.³⁶ An obvious

³¹ See *infra* text accompanying note 123. In this context, the *Burundi* Pre-Trial Chamber notably referred to a concept of “manifest[] unreasonable[ness]”, which may be an attempt to reframe the *Comoros* concept of ‘manifest falsity’ more clearly within the terms of article 53(1): *Burundi* Article 15 Decision, para. 138, see *supra* note 18. Yet, if so, it is still unconvincing – while appropriately shifting the focus somewhat to what is a *reasonable* conclusion, this is still qualified by the concept of what is ‘manifest’ – which itself depends on the nature of the evaluation which has been undertaken and the amount of information made available.

³² *Georgia* Article 15 Decision, para. 46, see *supra* note 9.

³³ See, for example, *infra* note 37, and accompanying text.

³⁴ See, for example, *Comoros* Reconsideration Request, para. 41 (“the Prosecutor erred in not recognising one of the reasonable alternative explanations of the available information, on the absence of which she then relied in concluding that the gravity requirement was not met”), see *supra* note 3.

³⁵ *Kenya* Article 15 Decision, Dissenting Opinion of Judge Kaul, para. 15, see *supra* note 9.

contextual analysis would thus suggest that it must be interpreted to ensure it is meaningfully distinct from the other standards of proof which the Statute contains. It is uncontroversial that it is less than proof beyond reasonable doubt (that is, the standard of proof for criminal conviction, requiring that the relevant conclusions constitute the *only* reasonable inference from the available information),³⁷ and less than “sufficient evidence to establish substantial grounds to believe” the relevant facts (that is, the standard for confirmation of charges).³⁸ But there may be insights to be drawn from consideration of the relationship between the standards of proof in Article 53(1), on the one hand, and Articles 53(2) and 58, on the other. In particular, it is quite a different thing to suggest that the Article 53(1) standard is the lowest of *three* alternative standards of proof than to suggest it is the lowest of *five* alternative standards of proof (which would, presumably, make it very low indeed). Answering this question depends on an analysis of Articles 53(2) and 58.

Article 53(2) provides that the Prosecutor must “inform the Pre-Trial Chamber and the State making a referral”, or the UN Security Council if it made a referral, if she decides that “there is not a sufficient basis for a prosecution” in a situation under investigation. Given the independence of the Prosecutor in “conducting investigations” under Article 42(1), Article 53(2) is understood to apply *only* if the Prosecutor determines she cannot initiate “*a*” prosecution – in the sense of “any” or “at least one”³⁹ –

³⁶ *Côte d’Ivoire* Article 15 Decision, Separate Opinion of Judge Fernández de Gurmendi, para. 43, see *supra* note 16; *Burundi* Article 15 Decision, para. 30; see *supra* note 18.

³⁷ *Kenya* Article 15 Decision, paras. 33–34, see *supra* note 9; *Georgia* Article 15 Decision, para. 25, see *supra* note 9. See also International Criminal Court, Situation in Darfur, Sudan, *Prosecutor v. Al Bashir*, Appeals Chamber, Judgment on the appeal of the Prosecutor against the “Decision on the Prosecutor’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir”, 3 February 2010, ICC-02/05-01/09-73, paras. 32–33 (*Al Bashir* Article 58 Appeal Decision’) (<http://www.legal-tools.org/doc/9ada8e/>). See further, for example, ICC Statute, Article 66(3), see *supra* note 7; International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Vasiljević*, Appeals Chamber, Judgment, 25 February 2004, IT-98-32-A, para. 120 (<http://www.legal-tools.org/doc/e35d81/>).

³⁸ See ICC Statute, Article 61(7), see *supra* note 7.

³⁹ As such, it cannot properly be seen as a “step” in the process from preliminary examination to investigation to prosecution. Rather, it is an *alternative* to prosecution, leading to the termination of an investigation. It applies only if the Prosecutor decides that she cannot make *any* applications under Article 58. By contrast, provided the Prosecutor retains the intention to bring at least one prosecution within any open investigation, she retains full discretion as to whether to make an application under Article 58 or not in any particular

in a situation.⁴⁰ Article 53(2) further defines that an “insufficient basis” to prosecute means the absence of “a sufficient legal or factual basis to seek a warrant or summons under Article 58”,⁴¹ the inadmissibility of the case,⁴² or a determination that a “prosecution is not in the interests of justice”.⁴³ For all these reasons, it follows, therefore, that Article 53(2) does not contain an independent standard of proof,⁴⁴ but rather is contingent

case. Notably, and in contrast to the apparently limited scope of Article 53(2)(a), this ensures that she can determine whether to initiate a prosecution not only on the basis of her view that she will meet the Article 58 standard, but more broadly on the prospects of obtaining a successful conviction. See also International Criminal Court, Office of the Prosecutor, *Policy Paper on Case Selection and Prioritisation*, 15 September 2016, paras. 25–55 (<http://www.legal-tools.org/doc/182205/>). Cf. Bergsmo *et al.*, p. 1370 (margin no. 11), see *supra* note 17; De Meester, “Article 53: Initiation of an investigation”, in Mark Klamburg (ed.), *Commentary on the Law of the International Criminal Court*, Torkel Opsahl Academic EPublisher, Brussels, 2017, pp. 389 (fn. 419), 395 (fns. 426–427) (<http://www.legal-tools.org/doc/aa0e2b/>); Matthew Brubacher, “Prosecutorial discretion within the International Criminal Court”, in *Journal of International Criminal Justice*, 2004, vol. 2, no. 1, p. 71, at pp. 79–80 (hereinafter ‘Brubacher’).

⁴⁰ Self-evidently, if the Prosecutor was required to inform the Pre-Trial Chamber and the referring party every time she determined that a particular person could not be prosecuted – a population which could run into the thousands – she would no longer be acting independently but under an intrusive form of supervision. See also Morten Bergsmo, Frederik Harhoff, and ZHU Dan, “Article 42: the Office of the Prosecutor”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: a Commentary*, 3rd edition, C.H. Beck/Hart/Nomos, 2016, p. 1267, at p. 1270, mn. 9 (“The Pre-Trial Chamber may not impose conditions as to how, when or where the investigations are to be carried out, for which alleged offences and against whom. These decisions fall within the purview of the Prosecutor’s prerogative”) (hereinafter ‘Bergsmo *et al.*: Article 42’); Daniel D. Ntanda Nsereko, “Prosecutorial discretion before national courts and international tribunals”, in *Journal of International Criminal Justice*, 2005, vol. 3, no. 1, p. 124, at p. 138 (hereinafter ‘Nsereko’). See further Hassan B. Jallow, “Prosecutorial discretion and international criminal justice”, in *Journal of International Criminal Justice*, 2005, vol. 3, no. 1, p. 145, at p. 155.

⁴¹ ICC Statute, Article 53(2)(a), see *supra* note 7.

⁴² *Ibid.*, Article 53(2)(b).

⁴³ *Ibid.*, Article 53(2)(c).

⁴⁴ Cf. Marco 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*, 2016, vol. 14, no. 4, p. 1011, at p. 1022 (hereinafter ‘Longobardo’); Bergsmo *et al.*, p. 1370 (mn. 11), see *supra* note 17; Kai Ambos, *Treatise on International Criminal Law: Volume III: International Criminal Procedure*, Oxford University Press, 2016, p. 380 (hereinafter ‘Ambos’); Brubacher, pp. 79–80, see *supra* note 39.

upon the Prosecutor's assessment of the prospects for meeting (at least) the standard of proof contained in Article 58.⁴⁵

Article 58 provides that the Pre-Trial Chamber shall issue a warrant of arrest or summons to appear, at the Prosecutor's application, if it is satisfied that: "[t]here are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court".⁴⁶ Whether the Pre-Trial Chamber issues a warrant or summons depends on its further assessment whether: "[t]he arrest of the person appears necessary" to ensure their appearance for trial, to preserve the integrity of the investigation or Court proceedings, or to prevent the commission of relevant crimes;⁴⁷ or whether: "a summons is sufficient to ensure the person's appearance".⁴⁸

The Appeals Chamber has emphasised that the Article 58 standard must be something less than the two aforementioned standards under Articles 61 and 66(3),⁴⁹ and stressed that, "at this preliminary stage, it does not have to be certain that th[e] person committed the alleged offence".⁵⁰ Although opinions may vary as to whether or not the Article 58 standard should properly be equated to the concept of 'reasonable suspicion' as articulated and understood by the European Court of Human Rights,⁵¹ the

⁴⁵ It is in this sense that it is likely that the distinct terminology in Article 53(2) was advertent: cf. Longobardo, p. 1022 (citing United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court: Official Records: Volume III: Reports and other documents, UN Doc. A/Conf.183/13 (Vol. III), August 2002, p. 292 (notes contained in the transmittal letters from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee) (<http://www.legal-tools.org/doc/e03967/>)), see *supra* note 44. The note of 26 June 1998 simply states that: "[i]n article 54", as it was, "the words 'reasonable basis' and 'sufficient basis' are used intentionally in different paragraphs". See also Bergsmo *et al.*, p. 1375, mn. 29, see *supra* note 17.

