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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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Deterrence or Withdrawals? Consequences of Publicising Preliminary Examination Activities

Ana Cristina Rodríguez Pineda*

24.1. Introduction

Preliminary examinations, the procedural step taken prior to determining whether or not to open an investigation, have become one of the International Criminal Court's ('ICC') principal and most controversial activities.[1] Notably, the Office of the Prosecutor ('OTP') is using the public announcement that a preliminary examination is underway to achieve the broader goals that underpin the Rome Statute, rather than fulfilling their statutory purpose. In this respect, publicising preliminary examination activities can be useful to the extent that it has an impact on the situation being considered before a decision to investigate is reached, including by creating pressure for national proceedings. Bearing in mind the limited capacity of the ICC, there is clear merit to the idea of extracting as much

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1 See Office of the Prosecutor ('OTP'), Strategic Plan 2016–2018, 6 July 2015, para. 54 (https://www.legal-tools.org/doc/7ae957/). Preliminary examinations are one of the Office's three core activities that can positively impact on future investigations and prosecutions, in addition to their potential to obviate ICC intervention through prevention and complementarity.

preventive and deterrent value from preliminary examinations through publicity of the OTP's activities.

As part of its efforts towards ensuring transparency in its activities, as well as managing expectations, the OTP has developed the Policy Paper on Preliminary Examinations ('2013 Policy Paper').[2] The stated aim of this policy paper is to "promote clarity and predictability regarding the manner in which the OTP applies the legal criteria set out in the Statute for the conduct of a preliminary examination".[3] Although it offers some information on the procedures to be followed by the OTP, the policy paper does not provide a coherent methodology for deciding what gets publicised or when. This *ad hoc* approach to publicity surrounding preliminary examinations has left the OTP vulnerable to criticism concerning how it handles situations and impacted the credibility of the Office as an impartial organ of the Court.

The 2013 Policy Paper also promotes the idea of maximising the utility of preliminary examinations by encouraging genuine national proceedings and contributing towards the prevention of crimes. As a result, the first step in prosecutorial activity is not about applying a standard anymore – the reasonable basis standard – but about applying pressure on States involved in situations under consideration. While the OTP's efforts are laudable, purposefully using preliminary examinations in a different manner from what the Statute intended can run counter to the interests of the ICC as a whole.

This chapter takes stock of how the OTP has publicised its preliminary examination activities and the impact of those choices on the OTP's image and credibility. It begins with an overview of the preliminary examination regulatory framework, followed by an analysis of the consequences of publicity in general terms. It reviews the different approaches and practices developed by the OTP with regard to how specific preliminary examinations have been publicised. It then examines whether and how such publicity may influence or motivate a decision by a State under preliminary examination to halt its co-operation with the Court or in extreme circumstances withdraw from the Rome Statute. Furthermore, it contrasts

[2] OTP, *Policy Paper on Preliminary Examinations*, 1 November 2013, paras. 94–99 (http://www.legal-tools.org/doc/acb906/).

[3] *Ibid.*, para. 21.

the current practices of the OTP with those of other international bodies with investigative and fact-finding functions in terms of how their work products are publicised, if at all.

Having set the scene, this chapter also argues that prevention is not an appropriate policy objective for a preliminary examination, as such a focus leads the OTP to side-line its main statutory task: *determining whether or not there is a reasonable basis to proceed with an investigation.* This chapter posits that a much more careful balancing of different goals and objectives is required. In this regard, practical recommendations are presented to enhance and improve public communications of the OTP during preliminary examinations. Finally, it is suggested that the value of publicity should be reassessed in light of whether it serves to promote the OTP's prosecutorial strategy and the Court's credibility as a judicial institution.

When discussing the consequences of publicising preliminary examination activities, this contribution will focus mainly on examinations conducted under Article 15 of the Rome Statute.

24.2. General Framework of Preliminary Examinations[4]

The regime governing preliminary examinations raises legal and practical questions essential to the effective functioning of the ICC. The legal framework contains but a single reference to the wording "preliminary examination" in the entire Statute, in Article 15,[5] and no explicit mention at all in the Rules of Procedure and Evidence ('RPE').[6] According to the Pre-Trial Chamber ('PTC') Article 15 is one of the most delicate provi-

4 For an overview on preliminary examinations see Pavel Caban "Preliminary Examinations by the Office of the Prosecutor of the International Criminal", in *Czech Yearbook of Public & Private International Law*, 2011, vol. 2.

5 Statute of the International Criminal Court, 17 July 1998, Article 42(1) ('ICC Statute') (http://www.legal-tools.org/doc/7b9af9/): provides that the Office shall be responsible for 'examining' referrals and any substantiated information on crimes within the jurisdiction of the Court.

6 Articles 15 and 53 of the Rome Statute are explicitly linked through [ICC], Rules of Procedure and Evidence, 2 September 2002, Rules 48 and 104 ('[ICC] RPE') (http://www.legal-tools.org/doc/8bcf6f).

sions of the Rome Statute.[7] Its origin resides in the compromise proposed by Germany and Argentina,[8] in response to intractable debates during the Rome Conference concerning the powers of the Prosecutor.[9]

This compromise succeeded in addressing several concerns relating to the scope of the Prosecutor's *proprio motu* powers.[10] In particular, leaving it up to Chambers to determine whether a matter should be pursued by the Prosecutor or dropped, in the absence of a referral from a State Party or the Security Council.[11] The compromise also introduced a procedural framework, which would prohibit the Prosecutor from initiating an investigation upon the mere receipt of a complaint. Through a preliminary examination, the Prosecutor would be required to first satisfy him or herself that enough information had been obtained to justify opening an investigation. In addition, the Prosecutor would have to consider whether the requirements necessary for the exercise of jurisdiction were present at the outset, avoiding a situation where the OTP would invest substantial resources only to discover that it could not exercise jurisdiction.[12]

A year after the entry into force of the Rome Statute in 2002, the OTP began developing policy papers on issues before it, including on preliminary examinations,[13] as well as some informal expert papers con-

7 ICC, Situation in Kenya, PTC, Decision pursuant to article 15 of the Rome Statute on the authorisation of an investigation into the situation in the Republic of Kenya, 31 March 2010, ICC-01/09-19, para. 17 (http://www.legal-tools.org/doc/338a6f/).

8 Proposal by Argentina and Germany, Article 46, Information submitted to the Prosecutor, A/AC.249/1998/WG.4/DP.35, 25 March 1998 (http://www.legal-tools.org/doc/896cf4/). This is the first time the term 'preliminary examination' appeared in the draft proposals and negotiations of the Preparatory Committee.

9 The current version of Article 15 is largely identical to the Argentine-German proposal, except that it leaves out the duty to assess admissibility. See Morten Bergsmo and Jelena Pejić, "Article 15", in Otto Triffterer (ed.), *A Commentary on the Rome Statute of the International Criminal Court*, C.H. Beck, Hart Publishing, p. 200.

10 Summary of the Proceedings of the Preparatory Committee during the period 25 March–12 April 1996, A/AC.249/1, 7 May 1996, paras. 165–168 (Summary of the Proceedings of the Preparatory Committee) (https://www.legal-tools.org/doc/d7aad5/).

11 Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. 1, Proceedings of the Preparatory Committee during March–April and August 1999, A/51/22[Vol-I](Supp), 14 September 1996, para. 151 (https://www.legal-tools.org/doc/e75432/).

12 Summary of the Proceedings of the Preparatory Committee, para. 168, see *supra* note 10.

13 Paper on Some Policy Issues Before the Office of the Prosecutor, 5 September 2003 (https://www.legal-tools.org/doc/f53870/); Annex to the "Paper on some policy issues be-

cerning essential prosecutorial matters.[14] In 2009 the OTP issued its Regulations,[15] containing a section entitled "Preliminary examinations and evaluation of information".[16] These Regulations sought to flesh out the regulatory framework for the conduct of preliminary examinations. Subsequently, in 2010 the OTP released its first Draft Policy Paper on Preliminary Examinations,[17] which eventually was revised and resulted in the 2013 Policy Paper, which outlines a phased approach towards preliminary examinations[18] in accordance with Article 53(1).[19]

The 2013 Policy Paper suggests that preliminary examinations are *sui generis* to the ICC.[20] Drawing a distinction between the ICC and other *ad hoc* and hybrid tribunals, it stresses that, unlike the legal framework of these bodies, the Rome Statute does not have predefined specific situa-

fore the Office of the Prosecutor": Referrals and Communications, 5 September 2003 (https://www.legal-tools.org/doc/5df43d/); Draft paper on some policy issues before the Office of the Prosecutor for discussion at the public hearing in The Hague on 17 and 18 June 2003, 18 July 2003 (https://www.legal-tools.org/doc/abb9f7/).

14 Informal expert paper: Fact-finding and investigative functions of the office of the Prosecutor, including international cooperation, OTP-ICC 2003; Informal expert paper: The principle of complementarity in practice, OTP-ICC 2003. See Morten Bergsmo and SONG Tianying, "The Principle of Complementarity" and the Annexes thereto, in Morten Bergsmo, Klaus Rackwitz and SONG Tianying (eds.), *Historical Origins of International Criminal Law: Volume 5*, Torkel Opsahl Academic EPublisher, Brussels, 2017, pp. 739 ff. (http://www.toaep.org/ps-pdf/24-bergsmo-rackwitz-song).

15 ICC, Regulations of the Office of the Prosecutor, 23 April 2009, Regulations 25–31, Section 3 ('OTP Regulations') (http://www.legal-tools.org/doc/a97226/).

16 *Ibid.*, Regulation 28.

17 OTP, *Draft Policy Paper on Preliminary Examinations*, 4 October 2010 (http://www.legal-tools.org/doc/bd172c/).

18 OTP, *Policy Paper on Preliminary Examinations*, para.72, see *supra* note 2.

19 It should be noted that in Article 53(1) there is no reference to the trigger mechanisms. The Pre Trial Chamber ('PTC') has held consistently that the criteria of Article 53(1) of the Statute governing the initiation of an investigation by the Prosecutor equally inform the analysis under Article 15(3) and (4) of the Statute as they enable first the Prosecutor and then the Chamber to determine whether there is "a reasonable basis to proceed with an investigation". Situation in Kenya, Decision pursuant to article 15 of the Rome Statute on the authorisation of an investigation into the situation in the Republic of Kenya, paras. 21–22, see *supra* note 7; ICC, Situation in 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, 3 October 2011, ICC-02/11-14, paras. 17–18 (http://www.legal-tools.org/doc/7a6c19/). See also ICC RPE, Rules 48 and 105, see *supra* note 6.

20 OTP, *Policy Paper on Preliminary Examinations*, para. 24, see *supra* note 2.

tions for investigation. It is the ICC that ultimately determines when and where it should intervene in accordance with its statutory criteria. According to the OTP other courts are neither in a position to decide against investigating or with the jurisdictional capacity to expand their focus to other situations.[21] The comparison with other courts and tribunals is overstated. While it is true that concerned States or the Security Council defined the respective situations of other courts and tribunals, this was only for the purpose of conferring jurisdiction and not for determining its exercise. For example, Article 18 of the Statute of the International Criminal Tribunal for the former Yugoslavia ('ICTY') states that the Prosecutor "shall assess the information received or obtained and decide whether there is sufficient basis to proceed".[22] To some extent this assessment is similar to the one carried out by the ICC Prosecutor serving as a basis to determine whether or not to proceed with an investigation.[23]

Although the term 'preliminary examination' might not be universal or found in most jurisdictions, its fundamentals are certainly not new. The notion of a preliminary examination resonates within any domestic jurisdiction that deals on a daily basis with probabilities of criminal conduct and is required to probe and collect information to determine whether

21 *Ibid*.

