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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.*

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Objectivity of the ICC Preliminary Examinations

Vladimir Tochilovsky*

25.1. Introduction

The quality of a preliminary examination in many regards depends on its objectivity. A one-sided approach inevitably affects the quality of the examination. It distorts the situation in general and the relevant facts in particular.

While the ICC Statute does not unequivocally require the Prosecution to examine the situation even-handedly, impartiality and objectivity are prerequisites of justice. In the Policy Paper on Preliminary Examinations, the Prosecutor emphasised that the preliminary examination process "is conducted on the basis of the facts and information available, and in the context of the overarching principles of *independence*, *impartiality and objectivity*".[1] The Policy Paper further explains that the principle of impartiality means that the Office will apply consistent methods and criteria, *irrespective of the States or parties involved or the person(s) or group(s) concerned*.[2] According to the document, the Office of the Prosecutor is to check "internal and external coherence, and considers information from *diverse and independent sources as a means of bias con-*

* **Vladimir Tochilovsky** was investigation team leader and trial attorney in the International Criminal Tribunal for the former Yugoslavia ('ICTY'), Office of the Prosecutor from 1994 to 2010; member (Vice-Chair) of the United Nations Working Group on Arbitrary Detention in 2010–2016; Deputy Regional Attorney for judicial matters, and District Attorney in the Ukraine from 1976 to 1994; and official representative of the ICTY to the United Nations negotiations for the establishment of the International Criminal Court ('ICC') from 1997 to 2001. He served as a member of two expert groups that prepared recommendations for the ICC Office of the Prosecutor ('OTP') in 2002–2003. He holds a Ph.D. and was a professor at Mechnikov National University, Ukraine in 1991–1994.

1 OTP, *Policy Paper on Preliminary Examinations*, 1 November 2013, para. 25 (emphasis added) (https://www.legal-tools.org/doc/acb906/).

2 *Ibid*., para. 28 (emphasis added).

trol".[3] The Policy Paper concludes that the Prosecution "also seeks to ensure that, *in the interests of fairness, objectivity* and thoroughness, *all relevant parties are given the opportunity to provide information* to the Office".[4]

25.2. Two Categories of Situations

The situations under the preliminary examination can be divided, for the purpose of this chapter, into two categories. The first category includes situations involving a conflict between the situation-State and its non-State opponents. The second category comprises the conflicts where other States besides the situation-State are involved.

It is noteworthy that the preliminary examinations in the first category do not take long before the Prosecutor moves to the investigations stage. Examination of the situation in Congo lasted only two months, Côte d'Ivoire – five months, Uganda and Mali – six months each.

By contrast, in the second category, the preliminary examinations take years. Preliminary examination in Georgia situation took almost eight years. The situation in Afghanistan has been under the preliminary examination for ten years. The situation in Iraq has been under examination since 2014, and in Palestine – since 2015. This may be explained by reliance on the notion of positive complementarity (States' commitment to investigate) and the limited ICC resources. In fact, in these situations, the Prosecutor remains on standby mode for years. There might also be some political considerations behind the Prosecutor's unwillingness to trigger the investigation. In this regard, HRW in its Policy Paper on the meaning of the "interests of justice" states:

> A decision whether or not to initiate an investigation […] must not be influenced by a) possible political advantage or disadvantage to the government or any political party, group or individual; and b) possible media or community reaction to the decision.[5]

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3 *Ibid*., para. 32 (emphasis added).

4 *Ibid*., para. 33 (emphasis added).

5 Human Rights Watch ('HRW'), "The Meaning of "the Interests of Justice" in Article 53 of the Rome Statute, Human Rights Watch Policy Paper", 1 June 2005, para. 3 (http://www.legal-tools.org/doc/4dc3b4/).

So far, only situations in the first category resulted in charges, arrests, and trials. Out of the six situations, five were submitted by the situation-States themselves under either Article 14 or Article 12(3) of the ICC Statute.[6] In fact, in these cases, the Prosecutor often encouraged the situation-States to submit the situations to the ICC. For instance, concerning situation in Congo, the Prosecutor stated:

