



Article 15 Communication

Methodological challenges relating to the use of third-party Human Rights Fact-Finding in Preliminary Examinations

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1. Introduction

1. The preliminary examination in the *Situation in Palestine* (the “Situation”) was opened by the Office of the Prosecutor (OTP) on 16 January 2015.¹ The opening of this preliminary examination followed Palestine’s purported accession to the Rome Statute on 2 January 2015, taking effect on 1 April 2015.² This communication is without prejudice to jurisdictional issues, including but not limited to both the legal capacity of Palestine to join the Rome Statute as a State and, even should the quality of Palestine as a State party be accepted, the “geographical scope” of such accession given the undetermined nature of Palestine’s borders, as well as conflicting obligations which operate to invalidate the lawful delegation of (Palestinian) criminal jurisdiction to the ICC. This purported accession, which would only give the International Criminal Court prospective jurisdiction,³ was accompanied by a declaration lodged under Article 12(3) of the Rome Statute by which Palestine claimed to grant jurisdiction to the Court since 13 June 2014.⁴
2. Following the ongoing preliminary examination, the Prosecutor will have to decide whether or not to move forward to the formal opening of an investigation. In that respect, the Prosecutor is under a professional obligation reach this decision on the basis of a serious analysis of the available information.
3. This analysis must meet certain standards, especially when it comes to the use of third-party human rights fact-finding, which is likely to constitute a large portion of what the Prosecutor will consider when deciding whether to open an

¹ ICC Press release, *The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine*, 16 January 2015 (available at <https://www.icc-cpi.int/Pages/item.aspx?name=pr1083>, last visited 15 May 2019).

² ICC Press release, *The State of Palestine accedes to the Rome Statute*, 7 January 2015 (available at <https://www.icc-cpi.int/Pages/item.aspx?name=pr1083>, last visited 15 May 2019).

³ Rome Statute, Article 11(2).

⁴ ICC Press release, *Palestine declares acceptance of ICC jurisdiction since 13 June 2014*, 5 January 2015 (available at <https://www.icc-cpi.int/Pages/item.aspx?name=pr1080>, last visited 15 May 2019). In relation to the legal framework applicable to 12(3) declarations, see Dov Jacobs, *Are all crimes committed in Palestine between 2002 and 2014 now beyond the reach of the ICC? Possibly*, Spreading the Jam, 6 January 2015 (available at <https://dovjacobs.com/2015/01/06/are-all-crimes-committed-in-palestine-between-2002-and-2014-now-beyond-the-reach-of-the-icc-possibly/>, last visited 15 May 2019). For an argument suggesting that the retroactive use of Article 12(3) might conflict with the principle of legality, see Talita de Souza Dias, *The Retroactive Application of the Rome Statute in Cases of Security Council Referrals and Ad hoc Declarations: An Appraisal of the Existing Solutions to an Under-discussed Problem*, *Journal of International Criminal Justice*, Volume 16, Issue 1, March 2018, Pages 65–89.



investigation. Indeed, the Situation is the object of interest of both domestic and international human rights organisations, as well as United Nations Human Rights bodies, in a way that probably no other situation in the world is. This is not the place to analyse why this is the case, but the result is that there exists for the Situation a volume of Human Rights reporting that the Prosecutor will be tempted and encouraged (through Article 15 communications as well as referrals themselves) to take into account. This is why it is crucial that the Prosecutor takes careful consideration of the methodological challenges raised by the use of such reports. This is the subject of the current Article 15 communication.

4. There are essentially four kinds of “producers” of these human rights reports in the context of the Situation: international NGOs, domestic Palestinian NGOs, domestic Israeli NGOs and UN fact-finding reports. Each of these sources may present specific challenges, given their different position in relation to the protagonists in the Situation. Specific analysis of these different types of sources could be the object of a subsequent communication. This communication does not purport to present a systematic analysis of all human rights reports that have been issued by various bodies (UN, International NGOs, local NGOs) in relation to the Situation, but to present general methodological challenges which are related to the use of such reports in the context of a Preliminary Examination, challenges which apply more or less equally to all such reports, irrespective of their source. These methodological challenges will be illustrated with examples from such reports (particularly the most recent report from the UN Human Rights Council on Gaza, presenting the “detailed findings of the independent international Commission of inquiry on the protests in the Occupied Palestinian Territory”)⁵ when relevant.
5. Finally, it should be clarified from the outset that this communication does not purport to present any concrete factual or legal findings in relation to the issues being considered in the context of the Preliminary Examination in the Situation. Once again, its aim is to highlight general methodological deficiencies that arise from human rights reports and the corresponding challenges this raises for the OTP if it were to want to rely on these reports.

⁵ Human Rights Council, *Report of the detailed findings of the independent international Commission of inquiry on the protests in the Occupied Palestinian Territory*, A/HRC/40/CRP.2, 18 March 2019 (“Gaza Protests Report”).



2. The use of Third-Party Human Rights Fact-Finding during the preliminary examination phase

2.1. *The general use of Human Rights Fact-Finding reports by the OTP during Preliminary Examinations*

6. The Preliminary Examination is procedurally a natural moment to take into account third party information. Indeed, this is explicitly provided for in Article 15 of the Rome Statute relating to the use of *proprio motu* powers by the Prosecutor, where “he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate”.⁶ The idea is to evaluate more generally if a situation deserves closer attention. Human rights fact-finding reports may be useful in this context.
7. This is *inter alia* shown by the practice of the ICC and the ICTY. Human rights documentation provided an essential starting point for the planning of cases at the ICTY, including choices of cases and sequencing strategies. In the ICC context, it has visibly influenced preliminary examinations.⁷ In many situations, ICC engagement is related to situations which have been subject to fact-finding initiatives (e.g. Darfur, Libya, Côte d’Ivoire, Guinea). These sources contain information that could be relevant, if only incidentally, to both incriminating and exonerating circumstances.
8. Of course, the relevance of such sources depends on the practice of the OTP in defining the scope of preliminary investigations. General fact-finding reports obviously become less important with the use of clearer analysis and more detailed criteria. In the ICC context, the Rome Statute left many of these questions unresolved. The Rome Statute did not specify in detail what the Prosecutor is meant to evaluate under article 15, and more particularly whether this should cover issues of gravity and complementarity. The OTP has included both considerations in its analyses. They are generally vague in nature. This might explain why the OTP has relied on human rights fact-finding sources in its practice.⁸

⁶ See Article 15(2), Rome Statute.

⁷ For a survey of the type of information assessed, see ICC, OTP, *Policy Paper on Preliminary Examinations*, November 2013, paras. 78-84.

⁸ See for example, *Situation in Colombia – Interim Report*, Office of the Prosecutor, 14 November 2012.



9. This raises the question of what importance has been and will be given to such sources in the current Situation.

2.2. *The use of Human Rights fact-finding reports in the current Situation*

10. There is very little information in the latest 2018 Report on Preliminary Examination Activities regarding the sources of the OTP's information regarding the Situation under examination. The Prosecutor explains that "The Office has received a total of 125 communications pursuant to article 15 in relation to the situation in Palestine"⁹, but there is no detail on the content, nature or volume of such communications.
11. In relation to additional information gathered, the Prosecutor simply states that:¹⁰
"During the reporting period, the Office has reached an advanced stage of its assessment of statutory criteria for a determination whether there is a reasonable basis to proceed with an investigation into the situation in Palestine pursuant to article 53(1) of the Statute. In the course of this process, the Office engaged with a number of stakeholders – including officials of Palestine and Israel, intergovernmental and non-governmental organisations, and members of civil society – for the purpose of gathering additional information relevant to the Office's assessment".
12. However, in the remainder of the 2018 Report on Preliminary Examination Activities the Prosecutor provides no further indication on the volume and the nature of the information she has received from these sources, nor is there any specific breakdown of the volume of information specifically received from NGOs.
13. Moreover, when discussing both issues of jurisdiction and issues of admissibility in the Report on Preliminary Examination Activities, the OTP does not provide any references for the claims it makes. It is thus very difficult to assess, based on this Report, exactly what methodology was followed by the OTP in gathering, analysing and using collected information. It should be noted that there is some minimal indication in the report that the OTP did rely on Human Rights Fact-Finding, most notably reports produced by the UN.¹¹

⁹ OTP, *Report on Preliminary Examination Activities 2018*, 5 December 2018, para. 251.

¹⁰ *Ib.* para. 282.

¹¹ *Ib.* para. 265: "the IDF's rules of engagement and the alleged use of excessive and deadly force by Israeli forces in the context of the demonstrations has been heavily criticized by, among others, UN officials and bodies and a number of international and regional NGOs".