22 Updated Statute of the International Criminal Tribunal for the former Yugoslavia, 25 May 1993, Article 18 ('ICTY' Statute) (http://www.legal-tools.org/doc/b4f63b/) concerning Investigation and preparation of indictment reads as follows: The Prosecutor *shall initiate investigations ex-officio or on the basis of information obtained from any source*, particularly from Governments, United Nations organs, intergovernmental and nongovernmental organisations. The Prosecutor *shall assess* the information received or obtained and *decide whether there is sufficient basis to proceed.*

23 See also the Internal Rules of the Extraordinary Chambers in the Courts of Cambodia, 12 July 2007 (Rev.7), 23 February 2011 (http://www.legal-tools.org/doc/d6b146/) containing a provision on a pre-investigative phase. While this differs from a preliminary examination at the ICC in that it is not part of the formal stage of proceedings of the Court, it is still similar in two aspects, one both processes are preliminary steps of procedural nature, second their purpose is to establish whether crimes within the respective jurisdictions have been committed. Rule 50: Preliminary Investigations. "1. The Co-Prosecutors may conduct preliminary investigations to determine whether evidence indicates that crimes within the jurisdiction of the ECCC have been committed and to identify Suspects and potential witnesses. 2. Preliminary investigations may be carried out by Judicial Police officers or by Investigators of the ECCC only at the request of the Co-Prosecutors. The Judicial Police and Investigators may search for and gather relevant evidence including documents… [I]tems that are of no evidentiary value shall be returned without delay at the end of the preliminary investigation".

there is a basis to open an investigation.[24] Filtering procedures, together with a 'feasibility to collect evidence' or 'more likely than not' standard are common and necessary to avoid overwhelming the limited resources of police and prosecutor offices,[25] and to ensure that resources are directed towards cases where there is a likelihood of conviction. As rightly noted by Human Rights Watch, it would be entirely inappropriate for the Prosecutor to be expected to prove a *prima facie* case or probable cause at this stage, before initiating any investigation into the facts.[26]

The 2013 Policy Paper sets out a phased approach to determine whether a complaint warrants conducting a preliminary examination:

- Phase 1: Initial assessment;
- Phase 2: Subject matter assessment;
- Phase 3: Admissibility assessment; and
- Phase 4: Interests of justice assessment.

During Phases 1 and 2, the OTP must determine whether the available information provides a reasonable basis to conclude that a crime falling under the Statute has been committed, establishing that it would have jurisdiction over the alleged criminal conduct.[27] In Phase 3, it must consider if the situation would be admissible in terms of Article 17 of the ICC

[24] At the national level it is not clear when an investigation is commenced, who takes the decision to start it and what is the level of discretion to carry it out. Normally there is some form of initial information gathering done by the police, as well as mechanisms to file complaints but the decision to initiate proceedings for the most part rests with prosecutors. For this matter the distinction between civil law and common law systems is also relevant.

[25] The OTP reported that during the initial review of the communications received, approximately 80% of communications were found to be manifestly outside the jurisdiction of the Court. Of the approximately 20% of communications warranting further analysis, 10 situations have been subjected to intensive analysis. See OTP, Report on the activities performed during the first three years (June 2003 – June 2006), 12 September 2006 (http://www.legal-tools.org/doc/c7a850/). According to the latest OTP Report on Preliminary Examination activities, 14 November 2016, para. 18, the Office has received a total of 12,022 Article 15 communications since July 2002 (http://www.legal-tools.org/doc/f30a53/).

[26] Human Rights Watch ('HRW'), "Justice in the Balance, Recommendations for an Independent and Effective International Criminal Court", June 1998, p. 67.

[27] Temporal, material, and either territorial or personal jurisdiction.

Statute.[28] If these three phases are satisfied, the Prosecutor must then give consideration to the "interests of justice".[29]

Although a general duty to conduct a preliminary examination exists once the Prosecutor is seised of a matter, there are some procedural differences to bear in mind depending on the triggering mechanism.[30] Where the Prosecutor receives a referral, Article 53 provides that the Prosecutor shall initiate an investigation unless there is no reasonable basis to proceed under the Statute. In that circumstance, the decision to initiate an investigation is further simplified in that the PTC may only review the Prosecutor's determination not to proceed, but does not review an affirmative decision to proceed. However, when the Prosecutor receives a communication,[31] the test is the same but the starting point is reversed. In other words, the Prosecutor shall not seek to initiate an investigation without determining first that there is a reasonable basis to proceed and that decision to proceed is subject to authorisation of the PTC.[32]

24.2.1. Observations on Preliminary Examinations

The following basic features can be identified in every preliminary examination process:[33] (1) they apply routinely irrespective of whether the OTP receives a referral from a State Party, the Security Council, or acts on the basis of communications pursuant to Article 15;[34] (2) they are informal,

[28] This second factor involves examination of whether national courts are unwilling or genuinely unable to proceed; but it also involves an evaluation of the notion of "gravity".

[29] OTP, *Policy Paper on the Interests of Justice*, September 2007 (http://www.legal-tools.org/doc/bb02e5/).

[30] Article 15 is one of the three triggering mechanisms in the ICC Statute established under Article 13 in relation to the exercise of jurisdiction.

[31] The OTP has adopted the term 'communications' to describe information provided on the basis of Article 15. "The primary sources of such communications are individuals and non-governmental organisations", in William A. Schabas, *The International Criminal Court, A Commentary on the Rome Statute*, Oxford University Press, 2010, p. 320.

[32] Annex to the 'Paper of some policy issues before the Office of the Prosecutor', see *supra* note 13.

[33] A preliminary examination is not an end in itself, rather it constitutes a process serving as a precursor to potential investigations. This idea is explained further see *infra*, fn. 47.

[34] The author agrees with those considering that these procedural mandates create a general duty to conduct a preliminary examination. Jan Wouters, Sten Verhoeeven and Bruno Demeyere, "The International Criminal Court's Office of the Prosecutor: navigating be-

inconclusive and distinct from investigations;[35] and (3) their function is to determine whether or not a *reasonable basis exists* to proceed with an investigation.

24.2.1.1. Preliminary Examinations Apply Equally to All Triggering Mechanisms

Preliminary examinations are conducted routinely irrespective of whether the OTP receives a referral from a State Party, the Security Council, or acts on the basis of communications pursuant to Article 15. That said, most of the problems surrounding preliminary examinations only come into play when the Prosecutor acts *proprio motu*. This is explained by the fact that referrals by States or the Security Council are normally made public and the situation is immediately assigned to a PTC.[36] As there is no need for the OTP to seek authorisation to proceed with an investigation these preliminary examinations end up being fast-tracked.[37]

The OTP thereby treats preliminary examinations differently depending on whether they arise from a referral by a State or the Security Council, or at the Prosecutor's own initiative. This differentiated treat-

tween independence and accountability?", in *International Criminal Law Review*, 2008, vol. 8, para. 10.

35 Situation in Kenya, Decision pursuant to article 15 of the Rome Statute on the authorisation of an investigation into the situation in the Republic of Kenya, paras. 32, 50 and 75, see *supra* note 7: "[t]he Prosecutor has limited powers which are not comparable to those provided for in article 54 of the Statute at the investigative stage" and the information available at such an early stage is "neither expected to be 'comprehensive' nor 'conclusive'. Furthermore, it should be noted that findings at the preliminary examination phase are not binding for the purpose of future investigations".

36 In the case of an Article 15 *proprio motu* situation a PTC is assigned pursuant to Regulations of the Court, 26 May 2004, Regulations 45 and 46 (http://www.legal-tools.org/doc/2988d1/). The Prosecutor shall inform the President of the Court of: (1) the Prosecutor's determination that there is a reasonable basis to proceed with an investigation. Regulation 46, sub regulation 2 of the Regulations of the Court, pursuant to which "[t]he Presidency shall assign a situation to a Pre-Trial Chamber as soon as the Prosecutor has informed the Presidency in accordance with Regulation 45".

37 Impetus is to make a decision quickly unless there is not a reasonable basis to proceed, Ignaz Stegmiller, *The Pre-Investigation Stage of the ICC, Criteria for Situation Selection*, Duncker & Humblot, GmbH, Berlin, 2011, p. 190.

ment results in fast track,[38] slow track,[39] and protracted[40] preliminary examinations.

To understand the preliminary examination process, it is important to properly construe Article 15 as a triggering mechanism that authorises the Prosecutor to initiate *proprio motu* investigations. It is not a provision dealing with the initiation of a preliminary examination *per se*, but rather a means through which the Prosecutor can initiate an investigation. The first step, which is compulsory, is the preliminary examination – the means by which the Prosecutor can decide whether or not to proceed with an investigation. It is thus an over-dramatisation for the OTP to announce to the world "the Prosecutor has decided to open a preliminary examination", since such a statement exaggerates what is merely a transitory step, not only in terms of what it is, but also what it can do.

24.2.1.2. Preliminary Examinations Do Not Constitute Investigations

Despite the OTP's best efforts of bringing clarity through its 2013 Policy Paper, it is in part responsible for creating the confusion that surrounds preliminary examinations and investigations. The OTP has consistently explained that a preliminary examination is not an investigation, but a process of examining the information available in order to reach a fully-informed determination on whether there is a reasonable basis to proceed

[38] Situations in Kenya, Libya, Guinea, Darfur, Democratic Republic of Congo, Uganda, Central African Republic II, Côte d'Ivoire and Mali. Preliminary examinations conducted expeditiously with Libya carried out in only five days. Investigations were opened in under two years.

[39] Preliminary examinations for the Situations in Honduras, Republic of Korea, Burundi, Nigeria, Gabon, Central African Republic I, Venezuela, Iraq/UK (2009), Ukraine, as well as the situation referred by Comoros were conducted for more than three years and less than five. The Situation in Central African Republic I eventually proceeded to an investigation. In five other situations the Prosecutor concluded the statutory requirements to proceed with an investigation had not been met, namely Honduras, Republic of Korea, Venezuela, Iraq/UK and the situation referred by Comoros. Regarding the most recent ones, in the Philippines and Venezuela, it is too early to know what pace they will take.

[40] Situations in Afghanistan, Colombia, Georgia, Palestine and Iraq/UK (2014). An investigation in Georgia was opened after nearly eight years under examination. Afghanistan and Colombia were ongoing for over a decade. At the time of writing the Prosecutor's request concerning Afghanistan was still pending review by the PTC. Palestine and Iraq/UK are still under subject-matter consideration.

with an investigation under the Rome Statute.[41] Yet, when speaking publicly of the preliminary examination process, it does so by referring to investigations instead of a precursor to a potential investigation.

Some authors[42] use imprecise terminology when referring to preliminary examinations,[43] such as pre-investigations.[44] Others contrast them with 'full' investigations or consider them part of the formal stage of ICC proceedings.[45] Although the Prosecutor requires an authorisation of

41 ICC OTP, The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine, 16 January 2015, ICC-OTP-20150116-PR1083 (http://www.legal-tools.org/doc/1dcbe5/). *Idem.*, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening a Preliminary Examination into the Situation in Burundi, 25 April 2016 (http://www.legal-tools.org/doc/155b19/).

42 Ignaz Stegmiller, 2011, pp. 26–27, see *supra* note 37. In a similar vein, Giuliano Turone, 'Powers and Duties of the Prosecutor', in Antonio Cassesse, Paolo Gaeta and John R.W.D Jones (eds.), *The Rome Statute of the ICC: A Commentary*, vol. II, Oxford University Press, 2002, pp. 1137, 1146; Jan Wouters, Sten Verhoeeven, Bruno Demeyere, 2008, para. 19, see *supra* note 34.