⁴⁶ ICC Statute, Article 58(1)(a), see *supra* note 7. See also Article 58(6), (7) (a summons may be issued if "there are reasonable grounds to believe that the person committed the crime alleged").

⁴⁷ *Ibid.*, Article 58(1)(b).

⁴⁸ *Ibid.*, Article 58(7).

⁴⁹ *Al Bashir* Article 58 Appeal Decision, para. 30 ("a Pre-Trial Chamber should not require a level of proof that would be required for the confirmation of charges or for conviction"), see *supra* note 37. See also paras. 32–33.

⁵⁰ *Ibid.*, para. 31.

⁵¹ Cf. *Ibid.* See Michael Ramsden and CHUNG Cecilia, "'Reasonable grounds to believe': An unreasonably unclear evidentiary threshold in the ICC Statute", in *Journal of International Criminal Justice*, 2015, vol. 13, no. 3, p. 555 (hereinafter 'Ramsden and CHUNG'); Amrutanshu Dash and Dhruv Sharma, "Arrest warrants at the International Criminal Court:

practice of the ICC nonetheless shows that Article 58 is not concerned with mere abstract suspicions but rather “‘grounds’ *founded on evidential material* giving rise to a reasonable belief that a crime has been committed”.⁵² This necessarily follows from Article 58(2)(d), which requires the Prosecutor at least to summarise “the evidence and any other information” which “establish” that the standard of proof is met.⁵³

Some authorities have gone further and suggested that the requirement of “reasonable *grounds* to believe” in Article 58 must therefore be a distinct (higher) standard of proof than Article 53(1) (“reasonable *basis* to believe”). Thus, the *Kenya* Pre-Trial Chamber stated without further reasoning that:

bearing in mind that the ‘reasonable basis’ standard under article 15 of the Statute is *even lower than that provided under article 58 of the Statute* [...], the Chamber considers that in the context of the present request, all the information provided by the Prosecutor *certainly* need not point towards only one conclusion.⁵⁴

This reasoning seems to have been accepted uncritically by the Office of the Prosecutor to date,⁵⁵ and by some academic commentators.

reasonable suspicion or reasonable grounds to believe?”, in *International Criminal Law Review*, 2016, vol. 16, no. 1, p. 158; Ventura, pp. 63–65, see *supra* note 14.

⁵² International Criminal Court, Situation in the Democratic Republic of the Congo, *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the appeal of Mr Thomas Lubanga Dyilo against the decision of the Pre-Trial Chamber I entitled “*Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo*”, 13 February 2007, ICC-01/04-01/06-824, “Separate Opinion of Judge Georghios M. Pikis”, para. 5 (emphasis added) (<http://www.legal-tools.org/doc/ff3bd8/>).

⁵³ See, for example, Ambos, p. 401, see *supra* note 44. Cf. Ramsden and CHUNG, p. 572, see *supra* note 51.

⁵⁴ *Kenya* Article 15 Decision, para. 34 (emphasis added), see *supra* note 9. See also paras. 27, 29.

⁵⁵ See, for example, International Criminal Court, Office of the Prosecutor, *Situation in Honduras: Article 5 Report*, October 2015, para. 37 (fn. 3: referring to “the higher ‘reasonable grounds’ standard for arrest warrant applications under article 58”, citing *Kenya* Article 15 Decision, para. 34, see *supra* note 9) (<http://www.legal-tools.org/doc/54755a/>); International Criminal Court, Office of the Prosecutor, Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia, *Situation on Registered Vessels of Comoros, Greece and Cambodia: Article 53(1) Report*, 6 November 2014, ICC-01/13-6-AnxA, para. 4 (fn. 4) (<http://www.legal-tools.org/doc/6b833a/>). Indeed, it appears that this reasoning by the *Kenya* Pre-Trial Chamber was initially *proposed* by the Office: International Criminal Court, Situation in the Republic of Kenya, Pre-Trial Cham-

Conceiving Article 53(1) as a ‘lower threshold’ has been justified on the basis that “[t]he level of information available to the prosecutor at the time of the preliminary examination is deemed to be less comprehensive and conclusive as opposed to the evidence gathered at the end of such an examination [sic]” (understood to mean ‘investigation’).⁵⁶ It has also been suggested that the standard for commencing a prosecution (of an individual) should “logically” be higher than the standard for commencing an investigation of a situation “since the actual prosecution affects the rights of the accused, who should be presumed innocent”.⁵⁷

Yet on closer examination, this reasoning appears doubtful.⁵⁸ First, the wording of the standards in Articles 53(1) and 58 is “almost the same” and “strikingly similar”.⁵⁹ The only difference – between “grounds” and “basis” – is, at most, very fine.⁶⁰ The other, equally authentic, linguistic versions of the Statute likewise reflect minor distinctions in terminology (not amounting to a substantive difference in connotation), and thus shed

ber, Request for authorisation of an investigation pursuant to Article 15, 26 November 2009, ICC-01/09-3, para. 103 (“The expression ‘reasonable basis’ in Article 15 indicates that a decision to authorize the commencement of an investigation shall be made pursuant to a lower standard than the one required for the issuance of a warrant of arrest or summons to appear.”) (<http://www.legal-tools.org/doc/c63dcc/>).

⁵⁶ Geert-Jan Alexander Knoops and Tom Zwart, “The Flotilla Case before the ICC: the need to do justice while keeping heaven intact”, in *International Criminal Law Review*, 2015, vol. 15, no. 6, p. 1069, at p. 1082 (citing Bergsmo and Kruger in the first edition of Triffterer’s commentary; for the analogous passage of the third edition, see Bergsmo *et al.*, p. 1370, mn. 12, see *supra* note 17) (hereinafter ‘Knoops and Zwart’).

⁵⁷ Longobardo, p. 1022, see *supra* note 44. See also pp. 1023–24, 1030; Ramsden and Chung, pp. 570 (“The fact that the object and purpose of Article 58 – to ascertain criminal responsibility of an individual – differs from that of Article 15(4) suggests that a uniform test is inappropriate for the two distinct stages”), 577, see *supra* note 51.

⁵⁸ *Ibid.*, p. 569 (acknowledging “the lack of definitive consensus” on this issue).

⁵⁹ Kenya Article 15 Decision, para. 29, see *supra* note 9; Ramsden and CHUNG, p. 569, see *supra* note 51.

⁶⁰ Compare, for example, “basis”, in *Oxford English Dictionary Online*, meanings II.8. (“That by or on which anything immaterial is supported or sustained; a foundation, support”), 9.b. (“That on which anything is reared, constructed, or established, and by which its constitution or operation is determined; groundwork, footing; a thing immaterial; a principle, a fact”), with “ground” (noun), meanings II.5.a. (“That on which a system, work, institution, art, or condition of things, is founded; the basis, foundation”), 5.c (“A circumstance on which an opinion, inference, argument, statement, or claim is founded, or which has given rise to an action, procedure, or mental feeling; a reason, motive [...]”) (available on its web site).

little additional light; indeed, in Russian, the *same terms* are used for both Articles 53(1) and 58.⁶¹ Accordingly, bearing in mind the principle that like terms should be interpreted alike,⁶² the standards of proof in Articles 53 and 58 should be read to be the same.⁶³

Second, although Articles 53 and 58 do indeed differ in their object and purpose (discussed further below),⁶⁴ this is more than adequately addressed by the different scope of their application. It is not necessary to interpret Article 58 as imposing a higher *standard of proof* than Article 53 because it requires proof of facts which are defined with much greater specificity, and hence necessarily more burdensome to establish.⁶⁵ Unlike Article 53(1), Article 58 requires proof (at the relevant standard) that a *particular identified person* “committed a crime” – thus, it not only requires evidence of the existence of a crime under Articles 5 or 70 but also that the identified person satisfied at least one mode of liability under Articles 25 or 28.⁶⁶ In practical terms, such evidence – often known as ‘linkage’ evidence (who did what, and how?), as differentiated from ‘crime-based’ evidence (what happened to the victims?) – is often the most difficult evidence to obtain in international criminal proceedings. It is thus appropriate to condition the beginning of a prosecution on the Prosecutor showing that the suspect is sufficiently implicated in the alleged crime – a

⁶¹ Compare, for example, ICC Statute, Article 53(1) (Arabic: “معقول أساس”; Chinese: “合理根据”; French: “*base raisonnable*”; Russian: “разумные основания”; Spanish: “*fundamento razonable*”), with Article 58(1)(a) (Arabic: “أسباب معقولة”; Chinese: “合理理由”; French: “*motifs raisonnables*”; Russian: “разумные основания”; Spanish: “*motivo razonable*”), see *supra* note 7.

⁶² See Richard Gardiner, *Treaty Interpretation*, 2nd edition, Oxford University Press, 2015, p. 209; see also p. 181.

⁶³ See also Pikis, p. 264, mn. 626, see *supra* note 17: “A question arises as to whether there is any material difference between the above term [‘reasonable basis to proceed’] and the corresponding term used in article 15.3 [sic], notably ‘reasonable grounds to believe’. To my mind, the answer is in the negative. ‘Grounds’ are what provide the basis for a proposition. ‘Grounds’ and ‘basis’ in the context under consideration are synonymous terms.” Since the term “reasonable grounds” appears in the ICC Statute only in Article 58, Pikis’ reference to “article 15.3” in this context must be a typographic error.