> If necessary, […] I stand ready to seek authorisation from a Pre-Trial Chamber to start an investigation under my *proprio motu* powers […] [I]n light of the current circumstances in the field, the protection of witnesses, gathering of evidence and arrest of suspects will be extremely difficult without the strong support of national or international forces.
>
> Our role could be facilitated by a referral or active support from the DRC. The Court and the territorial State may agree that a consensual division of labour could be an effective approach. Groups bitterly divided by conflict may oppose prosecutions at each other's hands and yet agree to a prosecution by a Court perceived as neutral and impartial. The Office could cooperate with the national authorities by prosecuting the leaders who bear most responsibility for the crimes. National authorities with the assistance of the international community could implement appropriate mechanisms to deal with other individuals responsible.[7]

Soon after this statement, Congo referred the situation to the ICC. Indeed, in those situations, the States had been eager to investigate and prosecute those who were prosecuted by the ICC. Actually, these situations have been comparatively the easiest ones for the investigation as the Prosecutor enjoyed the full support of the situation-State and the eagerness of the Government to have its opponents prosecuted.

25.3. Risk of Manipulation

The first category of the situations under the preliminary examination often involve a conflict between the Government of the situation-State

6 Côte d'Ivoire, Uganda, Congo, Mali, and Central African Republic.

7 ICC, Second Assembly of States Parties to the Rome Statute of the International Criminal Court, Report of the Prosecutor of the ICC, Mr. Luis Moreno-Ocampo, 8 September 2003 (http://www.legal-tools.org/doc/8873bd/).

and its military or political opponents. This could be election-related violence like in Côte d'Ivoire or an armed conflict like in Congo and Uganda.

Formally, in such cases, the ICC Prosecutor has no obligation to examine crimes committed by all parties to the conflict. There is nothing in the law that would prevent the Prosecutor from focusing on only one party. This creates a risk of a one-sided ICC examination which adversely affects its objectivity.

In particular, the objectivity of the preliminary examination may suffer if it relies on the material received from the situation-State. The experience of the ICTY shows that such material may be of questionable credibility and reliability. It is difficult to ensure impartiality of the domestic investigations where the Government itself is a party to the conflict. The authorities are often reluctant or unwilling to investigate their own forces. Such investigations are considered damaging for the morale of the forces. This is also stigmatized as unpatriotic. One can hear arguments like "We cannot investigate people who defend our country".

25.3.1. Acceptance of Jurisdiction and Self-referrals

Incorporation of a one-sided, often biased, domestic investigation into the Prosecution's public report makes it a political tool used by the government both domestically and internationally.

This could be one of the reasons behind the acceptance of the ICC jurisdiction under Article 12(3) by a State that is not a party to the Statute. That is why, whenever the Court receives Article 12(3) declaration from a State, special attention should be paid to the actual intention of the Government. This should also apply to a self-referral by a State Party under Article 14.

Such declarations and self-referrals often reveal the intention of the governments to have the ICC to focus only on their opponents.

For instance, in the Uganda situation, the Prosecutor reported:

> In December 2003, I received a referral from the Government of Uganda, the first state referral in the history of the Court. In the referral letter the Government specifically mentioned the case of the Lord's Resistance Army, the LRA. We notified Uganda that we would interpret the referral as concerning all crimes under the Statute committed in Northern Uganda and that our investigation would be impartial. In a

> July 2004 report to the Parliament the Government of Uganda confirmed their understanding of this interpretation.[8]

However, despite such commitment, the preliminary examination as well as the subsequent investigations and prosecution in this situation were limited to the offences committed by the opponents of the Government.

In Ukraine, the Parliament adopted the declaration "On the recognition of the jurisdiction of the International Criminal Court by Ukraine over crimes against humanity and war crimes committed by senior officials of the Russian Federation and leaders of terrorist organizations 'DNR' and 'LNR' [self-proclaimed entities]". The subsequent letter of the Minister for Foreign Affairs of Ukraine declaring acceptance of jurisdiction of behalf of Ukraine, however, was worded in accordance with Rule 44(2) of the ICC Rules of Procedure and Evidence. In particular, the letter does not contain any 'instruction' as to which particular parties to the conflict the ICC examination and investigations shall focused on. According to the letter, Ukraine accepted the jurisdiction of the Court "for the purpose of identifying, prosecuting and judging the perpetrators and accomplices of acts committed in the territory of Ukraine".[9]

Pursuant to Rule 44, a communication of the situation to the ICC under Article 12(3) of the ICC Statute has, as a consequence, the acceptance of jurisdiction with respect to the crimes referred to in Article 5 of relevance to the situation. It was emphasized in the *Gbagbo* case that: "Rule 44 of the Rules was adopted in order to ensure that States that chose to stay out of the treaty could not use the Court 'opportunistically'".[10] The Court further noted that: "there were concerns that the wording of Article 12(3) of the Statute, and specifically the reference to the acceptance of jurisdiction 'with respect to the crime in question', would allow the Court to be used as a political tool by States not party to the Statute who could

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8 ICC, "Statement by the Chief Prosecutor on the Uganda Arrest Warrants", 14 October 2005, ICC-OTP-20051014-109 (http://www.legal-tools.org/doc/d9b3cb/).