43 Ignaz Stegmiller, 2011, see *supra* note 37. Ignaz Stegmiller explains that when referring to preliminary examinations as foreseen in Article 15(6) they take place before the (formal) investigation stage, in accordance with Article 54, begins. Thus, two different procedural stages regarding the ICC procedural law can be identified, namely the pre-investigation stage and the formal investigation stage. He goes on to underscore that these stages have to be distinguished carefully and provisions have to be tested as to whether they apply to pre-investigations or (full) investigations. The author dissents with this description because it splits the investigation stage in two. Preliminary examinations are not investigations and that imprecision remains with the use of the term 'pre-investigation'. There is also no such thing as a 'full' investigation. Investigating is either something you are doing or you are not. By contrast the author agrees that the investigation stage is formal and that preliminary examinations are informal and that the powers of the OTP in the course of 'formal' investigations go far beyond those during preliminary examinations (pre-investigations as referred to by Stegmiller).

44 Ignaz Stegmiller, 2011, pp. 187–189, see *supra* note 37. Ignaz Stegmiller argues that the discretion meant by paragraph 1 [Article 15] covers the right of the Prosecutor to initiate pre-investigations only. He also states that one should speak of pre-investigations versus full investigations and that the terminology of Article 15(1) has to be interpreted, in light of Article 15(6) as referring to pre-investigation steps only.

45 The ICC web site refers to the Legal Process of the Court as follows: *Stages of proceedings.* There are several stages of the ICC process. Where grave crimes occur, the OTP must first conduct a preliminary investigation before an investigation can begin. Investigations may lead to several cases, which may go through different stages including Pre-Trial stage, Trial stage and Appeals. See ICC web site, available at https://www.icc-cpi.int/about/how-the-court-works/Pages/default.aspx#legalProcess, last accessed on 8 May 2017. Luis Moreno-Ocampo considers preliminary examinations to be a formal process defined by Articles 12,

the PTC to initiate an investigation, this does not mean the power does not exist, only that the decision to investigate is not taken alone.[46] Accordingly, preliminary examinations constitute precursors to potential investigations,[47] since they either lead to an investigation or not. They are, nonetheless, a required precursor because all investigations commence with a preliminary examination, but not all preliminary examinations lead to an investigation.[48]

Preliminary examinations should therefore not be confused with investigations.[49] This is due to several other reasons, starting with the fact that Article 15, which governs preliminary examinations, is not a provision found in Part 5 of the Rome Statute relating to investigations and prosecutions.[50] Similarly, preliminary examinations fall outside of Part 9 relating to co-operation obligations. Moreover, Article 17 on admissibility is applied differently to preliminary examinations than to investigations, leaving the assessment of admissibility entirely to the discretion of the Prosecutor.[51] Further, the preliminary examination process is exempt from

15 and 53 of the Rome Statute. Luis Moreno-Ocampo, "The ICC's Afghanistan Investigation: The Missing Option", in *Lawfare*, 24 April 2017.

46 The Prosecutor needs to convince the PTC that the standard of a reasonable basis to proceed has been met (Article 15(4) of the Rome Statute). The Chamber must be satisfied "that the case appears to fall within the jurisdiction of the Court", a determination that is without prejudice to subsequent determinations by the Court with regard to the jurisdiction or admissibility of a case.

47 The term of preliminary examinations as precursors is borrowed from the Oxford University Press blog by Iain Macleod and Shehzad Charania, "Three challenges for the International Criminal Court", May 2011. The author modified the term by adding the word 'potential' to accurately reflect the possibility that not all preliminary examinations lead to investigations and has removed the word 'full' to maintain the clear distinction between the informal preliminary examination process and the formal stage of proceedings, which includes investigations.

48 Just like not all investigations lead to prosecutions.

49 Regarding terminology, William Schabas draws a differentiation between 'preliminary examinations' when the Prosecutor is acting *propio motu*, and the 'pre-investigative phase', when the matter results from a referral. See Schabas, 2007, p. 239, see *supra* note 31. In his Commentary on the Rome Statute, Schabas mentions that a distinction between a preliminary investigation and a full investigation has been suggested, with Article 15 governing the former and Article 53(1) the latter. *Idem*, pp. 659–660; Ignaz Stegmiller, 2011 see *supra* note 37.

50 Schabas, 2010, p. 315, see *supra* note 31.

51 Complementarity was established for States to protect themselves. During a preliminary examination, it is up for the OTP to assess admissibility. Some States possibly find this

judicial review or control,[52] and finally the information that is collected is not treated as evidence.[53] Even more problematic is that preliminary examinations lack defined parameters and methodologies in relation to the standard of proof, timelines, duration,[54] as well as publicity, which is the focus of this chapter.

24.2.1.3. The Main Function of Preliminary Examinations Is to Determine Whether or Not a *Reasonable Basis Exists* to Proceed with an Investigation

In 2009, Prosecutor Luis Moreno-Ocampo stated that the "preliminary examination of alleged war crimes in Afghanistan was 'exceedingly complex' and time-consuming because of the difficulty of gathering infor-

more convenient because in order to enjoy full rights pursuant to Article 17 of the ICC Statute the situation would have to be under investigation, which is less desirable given that it exposes States even more than during the preliminary examination.

52 At least until Article 15(3) is prompted, prior to an authorisation by the PTC there is no judicial review. It is noticeable that the OTP has so far avoided submitting to the control by the PTC. For example, Article 53(3)(c)–interests of justice–has never been used by the OTP because that would trigger a *proprio motu* decision reviewable by the PTC, which would be imposing on the Prosecutor. Bergsmo and Pejić explain that the underlying purpose of the PTC check is to control for frivolous or politically motivated charges. See Morten Bergsmo and Jelena Pejić, 2008, see *supra* note 9. Stigen argues that the authorisation will presumably and in reality take the form of a "quality check" where the essential is to determine whether the Prosecutor's decision is made in good faith and according to the applicable procedures. See Jo Stigen, *The Relationship Between the International Criminal Court and National Jurisdictions: The Principle of Complementarity*, Martinus Nijhoff Publishers, 2008, p. 107.

53 ICC, Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia ('Situation referred by Comoros'), Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation, 16 July 2015, ICC-01/13-34, para. 13 (http://www.legal-tools.org/doc/2f876c/).

54 The low standard of proof threshold purportedly should impact the duration of the preliminary examination. Neither the ICC Statute nor the RPE offers any significant guidance on how to conduct preliminary examinations. For years the OTP has maintained that there are no timelines provided in the ICC Statute for bringing a preliminary examination to a close. "Termination of Preliminary Examination. No provision in the Statute or the Rules establishes a specific time period for the completion of a preliminary examination". See OTP, *Policy Paper on Preliminary Examinations*, paras. 14 and 89, see *supra* note 2. The OTP has explained that due to its independence, holding rigid timetables on when to reach a "reasonable basis" determination is not in conformity with the statutory framework; Annex to the "Paper of some policy issues before the Office of the Prosecutor", see *supra* note 13.

mation".[55] While it is understandable that certain situations are more challenging than others, preliminary examinations have a low standard of proof.[56] It is therefore difficult to accept that a decade long preliminary examination is needed to determine whether the *reasonable basis* standard has been satisfied.[57] In this regard, the PTC in the situation relating to the Registered Vessels of Comoros, Greece and Cambodia expressed the following: "The question that is asked of the Prosecutor by article 53(1) of the Statute is merely whether or not an investigation should be opened. The Prosecutor's assessment of the criteria listed in this provision does not necessitate any complex or detailed process of analysis".[58]

The Rome Statute does not offer a definition of *reasonable basis*.[59] Providing a definition was left to the judges of the ICC. The PTC, dealing with the situation in Kenya, observed that to satisfy the requirements under Article 15, the material provided by the Prosecutor "certainly need not point towards only one conclusion",[60] nor does it have to be conclusive.[61]

55 "Court to Probe Afghan War Crimes", in *BBC News*, 10 September 2009.

56 Article 53 Rome Statute sets a reasonable basis standard, Article 58 of the Rome Statute sets a reasonable grounds standard and Article 66 of the Rome Statute sets a beyond reasonable doubt standard. During a preliminary examination there is no need to produce evidence. This is the crucial point in the decision concerning the Situation referred by Comoros in which the PTC affirmed that the OTP did not need much to start with an investigation in response to the argument that an investigation could not be opened because of the lack of clarity. See Situation referred by Comoros, Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation, see *supra* note 53.

57 ICC Statute, Articles 15(6) and 53(1), see *supra* note 5.

58 Situation referred by Comoros, Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation, see *supra* note 53.

59 In the decision concerning the Situation in Kenya the PTC found that: "[t]he language used in both article 15(3) and (4) and in the chapeau of article 53(1) of the Statute is identical. The phrase "reasonable basis to proceed" in paragraph 3 regarding the Prosecutor's conclusion is reiterated in paragraph 4, which governs the Chamber's review of the Prosecutor's Request. Exactly the same language is also included in the opening clause of article 53(1) of the Statute. Thus, these provisions prescribe the same standard to be considered both by the Prosecutor and the Pre-Trial Chamber". See Situation in Kenya, Decision pursuant to article 15 of the Rome Statute on the authorisation of an investigation into the situation in the Republic of Kenya, para. 21, see *supra* note 7.

60 *Ibid.*, para. 34.

61 Situation in 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, para. 24, see *supra* note 19.

All that is necessary is that there "exists a sensible or reasonable justification for a belief that a crime falling within the jurisdiction of the Court has been or is being committed".[62] In that respect, the PTC provided the Prosecutor with some guidance in its decision on the situation referred by Comoros stating: "Even more, if, as stated by the Prosecutor, the events are unclear and conflicting accounts exist, this fact alone calls for an investigation rather than the opposite. It is only upon investigation that it may be determined how the events unfolded".[63]

The certainty of obtaining sufficient information to pass the statutory threshold is rarely uniform. However, the existing regulatory framework provides tools to enhance information-gathering capabilities of the OTP during a preliminary examination. Article 15(2) allows the Prosecutor to seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organisations, or other reliable sources deemed appropriate, and may receive written or oral testimony at the seat of the Court.[64] Moreover, in the absence of any information provided by a third party, it would appear from public statements made by the Prosecutor that it is the OTP's policy to actively consider potential situations within the jurisdiction of the Court based on information in the public domain.[65]

With respect to how the Prosecutor considers information that comes before him or her, OTP Regulation 24 provides that in the analysis of information and evidence regarding alleged crimes, the Office shall

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62 *Ibid.*; Situation in Kenya, Decision pursuant to article 15 of the Rome Statute on the authorisation of an investigation into the situation in the Republic of Kenya, para. 35, see *supra* note 7; ICC, Situation in Georgia, Decision on the Prosecutor's request for authorisation of an investigation, 27 January 2016, ICC-01/15, para. 25 (http://www.legal-tools.org/doc/a3d07e/).

63 Situation referred by Comoros, Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation, para. 36, see *supra* note 53.

64 Article 15(2) of the Rome Statute allows for "written or oral testimony" received at the seat of the Court whereby the ordinary procedures for questioning shall apply and the procedure for preservation of evidence for trial may apply pursuant to Rule 47 of the RPE.

65 This is compatible with the spirit of Article 15. The OTP has reported it "analyses all information on crimes within its jurisdiction", and that it received and analysed new Article 15 communications "relating to purported crimes during the reporting period […] In parallel, the Office continued the proactive examination of open sources". See Report on the activities of the Court, 29 October 2008, ICC-ASP/7/25, paras. 63–64 (http://www.legal-tools.org/doc/055a93/).

develop and apply a consistent and objective method for the evaluation of sources, information and evidence.[66] Notwithstanding, the OTP has yet to explain what methodology it uses and what steps have been taken to operationalise this Regulation. For example, how does the OTP determine the authenticity and the reliability of sources and information? Remarkably, some domestic jurisdictions have adjudicated situations on the basis of open sources, particularly those found on the Internet through YouTube or Facebook pages.[67]

It is difficult to imagine that the OTP could rely on open sources without resorting to investigative or forensic techniques to ensure their veracity. In addition, it would seem indispensable to have State co-operation in order to examine the authenticity and reliability of sources. The Prosecutor has the capacity to shape the struggle for co-operation and opening more investigations can facilitate this.[68] Given this necessity, and bearing in mind the guidance provided by the PTC in the Comoros decision mentioned above, there would appear to be a bias in favour of having more preliminary examinations advance to the investigation stage. Not only would this be consistent with Article 53, which contains a presumption in favour of investigations, but it would also help the Prosecutor further the statutory duty to establish the truth.[69]

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66 Regulations of the Office of the Prosecutor, 2009, Regulation 24, see *supra* note 15: "Analysis of information and evidence. In the analysis of information and evidence regarding alleged crimes, the Office shall develop and apply a consistent and objective method for the evaluation of sources, information and evidence. In this context, the Office shall take into account inter alia the credibility and reliability of sources, information and evidence, and shall examine information and evidence from multiple sources as a means of bias control".