14. However, despite this lack of clear information in the Report, it is potentially likely that Human Rights fact-finding reports will be used by the OTP in the current situation. As a result, a necessary question that needs to be answered is how such material is assessed. This in turn requires some discussion of the standard of proof that needs to be met by the Prosecutor when deciding whether to open a formal investigation.

3. Inherent tension between Human Rights Fact-Finding and criminal proceedings

15. As regularly noted in the literature, there are inherent differences between human rights fact-finders and criminal courts. It is often argued that fact-finding bodies pursue goals that overlap only partially with international criminal tribunals (e.g. deterrence, dispute resolution), that human rights bodies adopt different methods in the exercise of their mandate, and that they are rooted in different 'professional cultures'.¹²
16. Human rights actors are particularly concerned with the ending of violence at the 'earliest possible moment' and the improvement of the situations of individuals (e.g., humanitarian conditions).¹³ These goals do not necessarily coincide with the objectives of investigation and prosecution, which are typically *ex post facto* and rarely immediate tools of prevention. Criminal proceedings are geared towards longer-term accountability and protection of due process and fair trial of defendants. This last point is crucial: individual criminal responsibility, and the ensuing principles that apply to it - the most important of which is the presumption of innocence - are at the heart of the criminal law process, while they are only peripheral to the work of human rights organisations. As a result, the latter organisations are not bound by the same due process constraints, which will necessarily affect their daily working methodology.
17. This explains why there is often suspicion towards use of fact-finding materials in criminal proceedings inside international tribunals. For example, the Trial Chamber in the *Katanga* case found that: "conducting an investigation into human rights violations is not subject to the same rules as those for a criminal investigation. Reports are prepared in a non-adversarial manner; they are essentially based on oral testimony, sometimes derived from hearsay, and the

¹² See Bergsmo and Wiley, *Human Rights Professionals and the Criminal Investigation and Prosecution of Core International Crimes*, at 3.

¹³ See generally G. M. Steinberg, A Herzberg and J. Berman, *Best Practices for Human Rights and Humanitarian Fact-Finding* (2012).



identity of sources is always redacted”¹⁴. In the *Lubanga* Judgment, the Chamber recalls the testimony of a member of the Prosecution investigation team who noted “differences between the reports from the NGOs and the situation that confronted the investigation team during its work”¹⁵ and that “investigations carried out by humanitarian groups, in his opinion, are more akin to general journalism than a legal investigation”.¹⁶ The Chamber also quoted William Pace, the Coalition for the ICC Convenor, for whom “human rights and humanitarian organizations are lousy criminal investigators”.¹⁷

18. These inherent differences between criminal investigations and human rights bodies justify taking great care in using them in the context of criminal proceedings, even at such an early phase of the proceedings as the Preliminary Examination.

4. Standard of proof in deciding to open a formal investigation

4.1. *Nature of the Decision*

19. The decision to open an investigation is a key moment in proceedings. It marks the shift from general ‘situation’-related analysis to criminal proceedings. Formally, there is no identified suspect yet. The Prosecutor needs to identify a general context and the likelihood that certain crimes have been committed. In this context, third-party fact-finding material constitutes an easily accessible source and will generally provide a broad overview of a situation and general indications on patterns of violence which might, at this early stage, be indicative of the existence, for example, of an ‘attack’ as the contextual element of crimes against humanity.
20. In the present Situation, the existence of a referral would suggest that the Prosecutor might not have to obtain authorisation from a Pre-Trial Chamber in order to move past the preliminary examination phase and forward with a formal investigation into the Situation. Indeed, such authorisation must only be sought when the Prosecutor wishes to open a *proprio motu* investigation under Article 15 of the Rome Statute. In the present case, because there has been a State referral

¹⁴ See ICC, Trial Chamber, *Prosecutor v. Ngudjolo*, Judgment Pursuant to Article 74, 18 December 2012, at para. 294.

¹⁵ ICC, Trial Chamber, *Prosecutor v. Lubanga*, Judgment Pursuant to Article 74 of the Statute, 14 March 2012, ICC-01/04-01/06-2842, para. 129.

¹⁶ *Ib.*, para. 131.

¹⁷ *Ib.*, para. 130.



under Article 13(a) of the Rome Statute, such authorisation may arguably not be necessary.

21. However, the temporal as well as territorial scope of the Situation is questionable, both given the particular circumstances of the Referral (more than 3 years after the opening of the preliminary examination) and the existence of an Article 12(3) declaration for the period prior to Palestine purporting to join the Court.¹⁸
22. In addition, it should be noted that the 2018 Palestinian referral does not indicate a specific temporal scope, simply inviting the Prosecutor to investigate “in accordance with the temporal jurisdiction of the Court”.¹⁹ However, assuming *arguendo* Palestinian capacity to refer a situation to the ICC, the referral contemplates conduct which would pre-date entry into force of the Rome Statute for Palestine. In that respect, it is arguably impermissible for a State to refer a situation prior to accession to the Rome Statute²⁰, because prior to that date, the State did not have capacity to do so under Article 14 of the Rome Statute, as such right is reserved for States Parties. As a consequence, it can be argued that accession to the Rome Statute only creates prospective rights.
23. The fact that there exists an Article 12(3) declaration by which Palestine purports to recognise the jurisdiction of the Court since 2014 does not change this analysis. Indeed, a 12(3) declaration is not the same as a referral. It is not a trigger mechanism and, even if a State signs a 12(3) declaration, it does not mean that the OTP must not seek authorisation from a Pre-Trial Chamber to open an investigation under Article 15 in the absence of a formal referral. An example of this is the Situation in Côte d’Ivoire, where, despite the existence of an Article 12(3) declaration by Ivorian authorities dating back to 2003, the Prosecutor had to follow the process of obtaining an authorisation from a Pre-Trial Chamber to move forward²¹.
24. In such a context, one can wonder whether it might be both legally required and good policy for the OTP to request authorisation from a Pre-Trial Chamber to proceed further with the Situation. Indeed, just as the Prosecutor, out of an abundance of caution, approached a Pre-Trial Chamber under Article 19 of the Rome Statute in relation to Myanmar to obtain guidance on jurisdiction prior to

¹⁸ Subject to the caveat mentioned in paragraph 1 *supra*.

¹⁹ *Referral by the State of Palestine Pursuant to Articles 13(a) and 14 of the Rome Statute*, 15 May 2018.

²⁰ This includes any situation, not just self-referrals.

²¹ ICC, *Situation in the Republic of Côte d’Ivoire*, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire, Pre-Trial Chamber III, 3 October 2011.



the opening of a preliminary examination,²² the current ambiguity in relation to whether the Prosecutor should request authorisation from a Pre-Trial Chamber should compel the OTP to approach a Pre-Trial Chamber to dispel any doubts.

25. The Prosecutor could decide not to present a request to open an investigation under article 15 in order to move forward with a formal investigation. However, she is still under a statutory obligation to determine whether there are reasonable grounds to believe that crimes within the jurisdiction of the Court may have been committed,²³ and, more crucially, a professional obligation to apply rigorous methodology in assessing available information.

4.2. *Standard of proof at the preliminary examination stage*

26. Guidance as to the applicable standard of proof can be found in prior decisions by the Judges when ruling on a request to open an investigation under Article 15. This standard has generally been considered to be relatively low. For example, in the decision authorising the Prosecutor to open an investigation in the Situation in Kenya, the Pre-Trial Chamber found that:²⁴

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

27. This standard has been confirmed in subsequent decisions by the Court.²⁵ Moreover, all decisions authorising the Prosecutor to open an investigation

²² ICC, Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", Pre-Trial Chamber I, 6 September 2018. It should be noted that the PTC consider (para. 82) that the Prosecutor's request needed to be interpreted in the context of a preliminary examination, rather than as a preparatory step to the opening of one, contrary to what the OTP itself had stated.

²³ Article 53(1) of the Rome Statute.

²⁴ ICC, *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, PTC II, 31 March 2010, para. 27.

²⁵ See for example, ICC, *Situation in the Islamic Republic of Afghanistan*, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, Pre Trial Chamber II, 12 April 2019; ICC, *Situation in the Republic of Côte d'Ivoire*, Decision



affirmed that open source fact finding material is considered in most dimensions of the determination of the possible commission of crimes within the jurisdiction of the Court.