9 ICC, "Declaration by Ukraine lodged under Article 12(3) of the Statute", 8 September 2015 (http://www.legal-tools.org/doc/b53005/).

10 ICC, *Prosecutor v. Laurent Gbagbo*, Pre-Trial Chamber, Decision on the "Corrigendum of the Challenge to the Jurisdiction of the International Criminal Court on the Basis of Articles 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute Filed by the Defence for President Gbagbo (ICC–02/11–01/11–129)", 15 August 2012, ICC–02/11–01/11, para. 59 (https://www.legal-tools.org/doc/0d14c3/).

selectively accept the exercise of jurisdiction in respect of certain crimes or certain parties to a conflict".[11]

25.3.2. Publicity of the Preliminary Examination Reports

Such attempts of 'using' the ICC may also relate to the publicity of the Prosecutor's reports on preliminary examination.

Public awareness of the fact that the Prosecutor is conducting preliminary examination may by itself serve as a deterrent from further violations. However, the publicity of the Prosecutor's interim findings may also be counterproductive.

It is not only because in the interim findings the Prosecutor publicly 'designates' the 'guilty party' although no investigation has been conducted. Such publicity may also have a chilling effect on that party, discouraging it from co-operating, and may disturb peace negotiations and attempts of reconciliation.

Official reports of the ICC Prosecutor often have political ramifications. The preliminary character of the examination reports does not prevent governments from using them for political purposes. The reports are widely scrutinised by public and considered often as the authoritative source of the information on the situation in question. Such nuances in the report as terms "alleged" and "allegedly" are easily ignored in political discourse. In addition, publicity of the reports of one-sided examinations may serve as an incentive for other States to use the ICC against their opponents.

One may argue that, after preliminary examination and authorization, the Prosecutor may expand the scope of investigation beyond the events and parties covered by the report. In its request for authorisation of an investigation of situation in the Republic of Côte d'Ivoire, the Prosecution informed the Chamber:

> [F]or the purpose of the investigation and the development of the proceedings, [the Prosecution] is neither bound by its submissions with regard to the different acts alleged in its Article 15 application, nor by the incidents and persons identified therein, and accordingly may, upon investigation, take further procedural steps in respect of these or other acts, in-

[11] *Ibid.*

> cidents or persons, subject to the parameters of the authorised situation.[12]

However, in this case, as in other self-referred cases and cases of accepted jurisdiction, the subsequent investigations have been so far conducted mostly within the framework of the preliminary examination report.

25.4. Prosecutor's Policy and Nexus to Investigation

In 2005, the Prosecutor outlined his policy in the Uganda situation as follows:

> The criteria for selection of the first case was gravity. We analyzed the gravity of all crimes in Northern Uganda committed by the LRA and Ugandan forces. Crimes committed by the LRA were much more numerous and of much higher gravity than alleged crimes committed by the UPDF. We therefore started with an investigation of the LRA. […] We will continue to collect information on allegations concerning all other groups, to determine whether the Statute thresholds are met and the policy of focusing on the persons most responsible is satisfied.[13]

In practice, however, this principle of focusing first on the party that committed the gravest crimes and then looking into the crimes committed by other parties turned out to be unworkable. In all the situations that were submitted by the situation-States, the Prosecutor got stuck with the first selection of accused. In the Uganda situation, after the warrants of arrest where issued for five members of the LRA in 2005, no perpetrators from the Government forces were charged.

If the ICTY Prosecutor had also focused only on a party that committed more numerous and the gravest crimes, Serbian and Croatian victims would have little chance to see justice. In this regard, HRW in its comments to the Prosecutor's draft policy paper noted:

> The International Criminal Tribunal for the former Yugoslavia […] and the Special Court for Sierra Leone have prosecuted perpetrators from all of the major parties to the respec-

[12] ICC, Situation in the Republic of Côte d'Ivoire, Request for authorisation of an investigation pursuant to Article 15, 23 June 2011, ICC-02/11-03, p. 10, fn. 14 (http://www.legal-tools.org/doc/1b1939/).