67 In 2017 in Sweden, a Syrian Rebel was given a life sentence for a mass killing caught on *YouTube* video. Christina Anderson, "Syrian Rebel Gets Life Sentence for Mass Killing Caught on Video", in *New York Times*, 16 February 2017.

68 Sub-goals within the OTP's 2016–2018 time period include: (1) further developing cooperation activities and networks related to preliminary examinations, (2) further enhancing complementarity at the preliminary examination stage, and (3) continuing to increase the transparency of and public information on preliminary examinations. OTP, Strategic Plan 2016-2018, para. 45, see *supra* note 1.

69 ICC Statute, Article 54(1), see *supra* note 5. In the report of the Preparatory Committee, "[i]t was further stated that the Prosecutor's office should be established to seek the truth rather than merely seek a conviction in a partisan manner". Report of the Preparatory

24.3. Practices on Publicising Past and Present Situations

As explained previously, the Prosecutor's discretion is broad when conducting preliminary examination activities. Taking advantage of this leeway and considering resource constraints, the OTP has sought to use the preliminary examination process assertively for purposes other than what was originally intended in the Statute.[70] Indeed, the OTP has transformed the procedural step of preliminary examinations into an advocacy tool with a view to contributing towards some of the Rome Statute's overarching goals, namely ending impunity[71] and the prevention of future crimes.[72]

Despite the 2013 Policy Paper's aim of promoting clarity and predictability regarding the manner in which the OTP applies the legal criteria set out in the Statute, there is a growing gap between the Statute and the actual practice of preliminary examinations as developed by the OTP. This is illustrated by its publicity approach surrounding these activities, which is not properly regulated and is essentially selective. While this unfettered approach to publicity is problematic, publicising preliminary examinations has also become a crucial tool for the OTP in relation to its strategy of maximising utility. The frequent use of the media, public statements and other public relations devices by the OTP raises questions regarding what drives the decision-making process of the Prosecutor to publicise information concerning preliminary examination activities. Simply put, is it led by legal and political considerations, or is it simply a public relations exercise?

Publicity of preliminary examination activities was not seriously considered during the negotiations in Rome, though there are traces of the issue being discussed. In the Summaries of the Proceedings of the Preparatory Committee, the following reference is made in the context of the

Committee on the Establishment of an International Criminal Court, para. 46, see *supra* note 11.

70 David Bosco, "The International Criminal Court And Crime Prevention: Byproduct Or Conscious Goal?", in *Michigan State Journal of International Law*, 2013, vol. 19, no. 2, p. 178.

71 ICC Statute, Preambular paragraph 5, see *supra* note 5: "Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes".

72 OTP, *Policy Paper on Preliminary Examinations*, paras. 16–18 and 100–106, see *supra* note 2.

Chamber's power to decide whether an investigation should be initiated or not by the Prosecutor: "up to this point, the procedure would be *in camera* and confidential, thus preventing any publicity about the case and protecting the interest of the States".[73] This understanding was not crystallised in the Rome Statute or the RPE. In fact, if the practice of making announcements public concerning preliminary examinations had been foreseen during the drafting of the Rome Statute, it is probable that the interest of States in keeping these activities confidential would have been addressed. In any case, it is unlikely that negotiators in 1998 anticipated the amount of publicity given to preliminary examinations, including a preliminary examination list on the ICC's website even prior to the Prosecutor determining that a reasonable basis to proceed exists or seeking authorisation from the PTC to open an investigation.

The issue of public disclosure of preliminary examinations was explicitly regulated for the first time in 2009 in the OTP's Regulations.[74] Later it was included in the OTP's Prosecutorial Strategy (2009-2012) indicating that the Office would start to "regularly provide information about the preliminary examination process" and "issue periodic reports on the status of its preliminary examinations".[75] Both the Regulations, as well as some RPE provisions, conditionally allow for publicity of preliminary examinations, or at least do not prohibit it.[76] For example, the RPE require the Prosecutor to "analyse the seriousness of information received" but do not specify whether this can be done publicly or should be treated as a confidential exercise. The OTP's Regulations provide that "the Prosecutor *may* decide to make public the Office's activities in relation to the preliminary examination of information. In doing so, the Office *shall be guided inter alia* by considerations for the safety, well-being, and

73 Summary of the Proceedings of the Preparatory Committee, para. 166, see *supra* note 10 (http://www.legal-tools.org/doc/d7aad5/); Report of the Preparatory Committee on the Establishment of an International Criminal Court, para. 150, see *supra* note 11.

74 OTP Regulations, Regulation 28, see *supra* note 15.

75 OTP, Prosecutorial Strategy 2009-2012, 1 February 2010, Objective 3 (http://www.legal-tools.org/doc/6ed914/). As an example, see also Situation in Palestine, Summary of submissions on whether the declaration lodged by the Palestinian National Authority meets statutory requirements, 3 May 2010 (http://www.legal-tools.org/doc/af5abf/).

76 OTP Regulations, Regulations 21(1) and 28(1), see *supra* note 15; ICC RPE, Rules 46 and 49, Sub-rule 1, see *supra* note 6.

privacy of those who provided the information or others who are at risk".[77]

In addition, the OTP is required to send out acknowledgements of referrals and communications received and it may decide to make public such acknowledgement, *subject* to the Prosecutor's duty to protect the confidentiality of such information.[78] Rule 49 of the RPE requires the Prosecutor to promptly ensure that notice in accordance with Article 15(6) is provided, in a manner that prevents any danger to the safety, well-being and privacy of those who provided information, or the integrity of investigations or proceedings. The requirement to notify, however, only applies once a decision to investigate has been made,[79] and the Prosecutor therefore does not have to notify States when conducting preliminary examinations *proprio motu*.[80]

David Bosco notes that in 2010 certain court documents seemed to suggest that "the process of pre-investigation will normally be conducted without publicity and without public statements", noting further that generally, work in a situation does not become public knowledge until the Office opens an investigation.[81] However, the OTP's first publicised Draft Policy Paper on Preliminary Examinations in 2010 already evidenced a shift from such an approach by specifically providing for the regular publication of preliminary examination activities.[82] In the past, the Office

77 The OTP Policy Paper on Preliminary Examinations sets forth that the Office may only publicly confirm receipt of a given communication if the sender has already made that fact public. The author believes this practice undermines the Prosecutor's discretionary powers in addition to exposing the Office to the personal agendas of external actors, including NGOs or individuals. As a general rule, communications are supposed to be confidential. See OTP, *Policy Paper on Preliminary Examinations*, para. 88, see *supra* note 2; OTP Regulations, Regulation 28(2), see *supra* note 15.

78 OTP Regulations, Regulation 46, see *supra* note 15; ICC RPE, Rule 46, see *supra* note 6.

79 ICC Statute, Article 18, see *supra* note 5.

80 Article 15(6) requires the Prosecutor after concluding there is no reasonable basis to proceed to inform those who provided the information. The duty to notify those who provide information is a statutory obligation. Pursuant to Rule 49(1), such notification must be given promptly and must include reasons for the decision; Stigen, 2008, p. 126, see *supra* note 53.

81 Bosco, 2013, p. 178, see *supra* note 70.

82 OTP, *Draft Policy Paper on Preliminary Examinations*, para.15, see *supra* note 17: In order to promote transparency of the preliminary examination process the Office aims to issue regular reports on its activities and provides reasoned responses for its decision to ei-

handled internal reports for the consideration of the Executive Committee[83] or the Prosecutor, containing general information on the volume, frequency and patterns of communications relating to particular situations, as well as analyses and recommendations in line with Article 53.

By 2011, in line with the 2010 Draft Policy Paper, public reporting on preliminary examination activities became more systematic with the introduction of annual reports on preliminary examination activities.[84] These reports were later complemented by situation-specific reports concerning the status of preliminary examination situations. Another report containing information on preliminary examinations is the annual report on Activities of the Court submitted every year to the Assembly of States Parties.[85]

ther proceed or not proceed with investigations. *Idem.*, para 20: The Office has made this policy paper public in the interest of clarity and predictability over the manner in which it applies the legal framework agreed upon by States Parties. Both these paragraphs were retained almost identically in the 2013 Policy Paper on Preliminary Examinations.

83 The Executive Committee is composed of the Prosecutor and the Heads of the three Divisions of the Office. The Executive Committee provides advice to the Prosecutor, is responsible for the development and adoption of the strategies, policies and budget of the Office, provide strategic guidance on all the activities of the Office and coordinates them. OTP Regulations, Regulation 4, see *supra* note 15.

84 Prosecutor Fatou Bensouda: "My Office began releasing these annual reports in 2011, making this the fifth such report we have published. *It is not a report to the ASP per se, but rather for the public at large*, and its publication is timed to coincide with the ASP. We adopted the practice of publishing these annual reports in order to promote public awareness and transparency regarding the Office's preliminary examination process. For this purpose, as of last year, I have also adopted the practice of notifying the report through a press release". Remarks by Prosecutor Fatou Bensouda at the Fourteenth Session of the Assembly of States Parties on the occasion of the Launch of the 2015 Annual *Report on Preliminary Examination Activities*, 5 November 2015 (http://www.legal-tools.org/doc/04c7bb/).

85 ICC, Report on the Activities of the Court, ICC-ASP/3/10, 22 July 2004 (http://www.legal-tools.org/doc/3fb24f/). ICC, Report on the Activities of the Court, ICC-ASP/4/16, 16 September 2005 (http://www.legal-tools.org/doc/678b4c/); ICC, Report on the Activities of the Court, ICC-ASP/5/15, 17 October 2006 (http://www.legal-tools.org/doc/afd592/); ICC, Report on the Activities of the Court, ICC-ASP/6/18, 18 October 2007 (http://www.legal-tools.org/doc/8f3363/); ICC, Report on the Activities of the Court, ICC-ASP/7/25, see *supra* note 65; ICC, Report on the Activities of the Court, ICC-ASP/8/40, 21 October 2009 (http://www.legal-tools.org/doc/95f2fc/); ICC, Report on the Activities of the Court, ICC-ASP/9/23, 19 November 2010 (http://www.legal-tools.org/doc/f45213/); ICC, Report on the Activities of the Court, ICC-ASP/10/39, 18 November 2011 (http://www.legal-tools.org/doc/c7389a/); ICC, Report on the Activities of the Court, ICC-ASP/11/21, 9 October

The OTP prepared its first public situation-specific report on preliminary examinations in December 2006.[86] This was in response to a motion filed by the Central African Republic ('CAR') challenging the lack of progress in the situation referred to the OTP in 2004.[87] In this respect, PTC III stated that "a preliminary examination of a situation pursuant to Article 53(1) of the Statute and Rule 104 of the Rules must be completed within a *reasonable time* from the reception of a referral by a State Party under Articles 13(a) and 14 of the Statute, regardless of its complexity".[88] It then requested the Prosecutor to provide the Chamber and the Government of CAR, no later than by 15 December 2006, with a report containing information on the current status of the preliminary examination of the CAR situation, including an estimate of when the preliminary examination would be concluded and a decision pursuant to Article 53(1) would be taken. The Prosecutor reluctantly complied with the request, in the interests of transparency,[89] while questioning the authority of the PTC to request such information, maintaining that no provision in the Statute or RPE established a definitive time-period for a preliminary examination. The OTP has yet to recognise the significance of PTC III's decision of 30 November 2006.