28. Indeed, virtually all supporting documentation brought forward by the OTP for opening an investigation, whether in relation to the general context, or the commission of particular crimes has historically come from third party sources (NGOs, United Nations, press)²⁶ and receives little scrutiny from the Pre-Trial Chamber. It is striking to note that while decisions to authorise the opening of an investigation present general considerations on the standard of proof, they never contain a specific section explaining how the information presented is actually assessed. This suggests that such information is taken at face value by the Judges.
29. Pre-Trial Chamber II's recent decision in the Afghanistan situation even seems to suggest that the absence of evaluation of the available information is justified by the fact that it is not yet formally "evidence" that might be used in the context of establishing individual criminal responsibility.²⁷ If this is what the Pre-Trial Chamber is saying (the phrasing is not entirely clear), this is misguided for two reasons. First of all, the existence of a legal standard of proof to be reached necessarily and logically implies some level of assessment of the evidence put forward to prove it. Secondly, it is short-sighted to segregate strictly the "information" forming the basis of a Preliminary Examination and the "evidence" forming the basis of subsequent judicial proceedings. The Preliminary Examination must be seen in an investigative continuum leading up to prosecutions. Poor quality information at the Preliminary Examination phase is likely to transform into poor evidence in the other phases leading up to the Trial and at the Trial itself.
30. Taking things further, in the 2015 decision by Pre-Trial Chamber I inviting the Prosecutor to reconsider her decision in the "situation on the Registered Vessels

Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, Pre Trial Chamber III, 3 October 2011.

²⁶ The proportion of open source human rights reports in relation to other sources will vary depending on the context of the Preliminary Examination. Indeed, while some investigations were opened quasi-exclusively on human rights reports (in the Ivory Coast for example), in other situations, the Prosecutor benefited from some State cooperation which led to the possibility for the OTP to use more diverse sources of information, in the Georgia situation for example (see ICC, *Situation in Georgia*, Corrected Version of "Request for authorisation of an investigation pursuant to article 15", 16 October 2015, ICC-01/15-4-Corr, OTP, 17 November 2015).

²⁷ ICC, *Situation in the Islamic Republic of Afghanistan*, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, Pre-Trial Chamber II, 12 April 2019, para. 35.



of the Union of Comoros, the Hellenic Republic and the Kingdom of Cambodia”, the Judges asserted that:²⁸

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

31. This position of the Pre-Trial Chamber²⁹ is untenable and would effectively remove the purpose of having a Preliminary Examination conducted by the Prosecutor in the first place. Indeed, if the submission of weak information (how else to describe information that does not clearly establish facts or providing conflicting accounts of the facts?) positively calls for the opening of an investigation, there will never be any reason not to open an investigation, and therefore no reason actually to conduct a Preliminary Examination. On the contrary, it is vital that the Preliminary Examination be done with due regard to high professional standards in relation to the evaluation of the information – i.e. evidence - in the possession of the OTP to the statutory applicable standard of proof.

4.3. A professional obligation to apply rigorous methodological tools during the Preliminary Examination

32. At each stage, meticulous scrutiny of human rights reports is essential and should represent a gold standard in preliminary examinations - not an extraordinary measure that the OTP happens to undertake. This constitutes a professional obligation of the Prosecutor and her staff and should properly operate on her consideration of the information by reference to the statutory standard of proof.

²⁸ ICC, *Situation on the Registered Vessels of the Union of Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation, PTC I, 16 July 2015, para. 13.

²⁹ Which is subject to a possible resolution by the Appeals Chamber of the ICC in an upcoming Judgment in September 2019 (see ICC, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Scheduling Order for delivery of judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 15 November 2018 entitled ‘Decision on the “Application for Judicial Review by the Government of the Union of the Comoros”’, Appeals Chamber, 3 May 2019).



33. The “reasonable basis to believe” standard does not free the Prosecutor from applying rigorous methodological tools during the preliminary examination. It cannot be that any information will do. While a full investigation might have the potential of yielding qualitatively better evidence, the Prosecutor needs to keep in mind that over-reliance on third-party reports at an early stage of the proceedings can have the consequence that it is more difficult to build concrete cases in later stages of the proceedings, given the often unverifiable nature of information contained in such reports.
34. Beyond the standard of proof, it is crucial to stress the importance of relying on credible and reliable evidence from the beginning of the investigative process, as early as the preliminary examination, irrespective of the threshold to open an investigation. Indeed, analysis performed during a preliminary examination will set out the framework of a future formal investigation. This means that the factual narrative arising from and the potential perpetrators identified during a preliminary examination will form the factual foundation of cases to be further built during the OTP’s formal investigation. Because the OTP will be building cases from the very beginning, it will be identifying during the preliminary examination not only contextual elements and details of possible crimes, but also information relating to possible perpetrators.³⁰
35. As Carsten Stahn has commented:
- “the connection between preliminary examination and investigation needs to be improved. The Statute seems to imply that there is a clear-cut distinction between preliminary examination and investigation, according to which preliminary examination focuses on situation-related analysis while investigations involve the framing and testing of cases. Practice has shown that boundaries are more fluid. As part of the gravity test, the OTP has to make an assessment of hypothetical cases. There is a need to draw connections between incidents and suspects, even before the formal start of investigations. In ‘hard cases’, a preliminary examination may require onsite presence on the ground, and deeper engagement with the situational context. This would improve the quality of assessment and allow better hypotheses”.*³¹
36. Thinking of preliminary examinations not as an end in itself, to be able to open a formal investigation, but rather as a first investigative step in building cases,

³⁰ On this, see Dov Jacobs and Jennifer Naouri, *Making Sense of the Invisible: The Role of the ‘Accused’ during Preliminary Examinations*, in Morten Bergsmo and Carsten Stahn (editors), *Quality Control in Preliminary Examination: Volume 2*, Torkel Opsahl Academic EPublisher, Brussels, 2018, pp. 469-519.

³¹ Carsten Stahn, *Damned if you do, Damned if you don’t, Challenges and Critiques of Preliminary Examinations at the ICC*, in *Journal of International Criminal Justice*, 2017, vol. 15, p. 413.



means that the Prosecutor should endeavour actively to identify during the preliminary examination issues that are likely to be inherently difficult to prove at a later stage of the proceedings, and should apply a more robust methodology to such issues. In assessing the available information, the Prosecutor should assess the feasibility of obtaining solid evidence on these issues during a formal investigation. If this assessment leads to a negative conclusion, the Prosecutor should consider using her discretion not to open an investigation.³²

37. This need to consider preliminary examinations as part of the overall investigative process is reflected in the OTP's draft Strategic Plan 2019-2021:

*"Preliminary examinations, besides serving a necessary analytical function in determining whether there is sufficient basis to proceed in a given situation, help to prepare the ground for future investigations, including by identifying potential cases, building cooperation networks and gathering critical information and potential evidence. The Office will endeavour to further exploit their value and build upon their momentum. In particular, it will further adapt the analytical products and information databases used during preliminary examinations to better reflect and anticipate investigative needs, and consider means and opportunities for preserving evidence at the earliest stage, as appropriate—e.g. through increased interaction with first responders, preservation requests, statement-taking at the seat of the Court, etc."*³³

38. It should be noted that the OTP itself claims to assess open source material, including therefore human rights reports, following a certain methodology. This methodology is reflected both in the OTP policy paper on preliminary examinations³⁴ and in requests submitted to Pre-Trial Chambers in order to be authorised to open investigations. For example, in the most recent request to open

³² While beyond the scope of this communication, one suggestion would be to take into account the future feasibility of successful investigations as a component of the "interests of justice" assessment conducted by the Prosecutor under Article 53(1)(c) of the Rome Statute, especially in light of the recent ICC decision not to authorise the opening of an investigation in the situation of Afghanistan (ICC, *Situation in the Islamic Republic of Afghanistan*, Public redacted version of "Request for authorisation of an investigation pursuant to article 15", 20 November 2017, ICC-02/17-7-Conf-Exp, OTP, 20 November 2017).

³³ OTP, Draft Strategic Plan 2019-2021, p. 14 (available at <https://www.justsecurity.org/wp-content/uploads/2019/05/20190514-Draft-OTP-Strategic-Plan-2019-2021-launch-of-external-con...pdf>, last visited 28 May 2019).

³⁴ ICC OTP, *Policy Paper on Preliminary Examinations*, November 2013 (available at <https://www.legal-tools.org/en/doc/acb906/>, last visited on 15 May 2019), at para. 31: "As information evaluated at the preliminary examination stage is largely obtained from external sources, rather than through the Office's own evidence-gathering powers, (which are only available at the investigation stage), the Office pays particular attention to the assessment of the reliability of the source and the credibility of the information".



an investigation in a situation, in relation to Afghanistan, the Prosecutor explained that:³⁵

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

39. The position of the Prosecutor was set out in even clearer terms in her request to open an investigation in the *Situation in Georgia*:³⁶

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

40. This principled claim to following a rigorous methodology is to be welcomed, even if it is not always apparent from the remainder of the Prosecutor's various requests how exactly it was implemented on a case-by-case basis. The OTP should always endeavour to apply such methodology in a serious manner, even at the preliminary examination phase, in order to avoid building future cases on empty allegations.