[13] Statement by the Chief Prosecutor on the Uganda Arrest Warrants, see *supra* note 8.

> tive conflicts. This contributed to their credibility among the communities most affected.[14]

HRW also expressed concerns in regard to ICC Prosecutor's policy:

> Because of the prosecutor's reliance on state cooperation to carry out his mandate, especially in those situations that have been voluntarily referred, we believe the prosecutor should be sensitive to the risks to his impartiality […]
>
> The prosecutor's Policy Paper states that his office will investigate all groups in a situation "in sequence", suggesting that one group will be investigated at a time. After completion of an investigation of a particular group, the prosecutor's office examines whether other groups warrant investigation […]
>
> We urge sensitivity to the implications of mechanically pursuing a policy of proceeding sequentially in all situations. In the context of the DRC, our field research suggests that this approach may have already undermined the perception of the ICC as an impartial institution. As such, to the greatest extent possible, we urge the prosecutor to avoid delays in investigating other groups alleged to have committed crimes within the ICC's jurisdiction.[15]

It was also opined in regard to the Prosecutor's policy in the Congo situation:

> In determining its potential role in the conflict in the Democratic Republic of Congo, the Office of the Prosecutor of the ICC must consider the stability of the country's government, […] the ramifications of unequal justice for victims of the entire war, the feasibility of successful prosecutions, […] *[T]here are various prisms through which the Court could consider the questions: it could think of itself first; it could think of the donor countries first; it could think of the Congolese government first, or it could think of the victims first. We hope that the victims will carry the day*.[16]

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14 HRW, "The Selection of Situations and Cases for Trial before the International Criminal Court. A Human Rights Watch Policy Paper", 26 October 2006 (http://www.legal-tools.org/doc/753e9b/).

15 *Ibid*.

16 Pascal Kambale and Anna Rotman, "The International Criminal Court and Congo", Crimes of War Project (emphasis added) (http://www.legal-tools.org/doc/7ed751/).

Later, the OTP, having adjusted its policy in the preliminary examination in accordance with jurisprudence of the Pre-Trial Chambers, asserted:

> [T]he consideration of admissibility (complementarity and gravity) will take into account potential cases that could be identified in the course of the preliminary examination based on the information available and that would likely arise from an investigation into the situation.[17]

As to the 'targets' of the preliminary examination, the Policy Paper referred to the following jurisprudence of the Pre-Trial Chambers:

> [A]dmissibility at the situation phase should be assessed against certain criteria defining a 'potential case' such as: (i) the *groups of persons involved that are likely to be the focus* of an investigation for the purpose of shaping the future case(s); and (ii) the *crimes* within the jurisdiction of the Court allegedly committed during the incidents that are *likely to be the focus* of an investigation for the purpose of shaping the future case(s).[18]

The Prosecution further reiterated its policy of "focussing on those bearing the greatest responsibility for the most serious crimes".[19] Accordingly, in the Uganda situation (Article 12(3) declaration), the Prosecution

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[17] OTP, *Policy Paper on Preliminary Examinations*, para. 43, see *supra* note 1, with reference to ICC, Situation in the Republic of Kenya, Request for authorisation of an investigation pursuant to Article 15, ICC-01/09-3, 26 November 2009, paras. 51, 107 (http://www.legal-tools.org/doc/c63dcc/); 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, 1 April 2010, ICC-01/09-19-Corr, paras. 50, 182, 188 (http://www.legal-tools.org/doc/f0caaf/).

[18] 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, para. 50, see *supra* note 17; ICC, Situation in the Republic of Côte d'Ivoire, Corrigendum to "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire", 3 October 2011, ICC-02/11-14-Corr, paras. 190–191, 202–204 (emphasis added) (http://www.legal-tools.org/doc/7a6c19/).