2012 (http://www.legal-tools.org/doc/2d3dda/); ICC, Report on the Activities of the Court, ICC-ASP/12/28, 21 October 2013 (http://www.legal-tools.org/doc/b22709/); ICC, Report on the activities of the International Criminal Court, ICC-ASP/13/37, 19 November 2014 (http://www.legal-tools.org/doc/8cdb8d/); ICC, Report on the activities of the International Criminal Court, ICC-ASP/14/29, 13 November 2015 (http://www.legal-tools.org/doc/42f05b/); ICC, Report on the activities of the International Criminal Court, ICC-ASP/15/16, 9 November 2016 (http://www.legal-tools.org/doc/144ca9/).

86 ICC, Situation in Central African Republic, Prosecution's Report Pursuant to Pre-Trial Chamber III's 30 November 2006 Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic,16 December 2006, ICC-01/05-7 (http://www.legal-tools.org/doc/1dd66a/).

87 The Government of the Central African Republic pursuant to Article 13(a) and 14 of the Statute referred the situation in Central African Republic to the Prosecutor on 22 December 2004. The Prosecutor then made a public announcement in relation to said referral stating an analysis would be carried out in order to determine whether to initiate an investigation. On 27 September 2006 Central African Republic filed a motion before the PTC requesting information on the status of the preliminary examinations of the situation in the Central African Republic.

88 ICC, Situation in Central African Republic, Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic**,** 1 December 2006, ICC-01/05-6 (http://www.legal-tools.org/doc/76e607/).

89 *Ibid*., para. 11.

At the time of writing, 10 preliminary examinations were ongoing,[90] four were closed with a decision not to proceed,[91] and another 10 were completed with a decision to investigate,[92] bringing the total number of *official* preliminary examinations to 24 since 2002. It should be noted that this figure only covers official preliminary examinations that have, so to speak, been made public by the OTP. There are several other situations being monitored based on confidential communications. In that sense, what is publicly reported by the OTP or submitted to the Assembly of States Parties for the purposes of budgeting requirements does not fully reflect the number of preliminary examinations that are actually being conducted by the OTP.

It therefore follows that what determines a preliminary examination's official status is publicity. That is, a preliminary examination becomes official when its existence is made public. The 2013 Policy Paper indicates that the commencement of a preliminary examination will only become public in relation to activities under Phases 2 to 4.[93] Hence, those matters falling under Phase 1, the initial assessment phase, are undisclosed. This suggests that in practice the OTP conducts a *pre-preliminary* examination before a preliminary examination is announced to the public.

The confidential phase makes it difficult to ascertain when a preliminary examination actually commences once a situation comes to the attention of the Prosecutor on the basis of Article 15 communications.[94] The

90 See the Court's web site on preliminary examinations.

91 *Ibid*.

92 *Ibid.*

93 OTP, *Policy Paper on Preliminary Examinations*, para. 95, see *supra* note 2.

94 The examination of the situation in Afghanistan from 2006, was made public in 2007 and officially reported in 2011 in the OTP Report on Preliminary Examination of 13 December 2011 with the following mention: "The OTP has received 56 communications under article 15 of the Rome Statute between 1 June 2006 and 1 June 2011. The preliminary examination of the situation in Afghanistan became public in the course of 2007". However, in 2007 there was no mention of Afghanistan in the Prosecutor's report to the ASP or in the OTP's annual address to the Assembly. In fact, the wording purposefully stated that the "Office was currently analysing information on three continents" but only mentioned two situations, namely Colombia and Côte d'Ivoire. One would presume the third situation was in Afghanistan on the Asian continent. See OTP, *Report on Preliminary Examination Activities*, 13 December 2011 (http://www.legal-tools.org/doc/4aad1d/); Address of the OTP Prosecutor Luis Moreno-Ocampo to the Assembly of State Parties, 30 November 2007

OTP often alludes to the opening,[95] closing,[96] conclusion,[97] completion,[98] or re-opening of preliminary examinations.[99] This language underscores the perplexity between preliminary examinations and investigations, because only the latter are 'opened' in the strict sense of the Statute. Moreover, there are several incongruities regarding the start date of an examination. For instance, on 7 February 2014, the OTP announced the 'opening' of a preliminary examination in CAR II.[100] Prior to that date, the OTP had

(http://www.legal-tools.org/doc/c6de7d/); "ICC examines possible Afghan war crimes", in *Financial Times*, 10 September 2009.

95 ICC OTP, "The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination in Ukraine", 25 April 2014, ICC-OTP-20140425-PR999 (http://www.legal-tools.org/doc/e4a2b5/).

96 For example, the ICC website indicates that the preliminary examination of the situation in Iraq, terminated on 9 February 2006, was re-opened on 13 May 2014 upon receipt of new information.

97 ICC OTP, "Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the conclusion of the preliminary examination of the situation in the Republic of Korea", 23 June 2014, ICC-OTP-20140623-PR1019, 23 June 2014 (http://www.legal-tools.org/doc/8d0a96/).

98 While the Press Release on the Situation in Honduras of 28 October 2015 refers to the conclusion of the preliminary examination, it is labeled both as a 'completed' and a 'closed' examination in the OTP, Report on Preliminary Examination activities, 12 November 2015 para. 19 (http://www.legal-tools.org/doc/ac0ed2/). Similarly, the ICC web site places the situation in Honduras under those completed without a decision to investigate, however once the webpage on the Situation in Honduras is accessed its status shows it as 'closed'.

99 ICC OTP, "Prosecutor of the International Criminal Court, Fatou Bensouda, re-opens the preliminary examination of the situation in Iraq", 13 May 2014, ICC-OTP-20140513 (http://www.legal-tools.org/doc/d9d9c5/).

100 The Prosecutor's Statement on a new preliminary examination in the Central African Republic asserts that following the Office's analysis of the jurisdictional parameters regarding the situation in the Central African Republic since September 2012, the Prosecutor concluded that the incidents and the serious allegations of crimes potentially falling within the jurisdiction of the ICC constitute a new situation, unrelated to the situation previously referred to the ICC by the Central African Republic authorities in December 2004. See ICC OTP, "Statement of the Prosecutor, Fatou Bensouda on opening a New Preliminary Examination in the Central African Republic", 7 February 2014 (http://www.legal-tools.org/doc/6b4438/). See also ICC, Situation in the Central African Republic II, Situation in the Central African Republic II Article 53 (1) Report, 24 September 2014 (http://www.legal-tools.org/doc/1ff87e/). On 30 May 2014, the transitional government of the Central African Republic referred to the Prosecutor, pursuant to Article 14 of the Statute. See referral of the Central African Republic II, *idem*, Annex 1 Decision Assigning the Situation in the Central African Republic II to Pre-Trial Chamber II, 18 June 2014, ICC-01/14-1-Anx1 (http://www.legal-tools.org/doc/1cfbfe/).

issued statements informing the general public that it was closely following the situation in CAR. These statements indicated that the Prosecutor had been doing so since the end of 2012. It therefore appears that prior to the public announcement of the preliminary examination, the OTP was monitoring the situation, but not examining it. The same occurred with the situation in Mali. On 18 July 2012, the OTP announced that it had been following the situation in Mali very closely since violence erupted there around 17 January 2012. However, the Prosecutor's press release indicates that it was only after receiving a referral from the Malian authorities on the same day, 18 July 2012,[101] that the Prosecutor publicly instructed the Office to immediately proceed with a preliminary examination of the situation in order to assess whether the Rome Statute criteria stipulated under Article 53(1) for opening an investigation were fulfilled.[102] A separate issue here is also trying to understand when a situation is being 'followed', as opposed to 'examined', or whether these activities all just fall under the OTP's inherent monitoring role.

When the Prosecutor determines to close a preliminary examination is also ambiguous because situations under examination never seem to truly shut down.[103] For instance, the public statements of the OTP in 2006 in relation to the situations in Iraq and Venezuela clearly refer to the Prosecutor's decision not to open an investigation, which is different from a decision to close a preliminary examination.[104] The language used for these two situations, where the Rome Statute requirements have not been met, has been more or less replicated on other occasions in which statutory requirements to open an investigation were not met, even though these statements were headlined as decisions to close a preliminary examination. A reading of these decisions reveal a caveat that the Office may reconsider its conclusion not to open an investigation and senders of relevant in-

[101] Referral Letter by the Government of Mali, 13 July 2012 (http://www.legal-tools.org/doc/06f0bf/).

[102] ICC OTP, "ICC Prosecutor Fatou Bensouda on the Malian State referral of the situation in Mali since January 2012", 18 July 2012, ICC-OTP-20120718-PR829 (http://www.legal-tools.org/doc/31525f/).

[103] "To close", in *Oxford Dictionary of English*: Bring or come to an end (available on its web site).

[104] ICC OTP, OTP response to communications received concerning Iraq, 9 February 2006 (http://www.legal-tools.org/doc/5b8996/); ICC OTP, OTP response to communications received concerning Venezuela, 9 February 2006 (http://www.legal-tools.org/doc/c90d25/).

formation are encouraged to continue to bring such information to the attention of the Prosecutor.[105] This is what occurred with the preliminary examination in Iraq when in May of 2014 the OTP publicly announced the 're-opening' of the examination under the new heading of Iraq/UK.[106] The language was slightly changed in the Comoros situation where the OTP stated the following: "Accordingly, the Office has determined that there is no reasonable basis to proceed with an investigation and has decided to *close* this preliminary examination. The referral and additional information submitted by the Comoros will be maintained in the Office's archives and the decision not to proceed may be reconsidered at any time based on new facts or information".[107]

There is also lack of clarity regarding what goes on after a situation is presumably closed or before it eventually gets 're-opened'. Could it be that the OTP remains 'seised of the matter' or is it that these situations pass on to an inactive status ready to be resumed once sufficient infor-

[105] *Ibid.* The last paragraph of the OTP response to communications received concerning Iraq reads as follows: "For the above reasons, in accordance with Article 15(6) of the Rome Statute, I wish to inform you of my conclusion that, at this stage, the Statute requirements to seek authorisation to initiate an investigation in the situation in Iraq have not been satisfied. This conclusion can be reconsidered in the light of new facts or evidence. I wish to remind you, in accordance with Rule 49(2) of the Rules of Procedure and Evidence, that should you have additional information regarding crimes within the jurisdiction of the Court, you may submit it to the Office of the Prosecutor. Bearing in mind the limited jurisdiction of this Court, as well as its complementary nature, effectively functioning national legal systems are in principle the most appropriate and effective forum for addressing allegations of crimes of this nature". See *idem*, OTP response to communications received concerning Iraq.

[106] Closed preliminary examinations resound to the OTP's equivalent: 'hibernated' investigations that can later be 'de-hibernated'. The OTP explains that not all investigations lead directly to a voluntary appearance, arrest, or surrender. Where there is a lapse in time between the end of an investigation and the apprehension or voluntary appearance of a suspect, a case is considered hibernated. The comparison would be with the lapse in time between the 'termination' of a preliminary examination and the emergence of new facts or evidence. See Report of the Court on the Basic Size of the Office of the Prosecutor, 17 September 2015 ICC-ASP/14/21, paras. 17 and 19 (http://www.legal-tools.org/doc/b27d2a/).