³⁵ ICC, *Situation in the Islamic Republic of Afghanistan*, Public redacted version of “Request for authorisation of an investigation pursuant to article 15”, 20 November 2017, ICC-02/17-7-Conf-Exp, OTP, 20 November 2017, para. 29.

³⁶ ICC, *Situation in Georgia*, Corrected Version of “Request for authorisation of an investigation pursuant to article 15”, 16 October 2015, ICC-01/15-4-Corr, OTP, 17 November 2015, para. 48. It is more than likely that this strong statement not only on the obligations resting on the Prosecutor but also on the Chamber is a direct response to the above mentioned decision in the Comoros situation which had been issued a mere three months previously by the same Chamber before which the Prosecutor was now submitting her Georgia request.



4.4. *A relevant case study: the approach taken by the Prosecutor in relation to the Gaza Flotilla Incident.*

41. In that respect, it is interesting to consider the Prosecutor's decision to not proceed with the opening of a formal investigation in the *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia* relating to the 2010 Gaza Flotilla incident. In the second Report produced in order to respond to the Pre-Trial Chamber and justify such decision not to open an investigation, the Prosecutor went far beyond a *prima facie* assessment of the available information and adopted a welcome critical approach to the elements in its possession.
42. This critical approach applied to both legal and factual determinations.
43. In relation to legal determinations, the OTP explained that: "*The Comoros and the victims represented by OPCV referred to the assessment of the UN Human Rights Council that the mistreatment was 'cruel and inhuman in nature'. However, the assessment of a third party cannot replace the Prosecution's own obligations under the Statute. Article 53(1) requires that the Prosecution is satisfied that the requisite criteria for initiating an investigation are met, based on its own appreciation of the law and facts, applying the appropriate standard of proof*".³⁷
44. In relation to factual determinations, the Prosecutor assessed in detail the evidence provided in witness statements, identifying inconsistencies and possible improbable claims. For example, regarding the allegation that there was live fire before the boarding of the ship, the Prosecutor provides a detailed analysis of the credibility of the 10 eye-witnesses put forward by the Comoros and their lawyers, noting for example that one of them was on another ship, that another claimed to be below deck when the boarding occurred so could not possibly see if the IDF had started shooting before boarding the ship, or that some have made obvious material mistakes in their recollection of the order of events. The OTP also notes that 4 eye-witnesses "*were actively participating in the resistance aboard the Mavi Marmara at the material times*" and that therefore "*there is also a heightened risk of bias, both to justify their own actions and potentially to impugn the conduct of the IDF*".³⁸

³⁷ ICC, *Situation On Registered Vessels Of The Union Of The Comoros, The Hellenic Republic Of Greece, And The Kingdom Of Cambodia*, Final decision of the Prosecution concerning the "Article 53(1) Report" (ICC-01/13-6-AnxA) dated 6 November 2014, OTP, 30 November 2017, para. 163.

³⁸ *Ib.*, para. 122.



45. The Prosecutor went as far as to make the following general finding regarding witness statements received: *“As a preliminary matter, the Prosecution notes that many of the personal accounts appear to reflect some form of contact or link between their authors. In particular, the information available may lead to the conclusion that some persons who have sought to participate in these proceedings as victims have not only received some organised assistance in the practical arrangements to submit their applications, but also some forms of assistance related to the content or presentation of the accounts that they provide”*.³⁹ The Prosecutor then provides a list of examples of apparent similarities as to the content of the applications, which are also the object of an annex to the Report.⁴⁰
46. The Prosecutor also notes that *“the vast majority of victim applications in its possession declare, contrary to the impression given by their content, that the applicant is applying on their own behalf, without any assistance other than that of an interpreter, where required. The Prosecution is mindful that victim applications are not sworn statements, and are neither intended nor used as such. However, as a matter of good practice, it underlines its view that any organisation assisting persons to come into contact with the Court—a practice which is welcomed and encouraged—should ensure that the nature and extent of their role in assisting the applicant is made clear in the manner required”*.⁴¹
47. In other words, the Prosecutor, without explicitly saying it, suggests that witnesses have been coached when drafting their witness statement, thus affecting the credibility of their testimony.
48. This case-study is relevant as 1) it generally shows that despite the preliminary examination being at an early stage of the proceedings, it is still possible to apply rigorous methodology in assessing available information; and 2) it specifically illustrates the fact that in a situation closely related to the situation under consideration, there are concrete risks of manipulation of witness testimony, which might be submitted either directly to the OTP, or indirectly through the production of human rights reports.

³⁹ *Ib.*, para. 182.

⁴⁰ *Ib.*, Annex G.

⁴¹ *Ib.*, paras. 184-185.



5. Relevance of third-party human rights fact-finding depending on the type of evidence⁴²

49. Another crucial consideration that needs to be considered for the purposes of the present communication is the purpose for which the information is being used, and more particularly what it is used to prove. Criminal proceedings involve different types of evidence, which can be distinguished along three broad categories: (i) context-related evidence, (ii) crime-based evidence and (iii) linkage evidence. Depending on the category of evidence considered, third-party fact-finding might be more or less relevant, because the level of specificity required might not be the same. Generally speaking, however, it should be pointed out that, to the extent that the Prosecutor is trying to prove a legal element of a charge to a certain standard, all these categories of evidence require a rigorous and precise assessment of available material.

5.1. Context-related evidence

50. This first type of evidence is crucial in international criminal proceedings, due to the collective nature of the violence which is at the heart of core crimes.⁴³ It involves different types of facts, i.e. facts related to the context of the situation subject to investigation and prosecution, and (ii) facts related to the context of alleged crimes.

51. It is typically considered that open source information by fact-finders is useful in relation to facts relating to the situation, e.g. the context and scope of a conflict. For instance, reports by human rights fact-finders have been used to illustrate movement of groups, which are relevant to jurisdictional issues (e.g. Uganda), or places of attacks and number of incidents of violence. They are often deemed, in particular, sufficient for *prima facie* purposes, such as when a decision to open an investigation is taken.

52. However, from a legal point of view, context is not only useful as background information but is crucial in proving the crimes themselves. Indeed, international crimes generally require some form of contextual element in order to be established. For example, crimes against humanity require an attack against a

⁴² This section relies on work produced by the author of this communication for the purpose of the following publication: Stahn C. & Jacobs D.L. (2016), *The interaction between human rights fact-finding and international criminal proceedings: Toward a (new) typology* in Alston P., Knuckey S. (red.) *The Transformation of Human Rights Fact-Finding*, Oxford: Oxford University Press 257 – 280.

⁴³ On this, see generally A. Smeulers (ed.), *Collective Violence and International Criminal Justice* (2010).



civilian population⁴⁴ and war crimes require the existence of an armed conflict.⁴⁵ In light of this, the line becomes blurred between ‘context’ in a broad sense and ‘context’ as an element of a crime.

53. One can legitimately challenge the extent to which fact-finding materials can be used as evidence to establish contextual elements of crimes. A prominent example is the *Gbagbo* case before the ICC. In that case, the Prosecutor relied heavily on third party fact-finding in relation to the contextual elements of crimes against humanity, i.e, for determining the existence of an ‘attack against the civilian population’. The Defence argued during the confirmation of charges hearing that such evidence should not be accepted given that the contextual elements are part of the elements of the crimes to the same extent as the *mens rea* of the accused and should require equally strong evidence, drawn from proper investigations, to support these contextual elements. The Defence also raised an equality of arms argument according to which there would be a *de facto* shift in the burden of proof if third party fact-finding information were exclusively relied on. Indeed, while the Prosecutor could effectively just download a report on his computer, it is the defence which would have to actually investigate the content of the report to challenge its reliability. As a result, while the Defence did not oppose the use of outside sources, in particular human rights reports, it asked the Chamber to require that all information be corroborated by an independent investigation by the Prosecutor.⁴⁶

54. The Pre-Trial Chamber partly upheld the Defence argument. It held that:⁴⁷

“22. Taking into consideration that contextual elements form part of the substantive merits of the case, the Chamber sees no reason to apply a more lenient standard in relation to the incidents purportedly constituting the contextual element of an “attack” for the purposes of establishing the existence of crimes against humanity than the standard applied in relation to other alleged facts and circumstances in the case.

[...]

⁴⁴ See Article 7, Rome Statute.

⁴⁵ See Article 8, Rome Statute.

⁴⁶ ICC, Equipe de Défense du Président Gbagbo, *Prosecutor v. Gbagbo*, soumissions écrites de la défense portant sur un certain nombre de questions discutées lors de l’audience de confirmation des charges, 28 March 2013, ICC-02/11-01/11-429-Conf, paras. 94-100.