[19] *Ibid*., para. 45, with reference to Situation in the Republic of Kenya, Request for authorisation of an investigation pursuant to Article 15, see *supra* note 17; ICC, Situation in the Republic of Kenya, Prosecution's Response to Decision Requesting Clarification and Additional Information, 3 March 2010, ICC-01/09-16 (http://www.legal-tools.org/doc/1f1fec/); Situation in the Republic of Côte d'Ivoire, Request for authorisation of an investigation pursuant to article 15, see *supra* note 12.

focused both its preliminary examination and subsequent investigations and prosecutions on the offences committed by the opponents of the Government only. In this regard, it was noted:

> If the ICC wishes to establish and retain legitimacy, it must investigate all actors of possible atrocities, including the Ugandan government and the Ugandan People's Democratic Army (UPDF). "Just days before the ICC unsealed the warrants against the LRA leaders, HRW published a report in which it documented numerous instances in which the UPDF has been responsible for committing rapes, torture, killings, arbitrary arrests, and detentions of the civilian population in northern Uganda." […] The investigation and prosecution of LRA members suspected of gross violations of international law must be accompanied by an equally robust investigation of government abuse.[20]

Furthermore, it was also reported:

> The ICC […] made mistakes with the LRA case from the outset. When then chief prosecutor Luis Moreno-Ocampo announced the investigation in Uganda, he stood shoulder-to-shoulder in a London hotel with President Museveni. The court turned up with one of the parties to the conflict […] effectively vindicating the Ugandan army – which also committed serious crimes – of responsibility in the Ugandan civil war.[21]

25.5. Safeguarding Objectivity of the Preliminary Examination

25.5.1. Sources of Information

Where the State is eager to investigate only its 'enemies', one of the reasons for the Prosecutor to step in should be the opportunity to ensure even-handed examination. In this regard, it is noteworthy that in its Policy Paper, the Prosecutor noted:

> In light of the global nature of the Court and the complementarity principle, a significant part of the Office's efforts at the

[20] David L. McCoy, "Fostering Peace and Ending Impunity: The International Criminal Court, Human Rights, and the LRA", in *International Affairs Review, Special Africa Edition 2007*.

[21] Jessica Hatcher-Moore, "Is the world's highest court fit for purpose?", in *The Guardian*, 5 April 2017 (http://www.legal-tools.org/doc/05813d/).

> preliminary examination stage is directed towards encouraging States to carry out their primary responsibility to investigate and prosecute international crimes. The complementary nature of the Court requires national judicial authorities and the ICC to function together. […] *Where national systems remain inactive or are otherwise unwilling or unable to genuinely investigate and prosecute, the ICC must fill the gap left by the failure of States to satisfy their duty*.[22]

Reliable information related to all parties to the conflict can be found in the reports of the OHCHR, UN Independent Commissions, UN Special Procedures, and NGOs. These sources are especially important in the situations where some parties to the conflict do not, for some reasons, co-operate with the ICC and do not provide the Prosecutor with any information. At the very least, the Prosecutor should not ignore these sources of information.

In the Uganda situation, the Prosecution limited its preliminary examination and subsequent investigation only to the offences of the opponents of the Government. And this was despite the repeated appeals from Human Rights Watch to look also into the serious offences, committed by the Government forces.

In particular, in 2004, Human Rights Watch reported that the violations committed by the Ugandan government troops include: "extrajudicial killings, rape and sexual assault, forcible displacement of over one million civilians, and the recruitment of children under the age of 15 into government militias".[23] HRW emphasised that: "the ICC prosecutor cannot ignore the crimes that Ugandan government troops allegedly have committed", and that the Government's referral "does not limit the prosecutor's investigation only to crimes allegedly committed by the LRA […] The prosecutor should operate independently and has the authority to look at all ICC crimes committed in Uganda".[24] A year later, HRW reported again that soldiers in Uganda's national army have: "raped, beaten, arbi-

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22 OTP, *Policy Paper on Preliminary Examinations*, para. 100, see *supra* note 1 (emphasis added).

23 HRW, "ICC: Investigate All Sides in Uganda. Chance for Impartial ICC Investigation into Serious Crimes a Welcome Step", 4 February 2004 (http://www.legal-tools.org/doc/dabb8d/).