⁶⁴ *Kenya Article 15 Decision*, para. 29, see *supra* note 9.

⁶⁵ See also Ambos, pp. 380–81, see *supra* note 44.

⁶⁶ *Kenya Article 15 Decision*, para. 29 (“the criminal responsibility of an individual” is “not at stake for the authorization of an investigation”), see *supra* note 9. See Ventura, pp. 76–77, 80, see *supra* note 14.

showing which is not necessary to justify the opening of an investigation (when the perpetrator(s) may be unknown). But it does not necessarily follow from this that the standard of proof must be higher. Nor is such a view compelled simply by the fact that the Prosecutor has had the opportunity for investigation by this point.⁶⁷ The point is simply that Articles 53(1) and 58 are concerned with different questions.

Moreover, considering the suspect's right to liberty may be something of a red herring when defining the *standard of proof* under Article 58,⁶⁸ and consequently its relation with the standard of proof under Article 53(1). This is not because human rights are irrelevant to the work of the Court – far from it⁶⁹ – but because the determination whether to deprive the suspect of their liberty is not predicated on the standard of proof *per se* (that is, the standard by which the Prosecutor has supported her allegations of the suspect's criminal conduct), provided it is met, but on a further and separate assessment of the *necessity* of detention.⁷⁰ This is demonstrated, first and most obviously, by the fact that Article 58 applies the *same* standard of proof (“reasonable grounds to believe”) irrespective whether the Prosecutor seeks an arrest warrant (triggering provisional detention) or a summons to appear (not triggering provisional detention).⁷¹ What differs in these circumstances is merely the ‘necessity’ analysis.⁷² Likewise, once a suspect has been detained, they are entitled to

⁶⁷ Cf. *Kenya* Article 15 Decision, para. 27, see *supra* note 9; Bergsmo *et al.*, p. 1370, mns. 11–12, see *supra* note 17.

⁶⁸ Cf. Ramsden and CHUNG, pp. 570–571, 573–575, see *supra* note 51; Longobardo, p. 1022, see *supra* note 44; Ventura, p. 76, see *supra* note 14.

⁶⁹ See, for example, ICC Statute, Article 21(3), see *supra* note 7; International Criminal Court, Situation in the Democratic Republic of the Congo, *Prosecutor v. Lubanga*, Appeals Chamber, 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, 14 December 2006, ICC-01/04-01/06-772, para. 36 (<http://www.legal-tools.org/doc/1505f7/>).

⁷⁰ Christopher K. Hall and Cedric Ryngaert, “Article 58: issuance by the Pre-Trial Chamber of a warrant of arrest or a summons to appear”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd edition, C.H. Beck/Hart/Nomos, 2016, p. 1447, mn. 15.

⁷¹ Compare ICC Statute, Article 58(1), with Article 58(7), see *supra* note 7.

⁷² See also International Criminal Court, Situation in Darfur, Sudan, *Prosecutor v. Banda*, Appeals Chamber, Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain against Trial Chamber IV's issuance of a warrant of arrest, 3 March 2015, ICC-02/05-03/09-632-Red, para. 25 (<http://www.legal-tools.org/doc/bb2b11/>).

periodic reviews of the continuing *necessity* of their detention – but, in those reviews, a re-examination of the merits of the case against them will ordinarily be inappropriate and unnecessary.⁷³

To the extent that issuing a summons or arrest warrant (if public) may have some adverse reputational implications for the suspect, this limited harm is justified even by the “reasonable basis” to believe that the suspect committed one or more crimes within the jurisdiction of the Court. The remedy also lies within their hands – appearing promptly before the Court (as a person still presumed to be innocent) triggers the confirmation of charges procedure, which will eliminate weak cases.⁷⁴

Therefore, it is not the function of Article 58 to test the strength of the Prosecutor’s case against the individual, and thus to control whether or not the case should be committed for trial.⁷⁵ That is the distinct function of the confirmation of charges procedure – which must be accomplished within a “reasonable time” after the suspect’s arrival at the Court⁷⁶ – and which does indeed imposes a higher standard of proof (“substantial grounds to believe”) than Articles 53(1) or 58. Precisely because Article 58 proceedings occur *ex parte*, they are not well suited to serve as a ‘gateway’ to trial. It is also plain that Article 58 is not concerned with examining the entirety of the Prosecutor’s case against the suspect, but only in verifying that there is *a* case against the suspect. Thus, the Prosecutor may not only seek amendment of an arrest warrant by “modifying or

⁷³ See ICC Statute, Articles 60(2), 60(3), see *supra* note 7; International Criminal Court, Situation in Uganda, *Prosecutor v. Ongwen*, Pre-Trial Chamber, Decision on the “Defence Request for the Interim Release of Dominic Ongwen”, 27 November 2015, ICC-02/04-01/15-349-Red, paras. 6–13 (<http://www.legal-tools.org/doc/f20956/>).

⁷⁴ Cf. Ramsden and CHUNG, pp. 574–75, see *supra* note 51.

⁷⁵ Cf. *Ibid.*, pp. 572–573 (arguing for a “high threshold” under article 58, but apparently justifying this on the basis that “a higher standard [...] applied at the *confirmation of charges* stage” might better filter out weak cases).

⁷⁶ ICC Statute, Article 61(1), see *supra* note 7; International Criminal Court, *Regulations of the Court*, 6 December 2016, ICC-BD/01-05-16, regulation 53 (the confirmation decision shall be delivered within 60 days of the close of the confirmation hearing) (<http://www.legal-tools.org/doc/8a1f87/>); International Criminal Court, *Chambers Practice Manual*, 3rd edition, May 2017, pp. 7–8, 16 (advocating “[e]fforts [...] to reduce the average time that passes between the first appearance and the commencement of the confirmation of charges hearing”, taking into account “the circumstances of each particular case”) (‘Chambers Practice Manual’) (<http://www.legal-tools.org/doc/f0ee26/>).

adding to the crimes specified therein”,⁷⁷ but may also add charges prior to the confirmation hearing.⁷⁸

For all these reasons, recognising the suspect’s liberty interest does not require a distinction in principle between the standard of proof applicable when an *investigation* is initiated and when a *prosecution* is initiated. Rather, the suspect’s right to liberty is adequately guaranteed in the period between initiating the prosecution and confirming the charges by the ongoing assessment of the necessity of their detention, if indeed they are taken into custody at all.

Third, even if we attempt, *arguendo*, to distinguish the standards of proof in Articles 53(1) and 58, there is the immediate practical difficulty of meaningfully doing so.⁷⁹ Already, even if there are only three relevant standards of proof in the Statute, there is a tendency to define them purely on a relative basis – the confirmation standard (“substantial grounds to believe”) is ‘lower’ than the conviction standard (“beyond reasonable doubt”) and ‘greater’ than the “reasonable basis”/“reasonable grounds” standard(s).⁸⁰ But in concrete terms, what is the difference between a “substantial ground” and a “reasonable ground”? And how much harder does this become to determine if it is further necessary to distinguish between a “substantial ground”, a “reasonable ground”, and a “reasonable basis”? In short, proliferating standards of proof are likely to lead to conceptual confusion, and gradations based on mere semantics. This serves only to obscure the nature of the analysis, and favours neither the suspect nor the economy of judicial proceedings.

⁷⁷ ICC Statute, Article 58(7), see *supra* note 7.

⁷⁸ See, for example, Chambers Practice Manual, pp. 11–12, see *supra* note 76; International Criminal Court, Situation in Uganda, *Prosecutor v. Ongwen*, Pre-Trial Chamber, Status Conference of 19 May 2015, ICC-02/04-01/15-T-6-ENG, pp. 6–18 (<http://www.legal-tools.org/doc/18d506/>). For example, in the *Ongwen* case, although Mr. Ongwen was originally arrested on seven counts, charges were subsequently confirmed against him on 70 counts: compare International Criminal Court, Situation in Uganda, *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, Pre-Trial Chamber, Warrant of arrest for Dominic Ongwen, 8 July 2005, ICC-02/04-01/05-57, para. 30 (<http://www.legal-tools.org/doc/7a2f0f/>); with ICC, Situation in Uganda, *Prosecutor v. Onwen*, Pre-Trial Chamber, Decision on the confirmation of charges against Dominic Ongwen, 23 March 2016, ICC-02/04-01/15-422-Red, pp. 71–104 (<http://www.legal-tools.org/doc/74fc6e/>).

⁷⁹ See Ventura, pp. 78–80, see *supra* note 14.

⁸⁰ See *supra* note 49, and accompanying text.

A contextual analysis of Article 53(1) thus favours interpreting the standard of proof to be the same as the standard in Article 58,⁸¹ even though they are applied to different issues. Accordingly, the Article 53(1) standard of proof, while indeed being the lowest standard, is the lowest of *three* principal standards in the Statute.⁸² Recognising the link in this way between the standards of proof in Articles 53 and 58 does not necessarily *lower* the Article 58 standard but, rather, may simply illustrate that Article 53(1) is *also* a meaningful legal requirement. It clarifies, in particular, that Article 53(1), like Article 58, requires at least some evidentiary basis.