⁴⁷ ICC, Pre-Trial Chamber I, *Prosecutor v. Gbagbo*, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, 3 June 2013, ICC-02/11-01/11-432, paras. 22 and 35 (emphasis added).



35. *The Chamber notes with serious concern that in this case the Prosecutor relied heavily on NGO reports and press articles with regard to key elements of the case, including the contextual elements of crimes against humanity. **Such pieces of evidence cannot in any way be presented as the fruits of a full and proper investigation by the Prosecutor in accordance with article 54(l)(a) of the Statute.** Even though NGO reports and press articles may be a useful introduction to the historical context of a conflict situation, they do not usually constitute a valid substitute for the type of evidence that is required to meet the evidentiary threshold for the confirmation of charges.” [emphasis added]*

55. As a consequence, the confirmation of charges was adjourned. On appeal, the Prosecution sought to introduce a distinction between ‘material elements’ and ‘subsidiary elements’ which has broader consequences in legal and procedural terms. It would imply most importantly that ‘material elements’ would have to be proven by the requisite of standard of proof whereas ‘subsidiary elements’ might not have to meet such a standard. This in turn would necessarily have consequences in relation to the use of third party fact finding. It should be noted, however, that the Appeals Chamber dismissed the Prosecutor’s appeal, rejecting the distinction between material and subsidiary elements and confirming that the contextual elements of the crimes need to be proven at the same standard of proof and therefore validating the Pre-Trial Chamber’s assessment of the Prosecutor’s reliance on third party materials.⁴⁸
56. While this example relates to confirmation of charges proceedings, it illustrates the risks of initiating an investigation with an overreliance on third-party human rights reports. This created a structural weakness to the Prosecutor’s case that she had difficulty to correct, as illustrated by the PTC’s decision to adjourn the confirmation of charges hearing.

5.2. *Crime-based evidence*

57. Context-related evidence needs to be complemented by ‘crime-based’ evidence. Fact-finding sources typically do not suffice *per se* to constitute a basis for this. They can contribute to examination, investigation and analysis. But they need to undergo an additional process of transformation in order to be turned into evidence before international tribunals. This additional process is necessary, since

⁴⁸ ICC, Appeals Chamber, *Prosecutor v. Gbagbo*, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 June 2013 entitled “Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute”, 16 December 2013, ICC-02/11-01/11-572, paras. 37-38.



fact-finding bodies usually deploy different modalities and standards than criminal investigators in collecting information and physical evidence.

58. A good example is the ICC charge of genocide against Omar Al Bashir, which requires proof of 'special intent', i.e. *dolus specialis*. The United Nations International Commission of Inquiry on Darfur left open the case for a genocide charge. It noted that "*it would be up to a competent court*" to make a determination on genocide "*on a case-by-case basis*" and that it did "*not rule out the possibility that in some instances single individuals, including Government officials, may entertain a genocidal intent, or in other words, attack the victims with the specific intent of annihilating, in part, a group perceived as a hostile ethnic group*".⁴⁹ The ICC Prosecutor not only relied on documentary evidence, but also provided witness testimony to secure a warrant of arrest for genocide.⁵⁰ As a consequence, in its second decision on the arrest warrant, the Pre-Trial Chamber relied on a mix of documentary evidence and witness testimony already used in the first decision to establish that "*Omar Al Bashir acted with dolus specialis/specific intent to destroy in part the Fur, Masalit and Zaghawa ethnic groups*".⁵¹
59. Where the Prosecutor has not brought additional information forward in addition to that contained in human rights reports, this has often led Chambers to reject the Prosecutor's allegations. For example, the *Mbarushimana* confirmation of charges decision refused to make findings on some alleged incidents because the Prosecutor only brought one source from the UN or an NGO, noting in relation to two particular incidents that "*In both cases the Prosecution relied only on a single UN or Human Rights Watch Report and has not provided any other evidence in order for the Chamber to ascertain the truthfulness and/or authenticity of those allegations. The sources of the information contained in both the UN and Human Rights Watch Report are anonymous*".⁵²
60. This statement, made in the context of a confirmation of charges decision, is highly relevant for the Preliminary Examination phase. Indeed, as noted *infra* in more detail, NGO and UN reports are generally always based on anonymous hearsay that will by definition be extremely difficult to verify and corroborate. This means

⁴⁹ Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, UN Doc. S/2005/60, para. 520.

⁵⁰ See ICC, Pre-Trial Chamber I, *Prosecutor v. Bashir*, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Separate and Partly Dissenting Opinion of Judge Anita Usacka, 4 March 2009, ICC-02/05-01/09-3, paras. 25-33.

⁵¹ See ICC, Pre-Trial Chamber I, *Prosecutor v. Bashir*, Second Decision on the Prosecution's Application for a Warrant of Arrest, ICC-02/05-01/09, 12 July 2010, ICC-02/05-01/09-94, para. 4.

⁵² ICC, *Prosecutor v. Callixte Mbarushimana*, Decision on the confirmation of charges, PTC I, 16 December 2011, para. 117.



that if this kind of evidence is relied on to open an investigation, it will be extremely unlikely to lead to solid evidence, and therefore solid cases in the future.

5.3. *Linkage-evidence*

61. The third general type of evidence is linkage-evidence. Linkage-evidence ties the defendant to a particular type of conduct and crime. This evidence is of critical importance in a criminal trial. The existence and quality of linkage-evidence is what distinguishes a criminal court from a human rights tribunal. In essence, without any linkage-evidence, there can be no criminal trial.
62. These links take the form of different degrees of specificity. A general starting point is the establishment of the connection between the defendant and a state apparatus or a specific group. This nexus is followed by closer inquiry into the role of the defendant in conduct, and in particular the attribution of individual criminal responsibility in relation to specific modes of liability, such as perpetration, aiding or abetting, or responsibility as a superior.
63. This nexus is rarely explored with sufficient detail or reliability in reports of fact-finding bodies to stand as direct evidence in international criminal proceedings. As a consequence, such reports have mostly an indirect function. International tribunals rely not so much on the specific content of findings or conclusions, but rather on sources identified in such documents. Evidence is typically gathered through follow-up action, i.e. contact with the authors of reports or general sources indicated.
64. Typically, linkage-evidence also requires different witnesses than those used in relation to general human rights fact-finding. Linkage evidence is often based on statements of persons who were associated with underlying groups or organizations, or who have in-depth or insider knowledge of structures inside organizations. Investigations by fact-finding bodies are generally more focused on crime-based witnesses. They are only of limited use in this context.

5.4. *Drawing the line between the three*

65. While this distinction provides a useful way to 'map' the type of evidence that might allow for more or less recourse to external human rights fact-finding, it should be noted that the difficulty will often arise of knowing where to draw the line between the three categories in practice.



66. As noted previously in the *Gbagbo* case, it was a contentious issue whether the contextual elements of crimes against humanity fall within the ‘context-based’ evidence, or should in fact be considered as ‘crime-based’ evidence. The question can even arise whether this could not be considered linkage evidence, to the extent that the prosecution of a former head of state will usually lead to a confusion between the ‘plan or policy’ dimension of crimes against humanity and the ‘common plan’ aspect of the modes of liability. In the *Gbagbo* case for example, the Prosecutor relied heavily, if not exclusively on the former to prove the latter.⁵³

6. Specific methodological challenges in the use of human rights fact finding

67. The list of constraints that might limit the relevance of human rights reports in the context of a preliminary examination is extensive. This communication focuses on four constraints which present particular challenges that seem most relevant, particularly in the context of the Situation: lack of access to relevant information, risk of bias on the part of human rights investigators, the difficulty of assessing the reliability of sources and the minimal utility of legal determinations made in human rights reports.

68. These methodological constraints presented below need to be considered within a broader, meta-constraint so to speak, that of time limitations in the production of human rights reports. Indeed, most human rights reports are produced within a short timeframe after alleged incidents, sometimes even during such incidents. This has several structural consequences on the work of human rights organisations. First of all, serious investigations take time, especially in a conflict zone. It is often impossible for these organisations to gather all the relevant information within the timeframe between events and the production of the report. This means that any findings are necessarily based on a fragmented and partial knowledge of how events unfolded. Secondly, a thorough assessment of evidence is a lengthy process, particularly in such complex factual circumstances, and it is unlikely that such an assessment can be conducted adequately in the days, weeks or even months between the events and the production of an NGO or UN report. This time-constraint alone means that, as a matter of principle, the OTP

⁵³ See ICC, Office of the Prosecutor, *Prosecutor v. Gbagbo*, Document amendé de notification des charges, 13 January 2014, ICC-02/11-01/11-592-Anx1, para. 131. The Prosecutor adopted the same approach in the *Ruto and Sang* (ICC, Office of the Prosecutor, *Prosecutor v. Ruto and Sang* Updated Document Containing the Charges Pursuant to the Decision on the Confirmation of Charges, 21 August 2012, ICC-01/09-01/11-448-AnxA, fn 104).



should be cautious in using the information or findings contained in those reports in the context of a preliminary examination.