24 *Ibid*.

trarily detained and killed civilians in camps" and that "the Ugandan government has failed to pursue prosecutions of military officers before national courts that could put an end to such violations".[25] HRW once again urged the ICC to "thoroughly examine government forces' crimes against the civilian population as well as those committed by the rebels".[26]

Similarly, concerning the situation in Congo, HRW reported that: "both government soldiers and dissident forces have carried out war crimes in Bukavu, killing and raping civilians in their battle to control the eastern Congolese city […] [C]ivilians have been targeted by all sides".[27]

The Prosecutor may also seek assistance from UNHCHR, UNHRC, ICRC, NGOs and others present in the field. Such assistance may include screening for identification of potential witnesses or seeking other types of information that may be relevant to the assessment of the situation.[28] Under Article 15(2) of the ICC Statute, the Prosecutor may receive written or oral testimony at the seat of the Court only. It was opined, however, that there is nothing barring the Prosecutor from asking States or organizations to obtain information from potential witnesses as part of 'seeking information', including through obtaining voluntary written statements. Furthermore, it was argued, that the Prosecutor may also be able to directly obtain information from witnesses as "other reliable sources" with the State's consent, provided these do not amount to "testimony", which must be taken "at the seat of the Court".[29]

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25 HRW, "Uganda: Army and Rebels Commit Atrocities in the North. International Criminal Court Must Investigate Abuses on Both Sides", 20 September 2005 (http://www.legal-tools.org/doc/dbcc41/).

26 *Ibid*.

27 HRW, "DR Congo: War Crimes in Bukavu", 11 June 2004 (http://www.legal-tools.org/doc/911fb5/).

28 ICC, Informal Expert Paper: Fact-Finding and Investigative Functions of the Office of the Prosecutor, Including International Co-operation, 1 January 2003, para. 30 (http://www.legal-tools.org/doc/ba368d/). See also Morten Bergsmo and Vladimir Tochilovsky, "Fact-Finding and Investigative Functions of the Office of the Prosecutor, Including International Co-operation", in Morten Bergsmo, Klaus Rackwitz and SONG Tianying (eds.), *Historical Origins of International Criminal Law: Volume 5*, Torkel Opsahl Academic EPublisher, Brussels, 2017, chap. 44, pp. 695 ff. (http://www.toaep.org/ps-pdf/24-bergsmo-rackwitz-song).

29 *Ibid*., para. 31.

Some may argue that the even-handed approach may discourage the situation-States from co-operation with the ICC. However, the ICTY experience demonstrates that it is not impossible to investigate and prosecute perpetrators from all parties to the conflict despite of the lack of co-operation from some of them. Among those indicted and convicted by the Tribunal one can find perpetrators, including high-ranking ones, from all parties.

Indeed, in conducting preliminary examination, the Prosecutor should not pursue a 'fair balance' of number of perpetrators from all parties to the conflict at all costs. In the ICTY's early years, it had been criticised for perceived imbalance between the number of Serb and Croat defendants. The Prosecution was often criticized for an alleged ethnic bias. The imbalance was reduced to some extent at the end of 1995 when eight Croatian nationals were indicted in the *Kupreškić et al*. case. While this indictment temporarily improved the image of the ICTY, the subsequent outcome of the case was disastrous for the Prosecutor. Indictment against one defendant was withdrawn, another defendant was acquitted by the Trial Chamber, three others were acquitted by the Appeals Chamber, and one defendant died before the indictment was issued.[30]

25.5.2. On-site Visits

To address deficiency of one-sided domestic investigations, the Prosecution may seek access to the territory controlled by a non-State party to the conflict. Such visit to a self-proclaimed entity does not mean recognition of its legitimacy. It is a regular practice for the UN Special Procedures to visit such territories during country visits.

For instance, UN Special Rapporteurs visited Transnistrian region as a part of their visits to the Republic of Moldova. In July 2008, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, visited the self-proclaimed 'Transnistrian Republic' (Transnistrian region of the Republic of Moldova) as part of his fact-finding

[30] Vladimir Tochilovsky, "Special Commentary: International Criminal Justice – Some Flaws and Misperceptions", in *Criminal Law Forum*, 2011, vol. 22, pp. 602–603.

visit to Moldova.[31] Similarly, Special Rapporteurs visited self-proclaimed entities in eastern part of Ukraine during country visits.

Similarly, in the *Ilaşcu and others v. Moldova and Russi*a case, judges of the European Court of Human Rights visited Transnistria region of Moldova. The judges, in order to clarify, in particular, whether Moldova and/or the Russian Federation were responsible for the alleged human rights violations, conducted an on-site fact-finding mission in Moldova, including territory controlled by self-proclaimed Trans-Dniester Republic. They "took account of the numerous documents submitted by the parties and the Transnistrian authorities throughout the proceedings".[32] The Court also consulted certain documents filed by the authorities of the self-proclaimed entity through the OSCE mission.[33]

25.5.3. Role of Experts in National Investigations

The quality and objectivity of the domestic material relied upon in the ICC preliminary examination may be improved if it is collected with assistance of experts having experience in practical application of the international humanitarian law.