[107] A final decision not to proceed was communicated to the PTC on 29 November 2017. See also, ICC, Situation referred by Comoros, *Article 53 (1) Report*, 6 November 2014 (http://www.legal-tools.org/doc/43e636/); see also, ICC OTP, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on concluding the preliminary examination of the situation referred by the Union of Comoros: "Rome Statute legal requirements have not been met", 6 November 2014 (http://www.legal-tools.org/doc/e745a0/).

mation is obtained? Article 15(5) and (6) leaves the door open for the Prosecutor to consider whether new information gathered justifies re-evaluating the situation. The ICC website contains the following three categories of preliminary examinations: (1) ongoing preliminary examinations; (2) closed with a decision not to proceed and (3) completed with a decision to investigate.[108] Accordingly, the second category should also be referred to as completed rather than closed.[109] Terminology aside, this second category would appear to encompass those instances where the PTC refuses to authorise an investigation or rejects the Prosecutor's decision not to proceed.[110] In these circumstances, a preliminary examination cannot exactly be considered as completed.[111] The same can be said when the PTC requests the OTP to review a decision or the Prosecutor decides to reconsider it.[112] Following this reasoning, the Comoros situation should have been placed under the category of ongoing preliminary examinations until the OTP's reconsideration was finalised.

In 2009, the Palestinian Authority sought to accept the jurisdiction of the ICC. On 3 April 2012, after a three-year examination of the situation in Palestine, the OTP announced that the preconditions for the exercise of jurisdiction were not met.[113] This particular statement made no reference to the closing of the situation, although in subsequent documents it was described in those terms.[114] The OTP concluded it lacked

[108] Preliminary Examinations, ICC website, see *supra* note 90.

[109] The preliminary examination conducted in the Palestine situation between 2009–2012 belongs under the second category. In the 2012 OTP Report on Preliminary Examination Activities the situation is reported as completed. See OTP, *Report on Preliminary Examination Activities*, 22 November 2012, paras. 196–203 (http://www.legal-tools.org/doc/0b1cfc/).

[110] ICC Statute, Articles 15(4) and 53(1), see *supra* note 5; ICC RPE, Rule 105, see *supra* note 6.

[111] In the same way that the action of investigating may well continue through the proceedings and even at the appeals stage (or after, since many investigations can be opened in a same situation).

[112] ICC Statute, Article 53(4), see *supra* note 5; ICC RPE, Rule 107, see *supra* note 6.

[113] ICC, Situation in Palestine (embargoed until delivery 3 April 2012) (http://www.legal-tools.org/doc/f5d6d7/).

[114] OTP, *Report on Preliminary Examination Activities*, para. 196, see *supra* note 109 reads as follows: "On 3 April 2012, the Office issued a decision to close the preliminary examination of the situation in Palestine[…]". See also the OTP, *Report on Preliminary Examination Activities*, para. 48, see *supra* note 48: "*The Office previously conducted a preliminary*

jurisdiction due to Palestine's contested statehood, but the situation still required an examination to determine whether the statutory requirements had been met.[115] Technically, the lack of statehood should have led the OTP to declare the situation manifestly outside its jurisdiction. However, the Prosecutor's decision to consider this examination publicly resulted in greater polarisation of an already controversial matter and placed unnecessary pressure on the OTP to deliver results.[116] Notably in this situation, the Prosecutor determined that a fair process required that the Palestinian National Authority, as well as other interested parties be granted the opportunity to be heard and by so doing: "[T]he Office therefore ensured due process to all parties involved".[117] In the end, the Prosecutor conceded that the Rome Statute provides no authority for the Office to adopt a method to define the term "State" under Article 12(3).[118] What makes the Prosecutor's approach to the Palestinian matter exceptional is that due process considerations have not been a feature of any other preliminary examination process in any other situation.

examination of the situation in Palestine upon receipt of a purported article 12(3) declaration lodged by the Palestinian National Authority on 22 January 2009. The Office carefully considered all legal arguments submitted to it and, after thorough analysis and public consultations, concluded in April 2012 that Palestine's status at the UN as an "observer entity" was determinative, since entry into the Rome Statute system is through the UNSG, who acts as treaty depositary. The Palestinian Authority's "observer entity", as opposed to "non-member State" status at the UN, at the time meant that it could not sign or ratify the Statute. *As Palestine could not join the Rome Statute at that time, the Office concluded that it could also not lodge an article 12(3) declaration bringing itself within the ambit of the treaty, as it had sought to do"***.**

115 The Office of the Prosecutor carefully considered all of the legal arguments put forth and concluded in April 2012, after three years of thorough analysis and public consultations that Palestine's status at the UN as "observer entity" was determinant – since entry into the Rome Statute system is through the UN Secretary-General, who acts as treaty depositary. The OTP's position was that the Palestinian Authority's "observer entity" status at the UN at that time meant that it could not sign up to the Rome Statute. As Palestine could not join the Rome Statute, Prosecutor Luis Moreno-Ocampo concluded that it could not lodge an Article 12(3) declaration bringing itself under the ambit of the treaty either, as it had sought to do.

116 Palestine applied for Membership in the UN on 23 September 2011. The process was stalled in the Security Council, however on 31 October 2011 UNESCO's General Conference voted to admit Palestine as a Member State of the Organisation. In 2012, the General Assembly granted it a non-member observer State status, which was determinative.

117 OTP, *Report on Preliminary Examination Activities*, para. 17, see *supra* note 94.

118 OTP, *Report on Preliminary Examination Activities*, para. 201, see *supra* note 109.

The Palestine episode may provide some explanation of why the 2013 Policy Paper specifies that the commencement of a preliminary examination will not be publicised before entering Phase 2.[119] However, Phase 2 concerns jurisdiction as well. Consequently, preliminary examinations should not be publicised at all until jurisdiction has been established and ideally not before a decision to proceed or not with an investigation has been taken. It is not clear that the OTP could keep a preliminary examination confidential even if it wanted to, if senders of communications or States determine to make them public.[120] Regardless, the focus of this chapter is when the OTP purposefully publicises preliminary examination activities and takes public stances on situations under examination to influence change. In this respect, it would be preferable if the confidential nature of the examination process is maintained until a decision to investigate is taken. Making announcements before a determination to investigate can do more harm than good. Such is the case with situations under Phase 2 in which subject-matter jurisdiction is still being examined. At that point, the OTP is not even certain that crimes within the jurisdiction of the Rome Statute have been committed. What legitimate purpose, if any, does it serve to publicise the examination of activities that may not even end up constituting Rome Statute crimes? This can be observed in the Iraq/UK situation 're-opened' in 2014 and currently under Phase 2.[121]

Similarly, in the Honduras situation, after a nearly five-year long examination the conclusion was that "[t]he Prosecutor lacks a reasonable basis to proceed with an investigation and has decided to close this pre-

[119] OTP, *Policy Paper on Preliminary Examinations*, para. 95, see *supra* note 2.

[120] For example, news that the Prosecutor was examining crimes committed in Colombia became public in March 2005 when Colombian lawmakers released a letter from Luis Moreno-Ocampo requesting information on alleged crimes. See BBC News, "ICC probes Colombia on war crimes", 31 March 2005; School of the Americas, "War Crimes Tribunal Asks Colombia for Info" (available on its web site).

[121] Another question that arises is whether preliminary examinations should resume where they were left off, that is, when a situation is re-opened, previously finding there was subject-matter jurisdiction but that the alleged crimes were not of sufficient gravity. How is it that the Iraq/UK situation has remained under Phase 2 since its 're-opening' in 2014 when in 2006 the OTP had already confirmed jurisdiction over ICC crimes while concluding they were not of sufficient gravity, and collected information on national proceedings observing they had been initiated in respect to each incident. Currently it appears as though the OTP starts from scratch when re-opening situations.

liminary examination".[122] The OTP asserted that the situation in Honduras raised a number of issues that characterised it as a "borderline case",[123] without explaining why it reached this determination. Rather, it is left to interested stakeholders to infer that perhaps the complexity of the situation or the challenges of having to rely on information in different languages underpinned the Prosecutor's decision. Moreover, the OTP's open-ended practice to collect information over a long period of time prior to making any determination is neither pragmatic nor does it contribute to the efficiency of prosecutorial activity. In the Honduras situation, like with others, the Prosecutor continuously expanded the grounds for examination.[124] Preliminary examinations do not require the OTP to determine all aspects of a potential investigation, only to establish a reasonable basis to proceed with an investigation.

The Article 5 Report on the Situation in Honduras, which contains the reasoning for not proceeding with an investigation, is quite comprehensive and well-written. The report puts all the pieces together and lays bare the OTP's decision-making process. This approach reinforces holding off on putting out inconclusive or piecemeal information that can be misleading.[125] If we go back to the moment when the Honduras situation was made public, the OTP issued a newsletter referring to the recent announcement mentioning that, in "order to fulfil its mandate and maximize the preventative impact of its work, the Office will make public its preliminary examination activities when it assesses that this will have a posi-

[122] OTP, *Situation in Honduras: Article 5 Report*, 28 October 2015, paras. 31 and 143 (http://www.legal-tools.org/doc/54755a/).

[123] Unfortunately, the great majority of transnational organised crimes are outside the jurisdiction of the ICC. Attempts to include crimes such as trafficking in drugs into the ICC Statute were met by great opposition in Rome. See *ibid.*, paras. 30 and 93.

[124] The preliminary examination in Honduras was prompted by the 2009 coup that later expanded to post-electoral violence incidents and eventually led to a full analysis of links between the alleged crimes and the patterns of violence in the country affected by transnational organised crime.

[125] See OTP, Report on Preliminary Examination activities, see *supra* note 94; OTP, *Report on Preliminary Examination Activities*, see *supra* note 109; OTP, Report on Preliminary Examination activities, 25 November 2013 (http://www.legal-tools.org/doc/dbf75e/); OTP, Report on Preliminary Examination activities, 2 December 2014 (http://www.legal-tools.org/doc/3594b3/); OTP, Report on Preliminary Examination activities, see *supra* note 98; Report on the Situation in Honduras and Colombia 2 December 2014; OTP, *Situation in Honduras: Article 5 Report*, see *supra* note 122.

tive impact in stopping violence and preventing future crimes or when the senders of communications make them public".[126] Nevertheless, how can an assessment of positive impact occur before knowing if Rome Statute crimes have been committed? This is not to suggest that the idea is without merit. However, at such an early juncture, it would have been more prudent to simply confirm the receipt of communications and announce the OTP's commitment to seriously examine the information in accordance with the provisions of the Rome Statute. The fact that the Honduras situation deteriorated during the post-electoral period shows that, despite the OTP's best intentions, the announcement of the preliminary examination had little, if any, impact on preventing alleged crimes. It would therefore seem preferable to keep that process internal, in line with Article 53(1), until a reasonable basis decision is reached.

According to the 2013 Policy Paper, the Office will seek to publicise its preliminary examination activities in various ways, including through early interaction with stakeholders, dissemination of relevant statistics on Article 15 communications, public statements, periodic reports, and information on high-level visits to the concerned States.[127] If we were to group the different communication methods employed by the OTP to keep the public informed about situations under preliminary examination, we would find the following:

1. Media reports through press releases,[128] statements,[129] communications,[130] background notes,[131] and questions and answers;[132]

[126] ICC, OTP Weekly Briefing, 16–22 November 2010, Issue #64 (http://www.legal-tools.org/doc/0250bc/).

[127] OTP, *Policy Paper on Preliminary Examinations*, paras. 95–96, see *supra* note 2.

[128] ICC, "The Prosecutor of the International Criminal Court, Fatou Bensouda, issues her annual Report on Preliminary Examination Activities (2016)", 14 November 2016, ICC-CPI-20161114-PR1252 (http://www.legal-tools.org/doc/834809/).

[129] ICC, "Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, concerning referral from the Gabonese Republic", 29 September 2016 (http://www.legal-tools.org/doc/e0b4f6/).

[130] ICC-OTP, OTP response to communications received concerning Iraq, see *supra* note 104; *idem*, OTP response to communications received concerning Venezuela, see *supra* note 104.

[131] A background note on the situation in the Central African Republic and the OTP's work to date (http://www.legal-tools.org/doc/7ed1ee/).