69. It should also be noted that this communication addresses concrete methodological challenges faced in the context of human rights fact-finding and not the theoretical methodological framework applied by the UN or NGOs. Indeed, the study of such pre-established guidelines is of little relevance without inside knowledge of how the Commission or the NGO actually worked in a particular case. For this reason, claims by these organisations to be following rigorous guidelines are of little or no scientific interest if the actual reports produced do not allow for a relevant outside observer, in this case the Prosecutor of the ICC, to effectively assess whether the guidelines have actually been followed.

6.1. Lack of access to relevant information

70. One of the major methodological challenges faced by human rights organisations and UN Commissions of Inquiry is access to relevant information. This has several dimensions which are relevant in deciding what weight to give to reports produced.
71. First of all, because these organisations have no formal investigative powers, they have no authority to compel relevant protagonists to provide evidence. The consequence of such lack of cooperation necessarily has an impact on the quality of the fact-finding process.
72. This absence of cooperation is often noted in reports. For example, in the recent Human Rights Council *“Report of the detailed findings of the independent international Commission of inquiry on the protests in the Occupied Palestinian Territory”*, it is noted that the Commission was not able to enter Gaza, attend any demonstrations or interview many witnesses in person.⁵⁴ However, in practice, it is often not clear whether this lack of relevant information concretely led the commissioners to decline to make findings about a particular incident. More crucially, absence of field investigations can cast a more general doubt on the credibility of findings reached. In such a context, the OTP should be careful of taking into account factual or legal findings when such findings were obviously made in circumstances where there is a deficiency of accessible information.

⁵⁴ Human Rights Council, *Report of the detailed findings of the independent international Commission of inquiry on the protests in the Occupied Palestinian Territory*, A/HRC/40/CRP.2, 18 March 2019, para. 30-36.



73. Secondly, there is the problem of being able to assess the information that is actually received. Often, when it comes to the Situation, human rights investigators will have limited or no possibility directly to investigate in the field.⁵⁵ This is a major problem when having to analyse complex factual allegations over a long period of time. Indeed, as anyone with experience in criminal investigations will acknowledge, nothing replaces on-site investigations in order to understand and be able autonomously to analyse factual allegations.⁵⁶ It has often happened in the practice of international criminal tribunals that factual allegations which were made in Court did not survive an *in situ* judicial visit by the Judges, who would be able to witness first-hand that, for example, the physical layout of the land does not allow for events to have taken place as initially alleged. A perfect illustration of this is the *Katanga* Judgment at the ICC, where the Judges, on numerous occasions, explain that the site visit had allowed them to cast doubt on the credibility of certain Prosecution witnesses.⁵⁷
74. Moreover, inability to travel to the affected zone means that interviews of alleged witnesses cannot generally be done face to face⁵⁸. Yet, telephone interviews cannot serve as evidence without actually meeting a person. Without an immediate interaction with a person, not only is it impossible to verify their identity, but it is impossible to analyse all relevant indicia of credibility, such as physical demeanour, eye contact, possible influence from the environment, etc. It should be noted, that this is problematic, because the investigators will be directly making findings on the basis of such telephone interviews without the person ever attending Court to confirm the evidence in person.

⁵⁵ The extent to which this is a reality will vary depending on the nature of the human rights organisation producing the report. Indeed, while UN commissions have often not been able to proceed to any on-site investigations, this may be less true when it comes to local NGOs, be they Israeli or Palestinian.

⁵⁶ For guidelines on field investigations, see Global Rights Compliance, Basic Investigative Standards for Investigators of International Crimes, July 2016.

⁵⁷ ICC, *Prosecutor v. Katanga*, Judgment pursuant to article 74 of the Statute, Trial Chamber II, 7 March 2014, para. 224 (“during its judicial site visit to the DRC the Chamber realised that P-161 could not have seen, as he so claimed, Pastor Babona being killed in front of the Bogoro Institute, whilst he himself was fleeing his house, some distance away, to make his way to a hiding-place near the Waka river”), para. 278 (“Yet on its site visit the Chamber noted that the camp and the market are in fact too far apart for the witness to have been able to see the Accused persons enter the Bogoro Institute”).

⁵⁸ It should be noted that interviews can sometimes be conducted outside of the affected area. For example, the Commission of Inquiry into the Gaza protests visited Turkey and Jordan to interviews a number of people (Human Rights Council, *Report of the detailed findings of the independent international Commission of inquiry on the protests in the Occupied Palestinian Territory*, A/HRC/40/CRP.2, 18 March 2019, para. 5). This however raises new methodological difficulties in relation to how these interviews were organised, by whom, under what conditions of confidentiality, etc (see *infra*).



75. Thirdly, lack of access to the scene of the alleged facts limits the possibility for the organisation to assess the authenticity and credibility of any documentary evidence received. Indeed, a key principle for any documentary evidence is being able autonomously to establish its chain of custody, which is not possible without on-site investigations. One example of such evidence is video evidence, which, with the growing importance of social media in recent years is increasingly presented as evidence in international criminal proceedings. But this practice is fraught with risks. Videos can today be easily manipulated, edited to omit certain key aspects or simply presented as being of a different event. For example, despite a years-long investigation in the Ivory Coast situation, during the confirmation of charges of Laurent Gbagbo the Prosecutor presented as evidence a Youtube video of alleged crimes given to him by a witness, that in fact turned out to have been filmed years before during the post-electoral events in Kenya.⁵⁹
76. Another example is that of medical records, which are crucial from a forensic perspective in determining the reality of allegations. However, in circumstances of war or civil conflict, such documents are difficult to trace and are easily subject to manipulation, so as to require extra caution in their use in the fact-finding process. The Al Durrah case illustrates the potential for fabricating medical evidence to support a particular version of events⁶⁰. On a more basic level, the identification of casualties as civilian victims by medical staff who did not witness the incident has no evidentiary value⁶¹.
77. To put it simply, the political context in which alleged international crimes are committed can be conducive for the parties to the conflict to fabricate evidence in order firstly to obtain favourable media coverage and secondly to indict legally and therefore disqualify morally and politically the opponent. In other words, because war crimes accusations can provide easy political gain, investigations must take extra care in verifying the source of any documentary evidence, which is particularly complicated when it comes to physical evidence without on-site investigations.

⁵⁹ On this, see ICC, *Prosecutor vs. Laurent Gbagbo*, Version publique expurgée du second corrigendum concernant les observations écrites de la défense sur la preuve du Procureur, Defence, 4 April 2014, para. 91.

⁶⁰ On this see MISA, *The France 2 Al-Durrah Report, its Consequences and Implications*, Report of the Government Review Committee, Appendix 3.

⁶¹ On the difficulty of identifying victims as civilians, see Israel Ministry of Foreign Affairs, *The 2014 Gaza Conflict, 7 July – 26 August 2014, Factual and Legal Aspects*, Annex A - 1-4 (May 2015) <https://mfa.gov.il/ProtectiveEdge/Documents/2014GazaConflictFullReport.pdf> (accessed 20 May 2019).



78. Yet, human rights reports on the Situation rarely if ever provide any information on whether there exist available medical reports, how they were obtained and more importantly whether they were critically assessed. For example, in the Gaza report, the Commission claims to have collected medical reports⁶². Yet, there is no indication of how these records were obtained. Moreover, it is striking to note that on only eight occasions throughout the report is there a direct reference to the existence of an available report, and four of those references concern the same person.⁶³ This means that there are only five alleged victims amongst the dozens seemingly discussed in the report for which the commission has actually obtained some documentary evidence relating to the medical determination of the cause of injury or death.
79. Moreover, should the OTP take such elements on face value, it faces the risk of founding a decision to investigate on information that might either not be verifiable in the future, or turn out to lack sufficient credibility and reliability. For example, in the *Gbagbo* case, the Prosecutor relied on hundreds of forensic reports which the Defence showed to have been established in doubtful circumstances.⁶⁴ If the Prosecutor had exercised caution from the beginning of the investigation, including during the preliminary examination, the Prosecutor might have made different decisions in relation to taking into account such documents.

6.2. *Risk of bias on the part of human rights investigators*

80. Bias is not directly a problem from a methodological perspective. Indeed, political bias does not necessarily invalidate automatically findings by a human rights organisation. A human rights organisation can have a political agenda, but still, when conducting its work, follow a rigorous methodology that allows for its conclusions to be relevant. As a consequence, such allegations cannot as a matter of principle lead to the rejection of their work⁶⁵.