22.1.3. Object and Purpose of the Statute and Article 53(1): A Selective Approach to Investigations

Finally, in interpreting the standard of proof in Article 53(1), it is helpful to consider its object and purpose, and indeed the object and purpose of the Statute as a whole.

In *Côte d'Ivoire*, the Pre-Trial Chamber described the “underlying purpose” of Article 15(4) – which may be considered analogous to the Prosecutor’s function under Article 53(1) – as preventing “unwarranted, frivolous or politically motivated investigations”.⁸³ But it may be that this statement still does not go quite far enough, or at least gives little clue as to what an ‘unwarranted’ investigation might mean, in the context of the Statute.

The Preamble to the Statute recalls: “that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes” and emphasises that: “the International Criminal Court

⁸¹ See also Mark Klamberg, “Article 58: issuance by the Pre-Trial Chamber of a warrant of arrest of a summons to appear”, in Mark Klamberg (ed.), *Commentary on the Law of the International Criminal Court*, Torkel Opsahl Academic EPublisher, Brussels, 2017, p. 426 (fn. 464: “The threshold ‘reasonable grounds’ is the least demanding evidentiary requirement used in the ICC Statute”) (<http://www.legal-tools.org/doc/aa0e2b/>).

⁸² At least, three principal standards relevant to significant milestones of the criminal process, such as investigation, prosecution, committal for trial, conviction, and so on. Other standards may apply as conditions for lesser procedural matters. See, for example, Ambos, p. 400 (noting that Article 55(2), relating to investigative safeguards for suspects, applies when there are mere “grounds to believe that a person has committed a crime”), see *supra* note 44. This standard, if based merely on the subjective opinion of the investigator, is indeed lower than the standard in Articles 53(1) and 58.

⁸³ *Côte d'Ivoire* Article 15 Decision, para. 21, see *supra* note 9. See also *Kenya* Article 15 Decision, Dissenting Opinion of Judge Kaul, para. 15, see *supra* note 9.

established under this Statute shall be complementary to national criminal jurisdictions”. Moreover, although the crimes within the Court’s jurisdiction are, as such, “the most serious crimes of concern to the international community as a whole”,⁸⁴ the Statute nonetheless recognises that not all cases of such crimes are “of sufficient gravity to justify further action by the Court”.⁸⁵ These principles thus imply that some element of selectivity, both of situations and cases, is inherent to the Court’s operation, and thus favour an interpretation of the standard of proof in Article 53(1) which may properly give effect to that interest. In particular, it suggests that the Court is not mandated to investigate every allegation of an Article 5 crime, but must at least establish that the allegation is sufficiently well-founded on its facts (even without the Court itself conducting an investigation) as well as being sufficiently grave and not subject to relevant domestic proceedings.

There are also significant practical justifications confirming the necessity of a meaningful form of situation selectivity.

Although the Court and the Office of the Prosecutor are of a finite size, the Statute does not expressly allow for the resource implications of a new investigation to be taken into account in the Prosecutor’s Article 53 determination. Although laudable in principle, this silence might seem anomalous from a practical point of view. In the first years of the Court’s operation already, 11 situations are under investigation and/or prosecution, with another 10 under preliminary examination.⁸⁶ And this is still at a time when the Statute remains far from universal ratification, and when some notable situations of apparent international crimes have not even been referred to the Court. By contrast, even the ‘basic size’ of the Office of the Prosecutor – which is, itself, aspirational and not yet fully funded by the ICC Assembly of States Parties – imposes significant limits on the number of active investigations and prosecutions that can be pursued at any

⁸⁴ ICC Statute, Article 5, see *supra* note 7; see also Preamble.

⁸⁵ *Ibid.*, Article 17(1)(d); see also Article 8(1) (“The Court shall have in respect of war crimes *in particular when* committed as part of a plan or policy”, emphasis added).

⁸⁶ At the time of writing, the situations presently under investigation are: Burundi, Central African Republic (I and II), Côte d’Ivoire, Democratic Republic of Congo, Georgia, Kenya, Libya, Mali, Sudan (Darfur), and Uganda. The situations under preliminary examination are: Afghanistan, Colombia, Gabon, Guinea, Nigeria, Palestine, the Philippines, Ukraine, the United Kingdom (Iraq), and Venezuela. A request to the Pre-Trial Chamber, under article 15(3) of the Statute, is pending with regard to the Afghanistan situation.

one time.⁸⁷ This apparent lacuna in the Statute is, however, at least partially resolved if Article 53(1) is understood to apply a meaningful standard of proof, requiring allegations of crimes to be substantiated to a threshold level.⁸⁸ This means, at the very least, that investigations are not opened on a purely speculative basis, to resolve doubt even about the reasonable possibility that at least one international crime might have been committed. Rather, scarce resources are reserved for those situations where the threshold has been reached.⁸⁹

Similar reasoning could also be applied to the apparent silence of the Statute, in the context of Article 53, concerning the Prosecutor's anticipation of any difficulties in collecting evidence or obtaining the cooperation of relevant States (which may be a crucial consideration for many of her activities). It is possible that such issues might be reflected in the assessment of the interests of justice under Article 53(1)(c) (on the theory, perhaps, that an ineffective investigation is less beneficial to the victims than the prospect of a more effective investigation later on). But by requiring the facts of at least one crime to be established to a meaningful threshold as a condition for opening investigations, again Article 53(1)(a) and (b) ensure that there is an adequate basis for the expenditure of the efforts of the Prosecutor and the Court (even if such difficulties may potentially impede initiating any prosecution).

These views may be supported by Judge Kaul's separate opinion in *Kenya*. Recalling that “[n]ational prosecutors are called upon to commence investigations if they become aware of *any* information that a crime may have occurred”, he observes that this principle is “not entirely transferable” to Article 15 (and, accordingly, Article 53) of the Statute.⁹⁰

⁸⁷ See, for example, ICC Assembly of States Parties, *Report of the Court on the Basic Size of the Office of the Prosecutor*, 17 September 2015, ICC-ASP/14/21, paras. 7–8, 21 (<http://www.legal-tools.org/doc/b27d2a/>).

⁸⁸ By analogy, see also *Kenya* Article 15 Decision, Dissenting Opinion of Judge Kaul, para. 10 (justifying the necessity of, in his view, a strict definition of crimes against humanity on the basis *inter alia* of “the limited financial and material means” of the ICC, and his concern that a relaxed definition could lead to the Court being “unable to tackle all the situations which could fall under its jurisdiction with the consequence that the selection of the situations under actual investigation might be quite arbitrary to the dismay of the numerous victims in the situations disregarded”), see *supra* note 9.

⁸⁹ See also Bergsmo *et al.*, p. 1368, mn. 5, see *supra* note 17.

⁹⁰ *Kenya* Article 15 Decision, Dissenting Opinion of Judge Kaul, para. 16, see *supra* note 9.

Rather, the Prosecutor has a “differ[ent] mandate”.⁹¹ Judge Kaul does not elaborate on exactly what this means, except by referring to Article 53(1). Nor indeed is it correct even to say that *all* domestic systems favour a system of obligatory prosecution; to the contrary, although some States favour such an approach, it is by no means universal.⁹²

Finally, as reflected by the Statute’s emphasis on complementarity, it is also important to recall that Article 53(1) balances the Court’s effective operation in fulfilling its mandate against recognition of the sovereign powers and prerogatives of States, and their primary role in enforcing the criminal law. It is clear from the drafting history of the Statute that this balance was struck with great care, and after extensive negotiation and deliberation.⁹³ As such, it cannot be correct to imply that opening an ICC investigation, when it is ambiguous whether the Article 53(1) standard is met, does “no harm to anyone’s rights”.⁹⁴ The rights at issue may be the rights of States, rather than individuals, but this does not mean that the Court may disregard them lightly.⁹⁵ Indeed, transparent respect for these rights – 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.⁹⁶

⁹¹ *Ibid.*

⁹² Philippa Webb, “The ICC Prosecutor’s discretion not to proceed in the ‘interests of justice’”, in *Criminal Law Quarterly*, 2005, vol. 50, p. 305, at pp. 310–12 (hereinafter ‘Webb’).

⁹³ Bergsmo *et al.*, p. 1367, mn. 3, see *supra* note 17; Morten Bergsmo, Jelena Pejić, and ZHU Dan, “Article 15: Prosecutor”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd edition, C.H. Beck/Hart/Nomos, 2016, p. 725, at pp. 726–29, mns. 1–7. See also Alison M. Danner, “Enhancing the legitimacy and accountability of prosecutorial discretion at the International Criminal Court”, in *American Journal of International Law*, 2003, vol. 97, p. 510, at pp. 513–515 (hereinafter ‘Danner’); generally Silvia A. Fernández de Gurmendi, “The role of the international prosecutor”, in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results*, Kluwer Law International, 1999, p. 175.

⁹⁴ Cf. Longobardo, p. 1026, see *supra* note 44. See also *Comoros Reconsideration Request*, para. 13, see *supra* note 3.

⁹⁵ See Ventura, p. 78, see *supra* note 14.