2. Statements[133] and reports to the Assembly of States Parties, including on activities of the Court,[134] annual activities on preliminary examinations,[135] situation-specific reports,[136] Article 5 reports[137] and Article 53(1) reports;[138]
3. Reports[139] and statements to the United Nations;[140]
4. Filings by the OTP in relation to situations under preliminary examination;[141]
5. Policy Papers on preliminary examinations[142] and related matters;
6. OTP Weekly Briefings Newsletters;[143]

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132 Questions & Answers On the decision of the ICC Prosecutor to close the preliminary examination in Honduras, 28 October 2015 (http://www.legal-tools.org/doc/f0035a/).

133 Address by Prosecutor Luis Moreno-Ocampo to the Third Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court, 6 September 2004 (http://www.legal-tools.org/doc/0ada13/).

134 ICC, Reports on activities of the ICC, see *supra* note 85.

135 OTP, *Report on Preliminary Examination Activities*, see *supra* note 25.

136 Rapport sur les activités menées en 2014 en matière d'examen préliminaire Situations en Guinée et République Centrafricaine, 2 December 2014 (http://www.legal-tools.org/doc/9cc819/); Informe sobre las Actividades de Examen Preliminar de 2014 Honduras y Colombia (Joint Reports Guinea/ and Honduras/Colombia) (http://www.legal-tools.org/doc/153076/).

137 OTP, *Situation in Honduras: Article 5 Report*, see *supra* note 122; ICC, *Situation in the Republic of Korea: Article 5 Report*, 23 June 2014 (http://www.legal-tools.org/doc/ef1f7f/); OTP, *Situation in Nigeria: Article 5 Report*, 5 August 2013 (http://www.legal-tools.org/doc/508bd0/).

138 *Situation referred by Comoros: Article 53(1) Report*, see *supra* note 107; *Situation in the Central African Republic II: Article 53 (1) Report*, see *supra* note 100.

139 *Report of the International Criminal Court on its activities in 2015/16*, A/71/342, 19 August 2016 (http://www.legal-tools.org/doc/9606ac/).

140 ICC, First Report of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1970 (2011), 4 May 2011 (http://www.legal-tools.org/doc/76ba00/); Statement by Prosecutor Luis Moreno-Ocampo to the United Nations Security Council on the situation in the Libyan Arab Jamahiriya, pursuant to UNSCR 1970 (2011), 4 May 2011 (http://www.legal-tools.org/doc/9bb5db/).

141 Situation in the Central African Republic, Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic, see *supra* note 88.

142 OTP, *Policy Paper on Preliminary Examinations*, see *supra* note 2; OTP, Draft *Policy Paper on Preliminary Examinations*, see *supra* note 17.

143 ICC, OTP Weekly Briefing, see *supra* note 126.

7. Lectures and speeches presented at seminars, conferences and training addressing or referring to preliminary examinations;[144] and
8. Diplomatic briefings.[145]

The above range of communication methods demonstrates the OTP's creativity and flexibility, as well as how it has evolved in its approach towards publicity in an effort to be more transparent about its activities.[146] At the same time, the range of communication methods also shows a case-by-case approach with no methodological system in place to understand when and what information is made public and for what reason. According to the 2013 Policy Paper, the Office has adopted a policy of issuing situation-specific reports to substantiate the Prosecutor's decision to 'close' a preliminary examination, or to proceed with an investigation.[147] Paradoxically, the rationale provided by the OTP is the same as in the 2009 OTP public responses to communications received concerning Iraq and Venezuela, both on decisions not to proceed with an investigation.[148]

There are two main types of situation-specific reports: Article 5 and Article 53(1).[149] Both reports attempt to explain the Prosecutor's reasons for 'closing' situations. However, Article 5 reports are limited to circumstances where subject-matter jurisdiction is not met. At least that was the basis for 'closing' the situation in Honduras and in relation to the Repub-

144 The International Criminal Court and Africa: A Discussion on Legitimacy, Impunity, Selectivity, Fairness and Accountability, Keynote Speech of the Prosecutor - GIMPA Law Conference on the ICC and Africa, 17 March 2016 (http://www.legal-tools.org/doc/19ff9b/); Speech of the Prosecutor, International Seminar on the imperatives of the Observance of Human Rights and International Humanitarian Law Norms in International Security Operations, Seminar hosted by the Attorney General of the Federation and Minister of Justice of Nigeria, 24 February 2014 (http://www.legal-tools.org/doc/4cbd32/).

145 Most of the texts of these briefings are available at the Court's web site under "Reports on activities", with search string "Diplomatic Briefing".

146 OTP, *Report on Preliminary Examination Activities*, para. 14, see *supra* note 25.

147 OTP, *Policy Paper on Preliminary Examinations*, para.97, see *supra* note 2.

148 ICC-OTP, OTP response to communications received concerning Iraq, see *supra* note 104; *idem*, OTP response to communications received concerning Venezuela, see *supra* note 104.

149 In addition to the joint reports referred to above, see *supra* note 137, the OTP has issued interim reports. In relation to the Interim Report on Colombia of 14 November 2012 the OTP explained the presentation of a more detailed report was exceptional in nature, in recognition of the high level of public interest generated by this examination.

lic of Korea. However, the Article 5 report relating to the situation in Nigeria addressed a different matter, namely why the OTP saw merit in moving the situation to Phase 3.[150] Not only is this a discrepancy regarding the purpose of Article 5 reports, but it also presents an inconsistency with regard to other situations that advanced to Phase 3, such as with the situation in Afghanistan. What this inconsistency underscores is the seemingly *ad hoc* and selective approach the OTP has adopted in relation to the publication of information about its preliminary examinations. If the OTP is committed to transparency in the preliminary examination process, then it needs to adopt a consistent approach. The fact that the OTP has to date failed to develop a coherent methodology that guides the publication of its preliminary examination activities is a matter that requires further scrutiny. Some of the possible reasons behind the OTP's publicity policies are examined below.

24.4. Reasons for Publicising Preliminary Examination Activities

The policy-making activity of the OTP has been regular and substantial, covering a wide array of topics.[151] According to the OTP's Regulations, the Office shall, as appropriate, make public policy papers that reflect the key principles and criteria of the prosecutorial strategy.[152] With respect to preliminary examinations, the OTP has from the outset been forthcoming about regularly fine-tuning its policies and practices. The 2013 Policy Paper stipulates it is a document reflecting an internal policy of the OTP that does not give rise to legal rights, and is subject to revision based on

[150] *Situation in Nigeria: Article 53(1) Report*, para. 131, see *supra* note 138 specifies the following: "Accordingly, the Prosecutor has decided to move the situation in Nigeria to Phase 3 of the preliminary examination with a view to assessing whether the Nigerian authorities are conducting genuine proceedings in relation to the crimes committed by Boko Haram".

[151] OTP, *Policy Paper on the Interest of Justice*, see *supra* note 29; *idem*, *Policy Paper on Victims' Participation*, 12 April 2010 (http://www.legal-tools.org/doc/3c204f/); *idem*, *Policy Paper on Preliminary Examinations*, see *supra* note 2; *idem*, *Policy Paper on Case Selection and Prioritisation*, 15 September 2016 (http://www.legal-tools.org/doc/182205/); *idem*, *Policy Paper on Sexual and Gender-Based Crimes and Policy*, 5 June 2014 (http://www.legal-tools.org/doc/7ede6c/); *idem*, *Policy on Children* (http://www.legal-tools.org/doc/c2652b/).

[152] OTP Regulations, 2009, Regulation 14(2), see *supra* note 15.

experience and in light of legal determinations by the Chambers of the Court.[153]

The OTP contends it has decided to put forward a policy paper that describes the relevant Rome Statute principles, factors and procedures applied by the Office in the conduct of its preliminary examination activities. It explains it has made the policy paper public in the interest of promoting clarity and predictability regarding the manner in which it applies the legal criteria set out in the Statute.[154] In this connection, the OTP produces annual reports on preliminary examination activities aimed at raising public awareness and promoting transparency regarding the Office's preliminary examination process and related activities.[155] Unlike other reports, these are promptly disseminated to the general public through press releases and promoted further through informal launch events during the sessions of the Assembly of States Parties.

24.4.1. Manifest Reasons

By and large, the OTP's practice of sharing information publicly has been well-received. At the same time, it is difficult not to find a political motive behind the profile-raising of the preliminary examination activities of the OTP when compared to equivalent procedures at the domestic level, where preliminary findings generally result from a confidential process that occurs away from the public eye. This is not to suggest the ICC does not need publicity. Quite the opposite, an international court requires a careful handling of its public image to maintain support for its activities from the international community.

24.4.1.1. Transparency

The *raison d'être* of having a public policy and reporting regularly is transparency. But what does transparency mean in the realm of preliminary examinations? It should not be just another buzzword to attract sup-

[153] This caveat is important and recognises the need to enhance preliminary examinations and to continue improving the process. Notwithstanding the OTP should abide as much as possible to its policy otherwise it can give the impression of applying double standards. See OTP, *Policy Paper on Preliminary Examinations*, para. 20, see *supra* note 2.

[154] *Ibid.*

[155] ICC, "The Prosecutor of the International Criminal Court, Fatou Bensouda, issues her annual Report on Preliminary Examination Activities (2016)", 14 November 2016 (http://www.legal-tools.org/doc/834809/).

port or gain legitimacy. For transparency to have a real impact, it must be meaningful, exemplifying appropriate communication and ensuring accountability. Transparency as an objective should also aim to give the OTP long-term coherence so that its activities become both predictable and credible. The 2013 Policy Paper associates transparency with access to information.[156] Paragraph 94 specifies that in order to promote a better understanding of the process of preliminary examinations and to increase predictability, the Office will regularly report on its preliminary examination activities.

There is a proper level of transparency that is unique for each organisation and for each of its processes. The OTP cannot be expected to share all the information in its possession with everyone who is interested in having access to it. What is important for the purpose of transparency is the accurate and timely disclosure of information to the appropriate recipient(s).

Despite the OTP's paramount and well-intentioned efforts to share information, concerns remain in the international community because its reporting on preliminary examination activities has not necessarily brought about greater transparency or understanding of the OTP's activities. Indeed, while some preliminary examinations move very quickly (Kenya), others seem to stagnate for years (Colombia and Afghanistan). It is also unclear why the Office conducts regular missions to some countries (Colombia, Guinea and Georgia) but not to others. In November 2016, the OTP reported that a final decision was "imminent" on whether to request the PTC authorisation to investigate the situation in Afghanistan.[157] This announcement naturally raised expectations. It took the Office a whole year to request the authorisation from the PTC, resulting in a loss of trust and credibility and clearly no sense of increased transparency in the activities of the OTP. The long-awaited justification of why such a statement was made at that time and the circumstances that caused it to be no longer true were not compelling, nor did they help to restore confidence in OTP reporting.[158]

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156 OTP, *Policy Paper on Preliminary Examinations*, paras. 94-99, see *supra* note 2.

157 OTP, *Report on Preliminary Examination Activities*, para. 230, see *supra* note 25.

158 In relation to the same situation compare the language in paragraph 4 of the ICC, Report on the activities of the International Criminal Court, see *supra* note 85 which reads as follows: "*[t]he Office began to gather information relevant for assessing whether there are*

Separately, it was also noticeable, after the PTC in July 2015 rejected the OTP's decision not to proceed with an investigation in the situation relating to the Registered Vessels of Comoros, Greece and Cambodia, that this important development was left out of the preliminary examination activities report of that same year.[159] In 2016, the situation was reintroduced in the preliminary examination activities report, listed as still under examination.[160] In that report, a new section was added entitled "situations under reconsideration" contending that the OTP was nearing completion of its review of all information gathered, prior to and since its initial report of 6 November 2014, and was preparing to issue the Prosecutor's final decision under Rule 108(3) in "the near future".[161]

The OTP's choice of terminology is once again at fault. The near future was somewhat distant from the 12 months it took the OTP to issue its decision. Moreover, it seems impossible to distinguish between an imminent decision and one that will be issued in the near future. The lack of updates between reports was also not helpful. The OTP should increase its efforts to provide more timely and accurate information, along with reliable forecasts. These examples serve to explain why transparency must be consistently demonstrated and statements supported by actions.