⁶² Human Rights Council, *Report of the detailed findings of the independent international Commission of inquiry on the protests in the Occupied Palestinian Territory*, A/HRC/40/CRP.2, 18 March 2019, para. 6.

⁶³ *Ib.* footnote 578, para. 646, footnote 644, footnotes 698, 699, 701, 702 and 705 (for the same person).

⁶⁴ For example, the chief Ivorian forensic doctor claimed to have personally practised (in a team) all external medical examinations on the corpses of alleged victims of the crisis. However, this would have meant that she would have had to have done hundreds of reports in one day, which was physically impossible given the time it takes to conduct a thorough forensic medical examination.

⁶⁵ A related but distinct problem is perceived bias in the mandate given to certain fact-finding mechanisms. For example, the terms of reference of the Goldstone commission were considered to be one-sided, targeting only Israel, without mentioning Hamas (see Nigel S. Rodley, *Assessing the Goldstone Report*, in *Global Governance*, 2010, vol. 16, pp. 193-194). As a consequence, a biased mandate can be an indication that the mechanism will not assess facts impartially. However, it is not *per se* a methodological obstacle for the mechanism, nor does it automatically invalidate its findings.



81. This of course does not mean that the OTP should not be aware of the political leanings and biases of the authors of the sources it uses in order to assess on a case by case basis whether this bias might have affected the methodology followed, the factual and legal findings reached and the way they are presented. For example, the political aims of an organisation might have as a consequence that it is subject to a confirmation bias, i.e that it only looks for information that might validate a pre-determined opinion about how events unfolded, or give more credit to testimony that goes in that direction. Bias can also affect the way findings are discussed and presented, and therefore how they are received by the reader.
82. In the UN Gaza report, on the one hand the peaceful nature of the marches is often presented as a given, based on claims by the organisers of the marches, while Israeli claims that their objectives were at least in part violent is presented as a “narrative”, suggesting that it is a subjective perspective.⁶⁶ This suggests that, methodologically, the commissioners might be more inclined to want to confirm this pacific nature of the protest and on the contrary attempt positively to disprove its violent dimensions. This appearance of bias should all the more be taken into account by the OTP in the context of a report where, as noted *supra*, the organisation has only had access to information from one side of the conflict, which might directly affect the quality of the report. As a consequence, any investigator must be aware of the bias of his source in order to factor it in in the analysis.

6.3. *The problem of assessing reliability of sources*

83. This issue arises on two levels: that of how the human rights organisation assesses the reliability of its sources and that of how the OTP can in turn assess the reliability of human rights reports and its sources.

6.3.1. *Risks for human rights organisations*

84. Human rights reports are rarely clear on how they identify and locate particular witnesses of the fact. This is particularly important, as in certain highly charged political contexts as the Situation, there is always an objective risk of manipulation, as noted with the Gaza Flotilla incident example previously. The context is

⁶⁶ Human Rights Council, *Report of the detailed findings of the independent international Commission of inquiry on the protests in the Occupied Palestinian Territory*, A/HRC/40/CRP.2, 18 March 2019, para. 808. It should however be noted that the report claims to address “misinformation” from both sides to the conflict, but subsequently mostly targets one side as the source of alleged misinformation.



particularly important when one party to the conflict might seem to exercise extraordinary control over the local population, as is the case with Hamas in Gaza. This context requires particular caution when it comes to identifying witnesses for the purposes of making factual determinations.

85. One particular related issue, especially in circumstances where access to the conflict zone is difficult or impossible, is the use of intermediaries. Indeed, it seems inevitable that intermediaries will, by definition if they are to be of any utility, have some relationship with the Situation and therefore bear the risk of having their own agenda. Human rights investigator should therefore take all necessary measures to assess the reliability not only of witnesses, but also of any intermediary used to find those witnesses.
86. More generally, human rights investigators should, when conducting interviews, not only explore factual allegations made, but also how this person came to become a witness in the first place, by whom he or she was contacted, in what circumstances, if he or she has been coached in any way, or been promised anything for their testimony.⁶⁷
87. Even where direct witnesses are interviewed without any specific influence being brought to bear, there is still a serious risk that the evidence is unreliable due to their inexperience, lack of knowledge, expectations and fears. Donatella Rovera, an experienced investigator for Amnesty International, described some of the problems:

“Especially in the initial stages of armed conflicts, civilians are confronted with wholly unfamiliar realities – armed clashes, artillery strikes, aerial bombardments, and other military activities and situations they have never experienced before – which can make it very difficult for them to accurately describe specific incidents. In Gaza, Lebanon, Libya, Syria, and other places I interviewed civilians who described what they thought were artillery or bomb strikes being launched by far away government forces and striking near their homes – whereas in reality the loud bangs and tremors were caused by mortars or rockets being launched by opposition fighters from their positions nearby. For the untrained ear it is virtually impossible to distinguish between incoming and outgoing fire, and all the more so for those who find themselves close to the frontlines. The difference means little to panicked civilians often forced out of their homes by fear, but is vastly important to investigators. ...”

⁶⁷ It should be noted that such material compensation must not automatically be equated with bribing, nor does it necessarily entail a lack of genuineness of the testimony itself, but it is relevant information in the overall assessment of the credibility of the witness.



Even if they disregard it, investigators must be alert to the fact that disinformation and misinformation can contribute to shaping the perception of events, the narrative surrounding the events, and the behaviour of people who take it in good faith and internalize it, including victims, witnesses, and others potential sources.

...

Fear can lead victims and witnesses to withhold evidence or give deliberately erroneous accounts of incidents. In Gaza, I received partial or inaccurate information by relatives of civilians accidentally killed in accidental explosions or by rockets launched by Palestinian armed groups towards Israel that had malfunctioned and of civilians killed by Israeli strikes on nearby Palestinian armed groups' positions. When confronted with other evidence obtained separately, some said they feared reprisals by the armed groups."⁶⁸

88. As noted above, this applies equally in relation to documentary evidence received by human rights investigators. This should only be relied upon when there is an opportunity for the organisation to assess the author and chain of custody of any piece of evidence. This is particularly important when it comes to photographs and videos that can easily be the product of staging⁶⁹ or may be falsely ascribed to a particular incident or conflict⁷⁰ or may have been subject to doctoring or, at the very least, editing to suggest a particular sequence of events which might not correspond to reality.⁷¹

6.3.2. Challenges for the Prosecutor

89. The key principle in the context of criminal proceedings is the possibility for the Parties and the Judges to be able to test a piece of evidence. A piece of evidence that cannot be tested, that cannot be challenged, has limited to no value in a criminal law context, if only because there will be no way for the Defence to

⁶⁸ Donatella Rovera, *Challenges of monitoring, reporting, and fact-finding during and after armed conflict*, Professionals in Humanitarian Assistances and Protection, 28 April 2014.

⁶⁹ On this see MISA, *The France 2 Al-Durrah Report, its Consequences and Implications*, Report of the Government Review Committee. See also, The Telegraph, *Palestinian activists accused of faking Israeli sniper shooting video*, 24 July 2014 (available at <https://www.telegraph.co.uk/news/worldnews/middleeast/palestinianauthority/10983362/Palestinian-activists-accused-of-faking-Israeli-sniper-shooting-video.html>, last accessed 27 May 2019).

⁷⁰ See, for example, Donatella Rovera, *Challenges of monitoring, reporting, and fact-finding during and after armed conflict*, Professionals in Humanitarian Assistances and Protection, 28 April 2014; Easington Labour MP apologises after Israeli 'attack' tweet, BBC website 23 April 2019 <https://www.bbc.co.uk/news/uk-england-tyne-48030290> (last accessed 19 May 2019).

⁷¹ On this see MISA, *The France 2 Al-Durrah Report, its Consequences and Implications*, Report of the Government Review Committee.



challenge it. This means that the information provided must have a determined source and be set in a determined context. This also means that a piece of evidence must have a reliable chain of custody which allows for the verification of its authenticity.