⁹⁶ See Brubacher, pp. 94–95, see *supra* note 39. See also Danner, pp. 551–52 (noting that “[p]rosecutorial guidelines will help the Prosecutor negotiate the tension between accountability and independence”, enhancing the Prosecutor’s legitimacy and fostering effective

22.1.4. The Article 53(1) Standard of Proof: A Summary

For all these reasons, Article 53(1) can only be correctly interpreted to impose a standard of proof which must be genuinely applied to all factual matters which require determination under Article 53(1)(a) and (b). It requires the Prosecution to be satisfied that the available information shows a rational or sensible factual basis to reach the necessary conclusions. In particular, the Prosecutor must be satisfied of a “reasonable basis to believe” that:

- at least one Article 5 crime has been committed (including all the requisite legal elements);⁹⁷ and
- all other facts which are material to her admissibility assessment exist (for example, if her ‘sufficient gravity’ analysis turns on the existence of a plan or policy under Article 8(1), the existence of those facts showing that plan or policy, which may not themselves be legal elements of the crime).⁹⁸

This is no more and no less than the Pre-Trial Chamber’s analogous duty under Article 15(4) and, albeit applied to more specific (and hence demanding) types of facts, under Article 58 of the Statute.

22.2. The Scope of Prosecutorial Discretion in Article 53(1)

If Article 53(1) applies an essentially legal test, requiring that an investigation be opened if the conditions in Articles 53(1)(a) to (c) are satisfied, it follows that the Prosecutor’s discretion in opening an investigation is circumscribed. To be clear, the application of the standard of proof in Articles 53(1)(a) and (b) allows *no* discretion in the legal sense at all.⁹⁹ Rather, the only discretion lies in Article 53(1)(c).¹⁰⁰ And, so far in the history of this Court, this discretion has *never* been exercised. A clearer and wider understanding of this fact, as the present Prosecutor has repeatedly urged, would assist in answering many of the allegations of some kind of bias in the Court’s approach to preliminary examinations.

cooperation from States), see *supra* note 93. Article 53(1) of the Statute is a prosecutorial ‘guideline’ *par excellence*.

⁹⁷ ICC Statute, Article 53(1)(a), see *supra* note 7.

⁹⁸ *Ibid.*, Article 53(1)(b).

⁹⁹ See also Webb, p. 319, see *supra* note 92; Turone, p. 1152, see *supra* note 15.

¹⁰⁰ See *supra* note 12, and accompanying text.

However, the non-discretionary nature of the standard of proof in Article 53(1) does not mean that there is no room for prosecutorial discretion at all,¹⁰¹ but the specific nature and limits of the concept in this particular context must be understood. As Knoops and Zwart have recently recalled, “prosecutorial discretion” is an “integral part” of prosecutorial independence, which is guaranteed by Article 42(1) of the Statute.¹⁰² But in the context of Article 53(1)(a) and (b),¹⁰³ this discretion does not manifest itself in discretionary *decision-making* (because the Prosecutor could be objectively wrong in her determination that there is not a reasonable basis to believe a given fact is true, whereas a discretionary decision is not amenable to such criticism),¹⁰⁴ but in discretion as to *methodology*. To

¹⁰¹ Luc Côté, “Reflections on the exercise of prosecutorial discretion in international criminal law”, in *Journal of International Criminal Justice*, 2005, vol. 3, no. 1, p. 162, at p. 163 (“discretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction”, quoting Ronald Dworkin, *Taking Rights Seriously*, Harvard University Press, 1977, p. 31). See also Webb, pp. 310–311 (noting that, even in States abiding by the “principle of legality” – which “theoretically compels the prosecutor (or investigating authority) to investigate when there are facts that give enough grounds for suspicion” – “in practice there are no ‘pure’ versions of the principle of legality”, citing for example the “incidental areas of discretion” which remain and are “used to prioritize cases” in the Italian system, and greater latitude still in systems such as that in Germany), see *supra* note 92; Nsereko, pp. 127–129, see *supra* note 40.

¹⁰² Knoops and Zwart, p. 1073, see *supra* note 56. See also Brubacher, p. 76, see *supra* note 39; Jallow, p. 146, see *supra* note 40.

¹⁰³ Specifically, this means there is no discretion concerning relevant factual matters in Phases 2–3 of the preliminary examination process, as conceived by the Office of the Prosecutor: see *Policy Paper on Preliminary Examinations*, paras. 77–83 (Phase 2 “represents the formal commencement of a preliminary examination of a given situation”), see *supra* note 15. By contrast, Phase 1 decision-making – determining which individual communications to the Prosecutor under Article 15 should lead to opening a preliminary examinations – is in part discretionary, and is not directly governed by Article 53(1): for more information, see Amitis Khojasteh, “The Pre-Preliminary Examination Stage: Theory and Practice of the OTP’s Phase 1 Activities”, in Morten Bergsmo and Carsten Stahn (eds.), *Quality Control in Preliminary Examination: Volume 1*, Torkel Opsahl Academic EPublisher, 2018, chap. 8. This is consistent with Article 15(1) of the Statute, given its ordinary meaning, context, and object and purpose, which states that “[t]he Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court”.

¹⁰⁴ Cf. Knoops and Zwart, p. 1079. “A discretionary power involves the right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred. Therefore, discretion may be defined as the power to make a decision that cannot be determined to be right or wrong in an objective way”, citing UK House of Lords, *Secretary of State for Education and Sci-*

borrow an analogy from trial proceedings, whereas it is well-established that final determinations about the guilt or innocence of the accused are *not* discretionary, the Trial Chamber's management of the trial itself (how long to allow the Parties to question witnesses, order of questioning, and so on) *is* a discretionary matter.¹⁰⁵

The fact that Article 53(1)(a) and (b) determinations are not discretionary does not, however, mean that they may be judicially reviewed simply on a 'correctness' standard. To the contrary, as further explained below, such determinations remain entitled to a certain deference in the course of any judicial review.

So how does the residual *methodological* discretion of the Prosecutor manifest itself in Article 53(1)? As the very term implies, the Prosecutor has control of the process of conducting preliminary examinations, consistent with her statutory independence.¹⁰⁶ This control, and hence her discretion, extends to all aspects of the process. But three notable examples can quickly be identified, which may impact the preliminary examination function itself and allow for the Prosecution's particular approach to be suitably adapted to the circumstances.¹⁰⁷

ence v. Tameside Metropolitan Borough Council [1977] AC 1014, 1064, *per* Lord Diplock; Grey, "Discretion in administrative law", in *Osgoode Law Journal*, 1979, vol. 17, no. 1, pp. 1070, 1090 (apparently referring to a "broad prosecutorial discretion whether to bring situations [...] before the ICC"), see *supra* note 56. See also Nsereko, pp. 124–25, see *supra* note 40.

¹⁰⁵ See, for example, ICC Statute, Article 64; International Criminal Court, Situation in the Republic of Kenya, *Prosecutor v. Ruto and Sang*, Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled "Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial", 25 October 2013, ICC-01/09-01/11-1066, para. 50 (<http://www.legal-tools.org/doc/575657/>); International Criminal Court, Situation in the Republic of Kenya, *Prosecutor v. Ruto and Sang*, Trial Chamber, Decision on Witness Preparation, 2 January 2013, ICC-01/09-01/11-524, para. 27 (<http://www.legal-tools.org/doc/82c717/>).

¹⁰⁶ ICC Statute, Article 42(1) ("The Office of the Prosecutor shall act independently as a separate organ of the Court. It shall be responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them [...] A member of the Office shall not seek or act on instructions from any external source"), see *supra* note 7.

¹⁰⁷ See also Carsten Stahn, "Damned if you do, damned if you don't: challenges and critiques of preliminary examinations at the ICC", in *Journal of International Criminal Justice*, 2017, vol. 15, no. 3, p. 413, at pp. 417–22 (hereinafter 'Stahn').

First, the Prosecutor allocates and assigns her (limited) resources to the various activities of her Office, including to the conduct of particular preliminary examinations.¹⁰⁸ It follows from this that she controls the timing and relative priority of different preliminary examinations. She may choose, consistent with her developing practice,¹⁰⁹ to explain some of the principles which guide her discretion in this respect (through means of a policy document), but she cannot be obliged to exercise her discretion in a particular fashion.

Second, the Prosecutor has discretion in the extent to which she seeks out open-source information concerning the subject-matter of a preliminary examination. Although she does not enjoy investigative powers under Article 54 at this stage of proceedings, as further discussed below, she “*may seek additional information from [...] reliable sources that he or she deems appropriate, and may receive written or oral testimony*”.¹¹⁰ This means that the Prosecutor is not limited to the content of a referral or Article 15 communication, but may seek additional information from States, the United Nations, NGOs, or other reliable sources. By these means, she may be able to fill ‘gaps’ which appear to exist in the information in her possession, if she thinks this is appropriate. But by the same token, if a referral or Article 15 communication contains such gaps, she cannot be perpetually compelled to seek additional information to resolve those deficiencies.¹¹¹ She is entitled, if she thinks appropriate,¹¹² simply to close the preliminary examination.¹¹³

¹⁰⁸ *Ibid.*, Article 42(2) (“The Prosecutor shall have full authority over the management and administration of the Office, including the staff, facilities and other resources thereof”).