The NGOs and other members of the civil society conducting fact-finding investigations often lack the necessary legal expertise. Furthermore, even where the State investigators conduct investigations of the international crimes, they are not always properly equipped for the task. The States may have no shortage of investigators with experience in investigation of serious crimes such as murder or rape. However, the investigation of the same acts as international crimes is different. For the crimes against humanity, it is not only to prove elements of murders and rapes. The investigators shall also collect evidence that would demonstrate that those crimes were committed as part of a widespread or systematic attack; and that there was a State policy to commit the attack. The same is true for the investigation of war crimes. It does not happen often that States get involved in armed conflicts. As a result, in most countries it

[31] Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, Mission to the Republic of Moldova, A/HRC/10/44/Add.3, 12 February 2009 (http://www.legal-tools.org/doc/f18040/).

[32] European Court of Human Rights, *Ilaşcu and Others v. Moldova and Russi*a, [GC], Judgment, 8 July 2004, 48787/99, para. 16 (http://www.legal-tools.org/doc/f68a72/).

[33] *Ibid*., para. 17.

is difficult to find investigators with experience in investigation of such crimes. Furthermore, in most jurisdictions, there are no experts and military analysts in the prosecution office.

Investigations of international crimes require additional skills and knowledge, including the knowledge of the international humanitarian law. Investigators with such skills and expertise are not always readily available in national jurisdictions. For this reason, domestic investigations of international crimes would usually require support and assistance of the experts with experience in practical application of the norms of the international humanitarian law to the facts of the case.

25.6. Conclusion

In the situations involving conflict between the Government of the situation-State and its non-State opponents, the Prosecutor often takes side of the Government that submitted the situation to the ICC. By contrast, the preliminary examinations in the situations involving other States besides the situation-State, seems to be conducted generally even-handedly. However, it would be premature to assess the objectivity of any ongoing preliminary examination before the examination is completed.

Declarations of acceptance of the ICC jurisdiction and self-referrals have the risk of having the Court used as a political tool by States. The situation-States are often unwilling to investigate crimes committed by their forces and eager to prosecute its opponents. In such cases, one of the reasons for the Prosecutor to step in should be the opportunity to ensure even-handed examination.

Preliminary examinations are unjust if they are one-sided. They are discriminatory if they ignore entire classes of victims. The reputation of the ICC suffers if it appears unjust and indifferent to victims. In the report on Uganda situation, the Coalition for the ICC noted:

> The ICC investigation has not yielded cases against government officials and armed forces. According to some civil society groups, the absence of such cases—or clear and public explanations as to why they are not being pursued—has left

> too many victims without justice and undermined perceptions of the Court's independence and impartiality.[34]

The opponents in the conflict often do not care about the victims of the other side. The ICC must be different. The Prosecutor should not take or even seen as taking side in the conflict. By siding with the Government and turning a blind eye to the crimes committed by its forces, the Prosecutor ignores the victims of those crimes.

Decisions at this stage may have political ramifications on national and international levels. However, the Prosecutor should not be guided by political considerations in conducting examinations. An explicit pronunciation of the general Prosecution policy concerning objectivity of the preliminary examinations would be helpful to avoid any appearance of political bias in particular situations.[35] It should be made clear in a policy statement that the preliminary examination shall not be influenced by any perceived advantage by Governments.

[34] Coalition for the International Criminal Court, "Uganda" (available on the Coalition's web site).

[35] Informal Expert Paper: Measures available to the International Criminal Court to reduce the length of proceedings, 2003, 1 January 2003, para. 18 (http://www.legal-tools.org/doc/7eba03/).

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Quality Control in Preliminary Examination: Volume 2

Morten Bergsmo and Carsten Stahn (editors)

This is the second of two volumes entitled *Quality Control in Preliminary Examination*. They form part of a wider research project led by the Centre for International Law Research and Policy (CILRAP) on how we ensure the highest quality and cost-efficiency during the more fact-intensive phases of work on core international crimes. The 2013 volume *Quality Control in Fact-Finding* considers fact-finding outside the criminal justice system. An upcoming volume concerns quality control in criminal investigations. The present volume deals with 'preliminary examination', the phase when criminal justice seeks to determine whether there is a reasonable basis to proceed to full criminal investigation. The book promotes an awareness and culture of quality control, including freedom and motivation to challenge the quality of work.

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