90. The problem faced by the OTP in using human rights reports is that the information contained therein is generally presented in a way that it is unverifiable. Indeed, most often, there is no information on the source of a particular piece of information, because the human rights organisation will not publicly give the name of their source, nor will it accept to communicate it subsequently. One can take a case study from the recent UN report on the Gaza protests⁷². The UN Commission discusses 25 alleged incidents on 30 March 2018.⁷³ Of these incidents, 21 of them are presented with no footnotes, and therefore no precise reference to sources used. For the remainder of the allegations in this section, the Commission refers in the footnotes to 8 open source documents (including NGO reports containing equally unverifiable, unsourced, allegations, such as weekly updates from the PCHR and statistics provided by B'Tselem) and 25 unverifiable sources (such as anonymised interviews, of videos simply claimed to be "on file", with no further indication of what the video would be or where it would come from). This example illustrates how fundamentally flawed these types of reports are from the Prosecutor's perspective, if it wants to verify the findings contained therein.
91. Technically, this means that human rights reports are to be considered as one of the weakest possible sources of evidence in the context of criminal proceedings: that of anonymous hearsay. Indeed, a human rights report is by definition hearsay, given the fact the human rights investigator will most likely not have experienced the discussed events first-hand. It becomes anonymous hearsay when the original source is unknown to the reader of the report. In some cases, the Prosecutor might even be faced with multiple hearsay, if the human rights investigator himself did not speak to a direct witness of the alleged events.
92. What does this mean? First of all, the obvious consequence is that it is extremely difficult to verify the reliability of the information, as the source is unknown. Secondly, such anonymous hearsay is fundamentally impossible to corroborate, given the fact that the OTP will never be sure that there are in fact two different sources. To take a concrete example: the Prosecutor cannot claim that two human rights reports corroborate each other if she has not established beforehand that the

⁷² Human Rights Council, *Report of the detailed findings of the independent international Commission of inquiry on the protests in the Occupied Palestinian Territory*, A/HRC/40/CRP.2, 18 March 2019.

⁷³ *Ib.*, paras. 415-433.



human rights investigators from the different organisations spoke to different people rather than the same alleged eye-witness. Along the same lines, should the Prosecutor manage to find witnesses herself, there cannot technically be any corroboration with human rights reports if it has not been established that the witness was not the source for the human rights reports. In short, anonymous hearsay, independently of the fact that it is as such inherently weak evidence, is also an investigative nightmare for the Prosecution.

93. These inherent difficulties with anonymous hearsay contained in UN or NGO reports from a criminal law perspective has regularly been noted in the ICC's case law. For example, in the *Gbagbo* case, Pre-Trial Chamber I found that:⁷⁴

“Heavy reliance upon anonymous hearsay, as is often the basis of information contained in reports of nongovernmental organizations (‘NGO reports’) and press articles, is problematic for the following reasons. Proving allegations solely through anonymous hearsay puts the Defence in a difficult position because it is not able to investigate and challenge the trustworthiness of the source(s) of the information [...]. Further, it is highly problematic when the Chamber itself does not know the source of the information and is deprived of vital information about the source of the evidence. In such cases, the Chamber is unable to assess the trustworthiness of the source, making it all but impossible to determine what probative value to attribute to the information. In relation to corroboration, it should be noted that it will often be difficult, if not impossible, to determine whether and to what extent anonymous hearsay in documentary evidence corroborates other evidence of the same kind. This is because it will usually be too difficult to determine whether two or more unknown sources are truly independent of each other, and the Chamber is not allowed to speculate in this regard”.

94. It should be noted that in most cases, human rights reports do not even allow any possibility of making a *prima facie* or superficial assessment of the reliability of the source, given the lack of any information relating to it. For example, the UN Gaza report indicates that it relies on interviews, but only rarely provides any indication on whether the person was a direct witness to the events, or as to his or her link to the events – even though this should usually be possible without revealing the name of the witness.
95. Finally, anyone versed in the practice of criminal investigations will know that the content of a testimony will depend on the way the witness was interviewed. This

⁷⁴ ICC, Pre-Trial Chamber I, *Prosecutor v. Gbagbo*, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, 3 June 2013, ICC-02/11-01/11-432, paras. 29-30.



is why the substance of what the person said can only seriously be assessed if a complete recording or verbatim transcript of his or her interview is made available. This allows the criminal investigator to assess whether the person questioning the witness used leading questions, reformulated answers to obtain different information that initially given or omitted to request certain key elements of context. Experience at international tribunals, more particularly at the ICC, has shown that the testimony of a witness in Court will often differ from what is contained in witness statements, not necessarily because the person lied, but simply because questions were put to the witness differently.

6.4. *Limited use of legal determinations contained in human rights reports*

96. As a matter of policy, the OTP should be extremely wary of relying on legal determinations that can be found in human rights reports. There are two main reasons for this necessary caution.
97. First of all, from a factual perspective, human rights investigators will rarely be able to obtain information relevant to make an informed legal finding. More specifically, such investigators are not in a position to determine the existence of international crimes, due to lack of access to key evidence relating to the contextual elements of the crimes, the existence of *mens rea*, and, in the context of war crimes, whether an incident does in fact meet the requirements of IHL (necessity, proportionality, specificity, military objective, etc.). Indeed, such assessment requires knowledge not only coming from the alleged victims but also from the alleged perpetrators.
98. It is therefore important that the OTP acknowledge that there are a number of problems with Commissions attempting legally to characterise facts as international crimes that arise from taking international criminal law (ICL) outside its natural environment. The most obvious one is that technically, only a Court can determine that a fact pattern constitutes a crime. It is not because Commissions or human rights organisations use the language of ICL in terms of standards of evidence that they are imbued with legal authority. Another problem is the more or less systematic ignorance of the *mens rea* dimension of crimes in human rights reports, especially those which do not focus on particular individuals. This is a misunderstanding of the nature of criminal law, which requires both *actus reus* and *mens rea* for a crime to be constituted. In light of this, it is inaccurate to determine the existence of a crime without entering into an evaluation of the intention of particular individuals. The same fact pattern can constitute, for example, both a crime against humanity and genocide, depending on the intention of the



perpetrators. Commission reports which ignore that dimension⁷⁵ are misrepresenting ICL, while pretending to apply it.

99. Secondly, it must be noted that human rights organisations might not have the relevant expertise to make such determinations. As a result, human rights reports often propose superficial assessments of the applicable legal framework, based on what might appear as an arbitrary selection of sources, often secondary academic sources, to which not much weight should be given in the judicial context.
100. More worryingly, a careful analysis of the legal sources used in human rights reports often reveals either a wilful or negligent misunderstanding of the content of these sources. A good example of this can be found in the UN Gaza report. The Report claims at paragraph 65 that “notably in 2009 and again in 2016, the United Nations Security Council reaffirmed the position that Israel retains the status of occupying power in the OPT despite its 2005 disengagement”.⁷⁶ However, neither the 2009 nor the 2016 UNSC resolutions referred to in the footnotes make this claim. Indeed, Resolution 1860 of 2009 merely stresses “that the Gaza Strip constitutes an integral part of the territory occupied **in 1967** and will be a part of the Palestinian state” [emphasis added],⁷⁷ and makes no mention of the status of Gaza after 2005. As for the 2016 Resolution, it mentions Israel as an “occupying power”,⁷⁸ but makes no mention of Gaza. Reading the actual resolution, it appears that it does not even relate to Gaza, in that the main point of the Resolution is to discuss the issue of settlements, a point that was not relevant for Gaza at that date (following Israeli disengagement in 2005). This example shows that the Prosecutor should not rely on any legal conclusions drawn by human rights reports and should verify all primary sources.

7. Conclusion

101. This communication has aimed to highlight methodological challenges faced by the OTP when dealing with open source human rights reports in the context of Preliminary Examinations, whether these reports emanate from NGOs or the other

⁷⁵ See for example, the definition of crimes against humanity in the Goldstone Report, which refers to the *actus reus* only (Report of the Goldstone Commission, para. 293) and its finding that crimes against humanity may have been committed without any reference to the *mens rea* of particular individuals (Report of the Goldstone Commission, para. 1335).

⁷⁶ Human Rights Council, *Report of the detailed findings of the independent international Commission of inquiry on the protests in the Occupied Palestinian Territory*, A/HRC/40/CRP.2, 18 March 2019, para. 65.

⁷⁷ UNSC Resolution 1860, 8 January 2009, preamble (emphasis added).

⁷⁸ UNSC Resolution 2334, 23 December 2016, preamble.



bodies, such as the UN. In the light of the discussion above, the following points should be highlighted:

- 1) The OTP should aim at applying a high level of scrutiny of these reports during the Preliminary Examination phase in order to ensure that any decision to open (or not to open) an investigation in respect of the Situation is based on serious factual and legal findings. Such methodological rigour on the part of the OTP is essential to guarantee its independence, impartiality and ultimate credibility.
- 2) Human rights reports can only have a limited use within the scope of the jurisdictional assessment conducted during the Preliminary Examination. Indeed, these reports constitute a poor basis for making relevant finding both in terms of the contextual elements of possible crimes and in terms of their legal qualification. While less relevant during the Preliminary Examination, it should be noted that these reports provide an even less solid basis when it comes to identifying individuals that might bear criminal responsibility for the events.
- 3) Human rights reports do not present sufficient guarantees of methodological seriousness to be used as relevant information in the context of criminal proceedings. In addition, these reports are drafted in a way that the information contained therein can neither be verified nor corroborated.

8. OFFER OF ASSISTANCE

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

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