¹⁰⁹ The Prosecutor has, so far, published policies on procedural matters including the conduct of preliminary examinations, the meaning of the “interests of justice” in Article 53, and the process of case selection and prioritisation, as well as on substantive matters such as sexual and gender based crimes, and the relationship between international criminal law and children. See generally “Policies and Strategies”, available on the Office’s web site; Matthew E. Cross and Antonio Coco, “Foreword”, *Journal of International Criminal Justice*, 2017, vol. 15, no. 3, p. 407, at p. 409.

¹¹⁰ ICC, *Rules of Procedure and Evidence*, 9 September 2002, Rule 104(2) (emphasis added) (<http://www.legal-tools.org/doc/8bcf6f/>).

¹¹¹ See, for example, International Criminal Court, Situation in the Democratic Republic of the Congo, Appeals Chamber, Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007, 19 December 2008, ICC-01/04-556, pa-

Third, and in part consequent on the first two discretions, the Prosecutor controls the *duration* of a preliminary examination, and when it is terminated (by seeking to open an investigation, or by closing), with reference to relevant circumstances.¹¹⁴ She may be satisfied that the Article 53(1) standard is met within a matter of months (or, perhaps exceptionally, even weeks), or she may require years. Likewise, where she considers that the available information does not suffice, or her admissibility assessment relates to a manifestly changing or developing situation, she may properly decide to maintain a ‘watching brief’ and to defer reaching a determination until the facts become clearer.¹¹⁵

The Prosecutor’s methodological discretion may be illustrated by one incident in the early case law of the Court, in which Pre-Trial Chamber III queried the progress of the CAR I preliminary examination.¹¹⁶ Although providing this information, the Prosecutor stressed that “[t]he Pre-Trial Chamber’s supervisory role, under Article 53(3), only applies to the review of a *decision* under Article 53(1) and (2) by the Prosecutor not to proceed with an investigation of a prosecution”.¹¹⁷ He continued to point out that, since Article 53(1) requires “an informed and well-reasoned de-

ra. 51 (<http://www.legal-tools.org/doc/dca981/>); *Côte d’Ivoire* Article 15 Decision, Separate Opinion of Judge Fernández de Gurmendi, paras. 20–22, see *supra* note 16.

¹¹² See also ICC Statute, Article 42(3) (“The Prosecutor and the Deputy Prosecutors shall be persons of high moral character, be highly competent in and have extensive practical experience in the prosecution or trial of criminal cases”), see *supra* note 7.

¹¹³ This is without prejudice to the preliminary examination being reopened on the basis of new facts or information: see *infra* note 114.

¹¹⁴ This is supported, furthermore, by the Prosecutor’s discretion to reopen a closed preliminary examination: ICC Statute, Article 53(4) (“The Prosecutor *may*, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information”, emphasis added), see *supra* note 7.

¹¹⁵ See further *Policy Paper on Preliminary Examinations*, paras. 90, 101–102, see *supra* note 15.

¹¹⁶ International Criminal Court, Situation in the Central African Republic, Pre-Trial Chamber, Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic, 30 November 2006, ICC-01/05-6, pp. 4–5 (<http://www.legal-tools.org/doc/76e607/>).

¹¹⁷ International Criminal Court, Situation in the Central African Republic, Pre-Trial Chamber, 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, 15 December 2006, ICC-01/05-7, para. 1 (‘Prosecutor’s CAR Report’) (<http://www.legal-tools.org/doc/1dd66a/>). See also para. 10.

cision”, preliminary examinations must be carried out “in a comprehensive and thorough manner” and that “it must be for him to determine the breadth and scope of this preliminary assessment”.¹¹⁸ Moreover, notwithstanding the uniform legal framework, the practical requirements of any particular preliminary examination are “situation-specific”, and the “time taken” may depend “on the particular circumstances in each situation”.¹¹⁹ What Pre-Trial Chamber III thought of this response is lost to history, presumably because the Prosecutor nonetheless provided the information requested. Subsequently, moreover, the Prosecutor has herself adopted the practice of providing annual reports on preliminary examination activities,¹²⁰ which may go some way to increasing the transparency of her activities in this area.¹²¹ But the Policy Paper on Preliminary Examinations, published in 2013, has nonetheless maintained this view of the Prosecutor’s discretion in managing the ‘process’ of the preliminary examination.¹²²

22.3. Consequences of the Standard of Proof in Article 53(1)

The nature of the standard of proof under Article 53(1)(a) and (b), and the confined role of prosecutorial discretion, has some important consequences for the conduct of preliminary examinations, and hence for any assessment of their ‘quality’. These include: (1) the Prosecutor’s duty to evaluate the information available to her; (2) her response to a lack of information on relevant issues; (3) the extent to which she may select and/or prioritise the Article 5 crimes on which to make findings under Article 53(1); and (4) the nature of the Pre-Trial Chamber’s judicial review under Article 53(3).

¹¹⁸ *Ibid.*, para. 7.

¹¹⁹ *Ibid.*, para. 8. See also para. 9.

¹²⁰ This practice began in 2011, and has been maintained annually since that time. For the most recent annual report (at the time of writing), see, for example, International Criminal Court, Office of the Prosecutor, *Report on Preliminary Examination Activities 2016*, 14 November 2016 (<http://www.legal-tools.org/doc/f30a53/>).

¹²¹ Cf. Anni Pues, “Towards the ‘Golden Hour’? A critical exploration of the length of preliminary examinations”, in *Journal of International Criminal Justice*, 2017, vol. 15, no. 3, p. 435.

¹²² *Policy Paper on Preliminary Examinations*, para. 89, see *supra* note 15.

22.3.1. A Duty to Evaluate the Available Information

Article 53(1) conditions the Prosecutor's determination of whether the criteria in Article 53(1)(a) to (c) are met on "evaluat[ing] the information made available to him or her". Rule 104(1) further specifies that, "[i]n acting pursuant to Article 53, paragraph 1, the Prosecutor shall, in evaluating the information made available to him or her, analyse the seriousness of the information received".

Considering these prescriptions in the context of the standard of proof in Article 53(1), it is apparent that the Prosecutor is not obliged to accept the information presented to her at face value.¹²³ Admittedly, the meaning of the reference in Rule 104(1) to analysing the "seriousness" of the information is somewhat obscure, since this would seem to duplicate the requirements of Article 53(1)(a) or (b). But no matter the particular construction placed on it, the conclusion appears inescapable that the Prosecutor should reach her own assessment of the meaning, relevance and significance of the information available. It will likely be insufficient for the Prosecutor simply to accept the contents of a referral or Article 15 communication as true.¹²⁴ Consistent with her discretion to seek additional information (without 'investigating'), previously described, she may also attempt to contextualise the information she receives where she considers it appropriate.

It is implicit in these observations that the Prosecutor may weigh the available information as a whole. She may decide, on occasion, that some of the available information is less reliable than other information. In some instances, she may positively decide that she cannot rely on certain information, uncorroborated, even to establish a "reasonable basis to

¹²³ Cf. *Comoros* Reconsideration Request, para. 35, see *supra* note 3.

¹²⁴ Compare International Criminal Court, Situation in Georgia, Pre-Trial Chamber, Separate Opinion of Judge Kovács, 27 January 2016, ICC-01/15-12-Anx-Corr, paras. 6 ("Judicial control entails more than automatically agreeing with what the Prosecutor presents"), 20 (*Georgia* Article 15 Decision, Separate Opinion of Judge Kovács) (<http://www.legal-tools.org/doc/28b159/>); *Kenya* Article 15 Decision, Dissenting Opinion of Judge Kaul, para. 19 (the Pre-Trial Chamber's article 15(4) analysis is not "a mere rubber-stamping" exercise), see *supra* note 9. But see *Côte d'Ivoire* Article 15 Decision, Separate Opinion of Judge Fernández de Gurmendi, paras. 15 ("while the Chamber and the Prosecutor need to examine the same factors and apply the same 'reasonable basis to proceed' standard, the examination by the Chamber should not become a duplication of the preliminary examination conducted by the Prosecutor"), 16, 18–19, 27–28, see *supra* note 16.

believe”. This may include, for example, assertions which appear highly implausible in the context of all the relevant circumstances. Although the Prosecutor should take great care in such situations – and should not reject relevant available information merely because it challenges her preconceptions – she is not, for example, required to accept there is a reasonable basis to believe that aliens exist, merely because someone tells her so.

Consistent with the approach adopted in trial proceedings, however, the Prosecutor should not enter into the question whether particular pieces of information are themselves ‘reasonable’ or not.¹²⁵ Rather, she should apply the standard of proof to the factual findings which are indispensable to her determination (for example, the elements of the relevant Article 5 crime(s) and any factual matters material to her Article 53(1)(b) analysis). Only if such an indispensable finding depends on a single piece of information should she consider whether that information itself provides a reasonable basis to believe the finding in question.

22.3.2. Prohibitive Effect of Insufficient or Ambiguous Information

In *Comoros*, the majority of the Pre-Trial Chamber observed that: “[f]acts which are difficult to establish, or which are unclear, [...] are not valid reasons not to start an investigation but rather call for the opening of such an investigation”.¹²⁶ The same majority hinted at similar reasoning in *Georgia*,¹²⁷ and an entirely different bench of the Pre-Trial Chamber repeated this statement, without further elaboration, in *Burundi*.¹²⁸ Yet, on the other hand, Judge Kaul, writing separately in the context of the Article 15(4) decision in *Kenya*, had previously stated that a “somewhat selective

¹²⁵ See *supra* note 29.

¹²⁶ *Comoros* Reconsideration Request, para. 13, see *supra* note 3. But see also *infra* note 130.

¹²⁷ *Georgia* Article 15 Decision, paras. 34–35 (noting concerns by the Prosecutor that, for certain allegations, the standard of proof was not met based, in her view, on concerns about its reliability, and opining that the Prosecutor had “acted too restrictively and [...] imposed requirements on the material that cannot reasonably be met in the absence of an investigation, the initiation of which is precisely at stake”), see *supra* note 9. Notwithstanding his dissent from the reasoning of the majority in *Comoros*, Judge Kovács appears to agree with the majority in this respect: *Georgia* Article 15 Decision, Separate Opinion of Judge Kovács, paras. 21–23 (“[t]he complexity of the crimes makes it even more compelling to commence an investigation to establish whether or not the elements of the offence are fulfilled”), see *supra* note 124.

¹²⁸ *Burundi* Article 15 Decision, para. 30, see *supra* note 18.

or summary examination in the hope [...] that the investigation may bring about the missing pieces of his determination under Article 53(1)(a) of the Statute is not enough”¹²⁹.

To any extent that the *Comoros* majority was suggesting that investigations should nonetheless be opened even when the Article 53(1) standard of proof is *not* met,¹³⁰ Judge Kaul’s opinion is to be preferred. To do otherwise – opening an investigation when one or more indispensable facts is not established to the Article 53(1) threshold – would defeat the entire exercise, and create a wholly circular logic: “an investigation cannot be opened until these conditions are met; if the information does not show that these conditions are met, then an investigation is still necessary in order to find such information”. Such logic undermines the object and purpose of Article 53(1).

The correctness of Judge Kaul’s view is moreover supported by the consistent statements – even by the *Comoros* majority – that, until the Prosecutor has made a positive Article 53(1) determination, and at least one other relevant authority has concurred that an investigation should be opened,¹³¹ she may not take *any* ‘investigative’ measure which depends upon Article 54.¹³² Although the exact definition of an investigative measure in this context is not yet established, it may be taken to involve active measures to obtain primary source information in order to assess

¹²⁹ *Kenya* Article 15 Decision, Dissenting Opinion of Judge Kaul, para. 18, see *supra* note 9.

¹³⁰ The significance of the majority’s comment is not entirely clear, however, since it also (in the same paragraph) refers to the need for investigation to overcome doubts “[i]f there are ‘reasonable inferences’ that at least one crime has been committed: *Comoros* Reconsideration Request, para. 13, see *supra* note 3. An alternative interpretation of the majority’s remarks might be to suggest that the Article 53(1) requires little or no evaluation of the available information, and that the standard of proof is satisfied by the mere allegation of Article 5 crimes.

¹³¹ Article 13 of the Statute lists three such authorities: a referring State Party, the UN Security Council acting under Chapter VII of the UN Charter, and the Pre-Trial Chamber approving a request from the Prosecutor under Article 15(4). States and the UN Security Council provide the necessary authorisation through their referrals, prior to the Prosecutor’s preliminary examination. By contrast, since it provides a check on the *proprio motu* powers of the Prosecutor, applying in the absence of a referral, the Pre-Trial Chamber provides (or withholds) the necessary authorisation *after* the Prosecutor’s preliminary examination.

¹³² See, for example, *Kenya* Article 15 Decision, para. 27, see *supra* note 9. See also *Comoros* Reconsideration Request, para. 13 (“only during the investigation may the Prosecutor use her powers under article 54 of the Statute; conversely, her powers are more limited under article 53(1)”), see *supra* note 3.

whether there is criminal responsibility under the Statute, beyond those measures which inhere in the preliminary examination process.¹³³ Notwithstanding the vagueness of the definition, the prohibition of the use of investigative measures of this kind seems incontrovertible – if the Prosecutor may not open an investigation until the conditions of Articles 13, 15, and/or 53 of the Statute are met (as applicable), then necessarily those measures which can only be used in the context of an ‘investigation’ cannot be used in order to bring about this state of affairs.

22.3.3. Selectivity in Publicly Reported Criminal Allegations in ‘Positively-resolved’ Preliminary Examinations

Judge Kovács, in his separate opinion in *Georgia*, emphasised the importance of “ensur[ing] that the threshold provided for in Articles 15 and 53 of the Statute is *equally* applied to all crimes under the jurisdiction of the Court, irrespective of the nature of the alleged crimes at stake”.¹³⁴ Yet applying the standard of proof in Article 53(1) “equally” to all the Article 5 crimes does *not* mean that a preliminary examination which supports the opening of an investigation is likely to provide a ‘full’ account of all the types of crimes which might have been committed. Indeed, the opposite is true. Certain Article 5 crimes are, by their nature, more difficult to establish because they require a greater number of elements to be satisfied. Moreover, in the context of preliminary examinations, this logic applies even more strongly because some required elements, by their nature, may be difficult to establish to the standard of proof on the basis of the “infor-

¹³³ See generally ICC Statute, Article 54, see *supra* note 7. All intrusive measures are likely to be investigative measures. Preliminary examinations depend on open-source information, or information which is consensually provided to the Prosecutor. Certain measures are thus clearly not ‘investigative’ for these purposes, and are expressly contemplated by Article 53(1) and Rule 104(2). The Prosecutor may *receive* information (that is, “information made available”), and may seek information from any “reliable” source she deems appropriate; she may also receive “testimony”. Accordingly, it is certain that the Prosecutor may consult any open-source or public domain material. It also may be the case that the Prosecutor may receive the accounts of individuals – for example, victims, or ‘whistle-blowers’ – provided those accounts are made *voluntarily* and thus do not require the use of any measure under Article 54. Nor does anything in the Statute prevent other actors taking independent steps at least to preserve potential evidence pending the opening of an investigation.

¹³⁴ *Georgia* Article 15 Decision, Separate Opinion of Judge Kovács, para. 23, see *supra* note 124.

mation made available”. For example, certain ‘conduct of hostilities’ offences may be especially prone to this phenomenon.¹³⁵ The extent to which inferences of these elements can reasonably be made from the general circumstances is an open, and difficult, question.

Notwithstanding this limitation, it will generally not impede most kinds of preliminary examinations which see allegations of multiple kinds of criminality.¹³⁶ After all, an investigation can be opened if “the information available [...] 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”.¹³⁷ Likewise, Judge Fernández has recalled that “the facts and incidents identified” in an Article 15 application “are not and could not be expected to be exhaustive [...], but are intended solely to give concrete examples to the Chamber of the gravest types of criminality that have occurred in the situation”.¹³⁸ This same reasoning applies to the Prosecutor’s reasoning not only when she seeks to open an investigation *proprio motu*, by applying to the Pre-Trial Chamber, but also when opening the investigation of referred situations.

Yet, although Judge Fernández’s conclusion is correct, it cannot necessarily be assumed that the ‘examples’ demonstrating that the Article 53(1) requirements are met will necessarily prove to be the ‘gravest’ types of criminality in the situation. Rather, although the Prosecutor can be expected to enumerate the gravest types which she finds to be established according to the Article 53(1) standard of proof, practical considerations will necessarily inform which crimes actually meet the test.

The story is, of course, different if the Prosecutor resolves to *close* a preliminary examination without proceeding to open an investigation. In

¹³⁵ See, for example, ICC Statute, Article 8(2)(b)(iv), see *supra* note 7.

¹³⁶ It may, however, bite on situations which feature very narrowly framed allegations. Whether this is a negative or positive result of the Article 53(1) test may depend on the point of view. On the one hand, it could serve to prevent certain situations in which (for example) one or more types of ‘conduct of hostilities’ war crimes may have been committed from coming readily before the ICC. On the other hand, for a court of limited resources, it may help to ensure that attention is naturally focused on situations of more widespread ‘atrocities’, and to limit situations based on ‘technical’ (although nonetheless serious) breaches of IHL.

¹³⁷ *Comoros* Reconsideration Request, para. 13 (emphasis added), see *supra* note 3.

¹³⁸ *Côte d’Ivoire* Article 15 Decision, Separate Opinion of Judge Fernández de Gurmendi, para. 32, see *supra* note 16.

that situation alone must she address *all* the crimes alleged in a situation, or which might arguably be considered to have arisen, because Article 53(1) requires her to have concluded that there is *no* reasonable basis to proceed for *any* Article 5 crime. This is only possible if she has measured the available information against all the crimes in the Statute.

For these reasons, the Article 53(1) standard of proof, combined with the prohibition on investigative measures during preliminary examinations, means that the situation described when *opening* an investigation will be the ‘truth’, as it appears, but not necessarily the ‘*whole* truth’. Expecting a preliminary examination to correspond “as much as possible to the ‘reality’ on the ground” is reasonable in and of itself – but the caveat “as much as possible” is critical.¹³⁹ Inevitably, certain features, possibly key features, of the situation may well be suspected at the preliminary examination stage, but are only susceptible to proof by means of the investigation itself. This presents no legal problem as such, since the scope of the investigation once opened is not limited to the incidents discussed in any public outcomes of the preliminary examination.¹⁴⁰ But it is important to understand, consequently, that such public outcomes are not necessarily akin to a ‘monitoring report’ by a human rights organization, and may not even aspire to paint a complete picture of the situation. Perhaps paradoxically, it is only when the Prosecutor does *not* find a reasonable basis to proceed with an investigation that she may endeavour to

¹³⁹ Cf. *Georgia* Article 15 Decision, Separate Opinion of Judge Kovács, para. 20, see *supra* note 124.

¹⁴⁰ See, for example, *Georgia* Article 15 Decision, para. 63 (“for the procedure of article 15 to be effective it is not necessary to limit the Prosecution’s investigation to the crimes which are mentioned by the Chamber in its decision authorizing investigation. To impose such limitation would also be illogical, as an examination under article 15(3) and (4) of the Statute is inherently based on limited information. [...] Binding the Prosecutor to the crimes mentioned in the decision authorizing investigation would also conflict with her duty to investigate objectively, in order to establish the truth”), see *supra* note 9; *Côte d’Ivoire* Article 15 Decision, Separate Opinion of Judge Fernández de Gurmendi, para. 34 (“this early and necessarily non-comprehensive identification of incidents serves only as the basis for determining whether the requirements of Article 53 of the Statute are met and [is] not determinative of the case selection that will take place later upon further investigation”), see *supra* note 16. In this context, the *Burundi* Pre-Trial Chamber’s apparent criticism of the Prosecutor for basing her application under Article 15(3) on alleged crimes against humanity, and not finding it necessary or appropriate to enter into the question of any armed conflict, seems curious. See *Burundi* Article 15 Decision, paras. 137-141, see *supra* note 18.

provide a reasonably comprehensive account of the facts on the ground, in order to explain the basis of her conclusion.¹⁴¹

In this context, it is important to note, of course, that the public outcomes of preliminary examinations are not the *only* outcomes. Preliminary examination activities may also yield *internal* work product, which may be relevant to and relied upon by any subsequent investigation, even if it does not meet the Article 53(1) standard of proof and therefore may not form part of the Prosecutor's Article 53(1) determination (and thus publicly reported).¹⁴²

22.3.4. No De Novo Judicial Review

Article 53(3)(a) provides that, for situations referred to the Court and at the request of the referring body, the Pre-Trial Chamber may review the Prosecutor's decision *not* to open an investigation when based on her view that one or more of the criteria in Article 53(1)(a) or (b) is not met. In essence, therefore, this provision allows the Pre-Trial Chamber to review the Prosecutor's evaluation of the facts through the lens of the standard of proof set out in Article 53(1), as well as the correctness of the law to which she directs herself.

Just like any other proceedings before the Court, however, the existence of a mechanism for judicial review does not necessarily mean that the reviewing body can automatically substitute its own opinion of the facts for that of the body under review. Even in criminal trials, where the standard of proof applied is especially rigorous, it is still settled that "two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence, both of which are reasonable".¹⁴³ This reasoning may apply *a fortiori* at the lower standard of proof of a preliminary examination.

¹⁴¹ See also Stahn, pp. 433-434, see *supra* note 107.

¹⁴² See also International Criminal Court, Office of the Prosecutor, *Policy Paper on Sexual and Gender Based Crimes*, June 2014, paras. 6, 21, 38-40, 54-55, 71 (<http://www.legal-tools.org/doc/7ede6c/>); International Criminal Court, Office of the Prosecutor, *Policy on Children*, November 2016, paras. 53-54, 65, 117, 123 (<http://www.legal-tools.org/doc/c2652b/>).

¹⁴³ International Criminal Tribunal for Rwanda, *Ntawukulilyayo v. the Prosecutor*, Appeals Chamber, Judgment, 14 December 2011, ICTR-05-82-A, para. 15 (<http://www.legal-tools.org/doc/42d81d/>).

Accordingly, recognising that Article 53(1) imposes a standard of proof, with which the Prosecutor must comply, does not mean recognising that the Pre-Trial Chamber may overturn the Prosecutor's determination based merely on its own subjective disagreement.¹⁴⁴ This is most especially the case when the Pre-Trial Chamber does not necessarily have before it all the primary information which was available to the Prosecutor in making her determination.¹⁴⁵ Applying a standard of review with an appropriate measure of deference on factual matters is not directly a matter of prosecutorial independence as such, but one of judicial economy and judicial procedure. This much should be clear from the example of the Appeals Chamber, even if reasonable minds may disagree whether the precise standard of review to be applied is better analogised to the standard for judicial review of administrative or executive action, or the appellate standard for factual errors, or the appellate standard for an abuse of discretion.¹⁴⁶

22.4. Conclusion

This chapter has sought to examine the standard of proof under Article 53(1) – which should be a bedrock principle for the conduct of preliminary examinations, and for the evaluation of preliminary examination activity by the Court's wider constituency in the international community. It seems a simple proposition that, subject to her residual discretion in Article 53(1)(c) – as yet, unused – the Prosecutor will open an investiga-

¹⁴⁴ Cf. *Comoros* Reconsideration Request, paras. 14–15 (“paragraphs (a) and (b) require the application of exacting legal requirements [...] the Chamber considers it necessary to add that there is also no valid argument for the proposition that in order not to encroach on the independence of the Prosecutor, the Chamber should knowingly tolerate and not request reconsideration of decisions under Article 53(1) [...] which are erroneous, but within some field of deference”), see *supra* note 3. Compare International Criminal Court, Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia, Pre-Trial Chamber, Partly Dissenting Opinion of Judge Kovács, 16 July 2015, ICC-01/13-34-Anx, paras. 6–8 (doubting the standard of review applied by the majority, and calling for “a more deferential approach”) (<http://www.legal-tools.org/doc/c854cf/>).

¹⁴⁵ See, for example, Rules of Procedure and Evidence, Rule 107(2), see *supra* note 110.

¹⁴⁶ See further, for example, International Criminal Court, Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia, Pre-Trial Chamber, Public Redacted Version of the Prosecution's Consolidated Response to the Observations of the Victims (ICC-01/13-27 and ICC-01/13-28), 14 July 2015, ICC-01/13-29-Red, paras. 15–18 (<http://www.legal-tools.org/doc/248fd1/>).

tion if she determines that the information available shows a reasonable basis to believe that the criteria in Article 53(1)(a) and (b) are met. Yet, despite her recent repeated emphasis on this fact, it remains on occasion misunderstood.

The Article 53(1) standard of proof is indeed relatively low, but it is not meaningless. Like any other fact-finding exercise, it requires that the standard be satisfied by information and not conjecture or assertion. It requires that the standard be genuinely and consistently applied to all the factual elements required by Article 53(1)(a) and (b). It requires resources, time, and professional analysis, and a due measure of co-operation from the international community. Moreover, the link between the standards of proof in Articles 53(1) and 58 underlines the view of the drafters of the Statute that opening an investigation is just as serious and significant a decision as requesting an arrest warrant, with the former impacting largely on States and the latter impacting largely on individuals.

The implications of this analysis are enlightening. First, it underscores that preliminary examinations are not a reflection of the Prosecutor's opinion, or preconceptions, but merely a statement of what the information made available to her reasonably suggests, *without* conducting an investigation. As such, preliminary examinations neither express a political opinion, nor represent a statement of what the Prosecutor (or anyone else) might *suspect* about a situation.

Second, consequently, preliminary examinations serve a fundamentally *procedural* purpose: they are a step to opening an investigation, when this is called for, rather than an end in themselves. Accordingly, although there may sometimes be benefits in publicising the Prosecutor's finding(s) of a reasonable basis to believe that certain crimes are being committed, this is not their core function. Even if an overtly pragmatic approach to preliminary examinations were to be taken, where the Prosecutor only ascertains the bare minimum necessary to open an investigation, this would not mean that the Prosecutor will not carry out the resulting investigation fully, comprehensively and impartially, nor that she has overlooked (or will overlook) any type of Article 5 crime. In this regard, the public outcomes of preliminary examinations may not always reflect (some of) the short-term interests of civil society – to the extent this means drawing public attention to certain allegations of crime – even if such allegations remain material to an ensuing criminal investigation.

Third, preliminary examinations reflect a sophisticated balance struck by the drafters of the Statute. While ensuring that pragmatic considerations are not a primary consideration in deciding whether to open or not to open an investigation, unless they rise to the level of a consideration relevant to Article 53(1)(c), the standard of proof in Article 53(1) also ensures that there is a meaningful and objective filter on those situations which come before the Court. Care should be taken in ensuring that this standard of proof remains fit for purpose. In this context, by giving the Prosecutor the primary and independent responsibility for the *process* by which the standard of proof is applied (within her limited resources), and giving the Pre-Trial Chamber an oversight role in ensuring that the standard of proof is applied *properly*, the Court employs a system which makes a fair and reasonable effort to meet the unique constraints under which it operates.

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