As we have seen, the OTP routinely reports on situations under examination even in the absence of a formal requirement. Although transparency is always desirable, it has to be the right kind and balanced out against other values such as the need to maintain confidentiality, the need to maintain credibility and the need to maintain the trust of States. If the intention of the OTP in publicising its preliminary examination activities is to send a particular message – to prevent crimes, encourage national prosecutions or to impact in some other way the situation that it is considering – then the OTP should reflect on what are the most appropriate

substantial reasons to believe that an investigation would not serve the interests of justice prior to making a decision on whether to seek authorization from the Pre-Trial Chamber to open an investigation". With just one week apart the 2016 OTP Report on Preliminary Examination Activities indicated convincingly that a final decision to seek authorisation to investigate in the situation in Afghanistan was 'imminent'.

159 Although the OTP appealed the PTC decision it was still adjudicated before the issuance of the 2015 report.

160 OTP, *Report on Preliminary Examination Activities*, para. 20, see *supra* note 25.

161 OTP, *Report on Preliminary Examination Activities*, para. 331, see *supra* note 25.

means to achieve its goals. For example, resorting to quiet diplomacy. When it comes to reporting to the public at large the information should serve to update on the situation by presenting factual and legal findings that are relevant to the decision to proceed or not with an investigation. Anything different or divorced from reality is negligent and may even constitute a breach of the Prosecutor's duty of care as a global public figure.

During the preliminary examination stage, the OTP handles information that is both sensitive and inconclusive, making it premature to share with the general public given the adverse impacts for the States concerned. Under these circumstances, channels of communication should be limited to main stakeholders, such as the senders of information and concerned States, until the moment the OTP is truly in a position to announce its decision to proceed or not with an investigation. This should not be read as a statement against transparency. What the author is advocating for is a more meaningful transparency and that thoughtful consideration be given to what is publicised when a situation is under examination through a proper balancing of all the interests involved.

24.4.1.2. Raising Public Awareness

Structurally, within international courts or tribunals, external relations and raising public awareness about the work of the Court is a function that is mainly carried out by the Registry through outreach activities. However, prosecutors also have a valuable role to play in raising awareness and educating the public about their work, which is separate and independent from the work of the Court as such. Efforts must be made to ensure that the work of the Prosecutor is not only known but also understood by the societies on whose behalf he or she acts.

Under the regulatory framework of the Court, the OTP has a mandate relating to public information and outreach in general.[162] So far, the

[162] Pursuant to Regulation 15, the Office shall disseminate information on its activities to, and respond to enquiries from States, international organisations, victims, non-governmental organisations and the general public, with a particular focus on the communities affected by the work of the Office, as appropriate in coordination with the Registry. In doing so, the Office shall at all times ensure compliance with its statutory obligations and the decisions of the Chambers regarding confidentiality, and the safety and well-being of victims, witnesses, Office staff and other persons at risk on account of their interaction with the Court.

Office has focused most of its attention on increasing the visibility of its preliminary examination activities. On several occasions, the OTP has stressed the benefits that awareness of ICC scrutiny can have: "[T]he announcement of ICC activities can have a preventive impact. The mere monitoring of a situation can deter future crimes. It increases the risk of punishment even before trials begin. This effect is not limited to the situation under investigation but extends to all State Parties and reverberates worldwide".[163] However, this comes with particular challenges regarding the impartiality and role of the Prosecutor, as envisaged in the Rome Statute.

The Office is employing its monitoring of situations and subsequent public statements, as a form of targeted deterrence in situations where it appears that a recurrence of crimes is likely.[164] Promoting preliminary examination activities in this way can be counterproductive and to the detriment of the main functions of the OTP – investigations and prosecutions. Paragraph 95 of the 2013 Policy Paper underscores that "such information provided to the public will enable the Office to carry out its mandate without raising undue expectations that an investigation will necessarily be opened, while at the same time encouraging genuine national proceedings and contributing towards the prevention of crimes". The reality is that publicising this information has achieved the opposite. The policy of the Prosecutor to use preliminary examinations for other purposes is well intentioned but, as will be explained below, is simply not working.

It adds that the Office shall contribute to the Court's outreach strategies and activities. OTP Regulations, see *supra* note 15.

[163] Under ICC, Office of the Prosecutor, *Report on Prosecutorial Strategy*, 14 September 2006, p. 6 (http://www.legal-tools.org/doc/6e3bf4/): "The third principle [i]s to maximize the impact of the activities of the Office. As noted in the Preamble of the Statute, the Court has a role in contributing to the prevention of future crimes. The Office has to maximize the impact of each of its activities, from the analysis of the information, to the beginning of the investigation, to the trial and eventual conviction. Massive crimes are planned; the announcement of an investigation could have a preventative impact. The mere monitoring of a situation could deter future crimes from being committed. It increases the risk of punishment even before trials have begun. Interestingly, this effect is not limited to the situation under investigation but extends to different countries around the world".

[164] Bosco, 2013, p. 181, see *supra* note 70.

In 2009, the OTP incorporated into its Prosecutorial Strategy document the goal of prevention through public monitoring, indicating that the Office would "make preventive statements noting that crimes possibly falling within the jurisdiction of the Court are being committed" and "make public the commencement of a preliminary examination at the earliest possible stage through press releases and public statements".[165] This preventative goal is also one of the three policy objectives contained in the 2013 Policy Paper establishing that the Office may also issue public, preventive statements in order to deter the escalation of violence and the further commission of crimes, to put perpetrators on notice that they may be held to account.[166]

This policy objective has led the OTP to issue several 'early warnings' and strongly-worded statements directed to States and to perpetrators. In situations where conflict has broken out abruptly, the OTP has signalled to combatants that it is scrutinising events, a clear attempt to use its influence to alter the conduct of hostilities. When fighting erupted between Georgian and Russian forces in August 2008, the OTP released a statement indicating that it was analysing alleged crimes committed during combat operations.[167] Just two days after a massacre at a refugee camp in Uganda, the Prosecutor released a statement indicating his intent to investigate, which could also be seen as an effort to assure the affected Ugandan communities that revenge attacks were unnecessary and to thereby help prevent a spiral of violence.[168] The Prosecutor also condemned the killing of seven United Nations peacekeepers from Tanzania and the wounding of 17 military and police personnel of the African Union–United Nations Hybrid Operation in Darfur ('UNAMID') on 13 July 2013 in South Darfur. The statement provided a strong reminder that attacks against peacekeepers may constitute war crimes.[169]

[165] OTP, Prosecutorial Strategy 2009-2012, para. 39 see *supra* note 75.

[166] OTP, *Policy Paper on Preliminary Examinations*, para. 106, see *supra* note 2.

[167] ICC OTP, ICC Prosecutor confirms situation in Georgia under analysis, 20 August 2008, ICC-OTP-20080820-PR346 (http://www.legal-tools.org/doc/1e947b/).

[168] ICC OTP, Statement by the Prosecutor related to crimes committed in Barlonya Camp, Uganda, 23 February 2004 (http://www.legal-tools.org/doc/022076/).

[169] ICC OTP, Statement of the ICC Prosecutor: Attacks against peacekeepers may constitute war crimes, 19 July 2013 (http://www.legal-tools.org/doc/ac9487/).

The OTP has also adopted the practice of issuing statements related to electoral violence such as with Kenya, Guinea, CAR and Burundi.[170] Some of these statements have been pre-emptive and others *post-facto*. In Nigeria, the Prosecutor warned ahead of elections that: "Any person who incites or engages in acts of violence encouraging or contributing to the commission of crimes that fall within ICC's jurisdiction – is liable to prosecution; either by Nigerian Courts or by the ICC".[171] Conversely, when violence broke out in Côte d'Ivoire after a disputed election, the Prosecutor publicly warned one individual that his incitements to violence might be prosecuted.[172] On this point, the United Nations Secretary-General has recognised that carefully monitoring electoral processes in ICC situation countries may help prevent large-scale violence resulting from elections by putting would-be violators on notice that impunity is not assured.[173]

Another striking example where the OTP tried to exert pressure is in relation to the situation in the Philippines.[174] On 13 October 2016, the Prosecutor expressed concerns over alleged extra-judicial killings and vowed to closely follow developments "in the Philippines in the weeks to come and record any instance of incitement or resort to violence with a

[170] ICC OTP, Prosecutor reaffirms that the situation in Kenya is monitored by his office, 11 February 2009 (http://www.legal-tools.org/doc/acbb26); ICC OTP, Statement of the ICC Prosecutor Statement on the occasion of the 28 September 2013 elections in Guinea, 27 September 2013 (http://www.legal-tools.org/doc/96982f/); Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, ahead of general elections in the Central African Republic: "we will record any instance of violence or incitement to violence", 23 December 2015 (http://www.legal-tools.org/doc/b1e153/); ICC OTP, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, regarding the recent pre-election violence in Burundi, 8 May 2015 (http://www.legal-tools.org/doc/db08e6/).

[171] ICC OTP, Statement by the Prosecutor of the International Criminal Court, Fatou Bensouda, ahead of elections in Nigeria: "I reiterate my call to refrain from violence", 16 March 2015 (http://www.legal-tools.org/doc/db08e6/).

[172] ICC OTP, Statement by ICC Prosecutor Luis Moreno-Ocampo on the situation in Côte d'Ivoire, 21 December 2010, ICC-OTP-20101221-PR617 (http://www.legal-tools.org/doc/3ffcf8/).

[173] Report of the Secretary-General, The rule of law and transitional justice in conflict and post-conflict societies, 23 August 2004, S/2004/616, para. 49 (http://www.legal-tools.org/doc/77bebf/).

[174] ICC OTP, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda concerning the situation in the Republic of the Philippines, 13 October 2016 (http://www.legal-tools.org/doc/bbc78e/).

view to assessing whether a preliminary examination into the situation of the Philippines needs to be opened". The statement expressly referred to high-level officials condoning or encouraging such actions, which included the Head of State of the Philippines. Interestingly it referred to a figure of over 3,000 deaths in three months, while clarifying that a preliminary examination had not yet taken place. Presumably, this alarming figure would be enough to conduct a preliminary examination in accordance with the duty to analyse the seriousness of the information communicated to the Office. How can the Prosecutor issue statements containing details it has not yet assessed? Why announce close scrutiny in the weeks to come to assess the need to conduct a preliminary examination, but then take 16 months - until February 2018 - to follow through?

The statement concerning the so-called Islamic State of Iraq and al-Sham/Greater Syria ('ISIS', also known as 'ISIL', 'Daesh' or 'IS')[175] was quite unique because it served as a clarification in response to criticism for not taking any action with respect to alleged crimes committed by this entity. After a careful reading of the statement, it seems to imply that a preliminary examination was carried out. In the statement, the Prosecutor claims to have jurisdiction but that the prospects of the OTP investigating and prosecuting those most responsible, within the leadership of ISIS, is limited because it involves nationals from two non-States Parties. The statement confirms the receipt of communications concerning the commission of crimes against humanity and war crimes by members of ISIS involving nationals from States Parties. The Prosecutor nevertheless concludes that: "[t]he jurisdictional basis for opening a preliminary examination into this situation is too narrow at this stage" taking into account OTP policy, which is to focus on those most responsible for mass crimes.[176]

[175] ICC OTP, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the alleged crimes committed by ISIS, 8 April 2015 (http://www.legal-tools.org/doc/b1d672/).

[176] The contradiction lies in the OTP's reliance on its prosecutorial strategy as an obstacle to proceeding further. At that time the OTP in both Strategic Plans 2012–2015 and 2016–2018 had already shifted its policy through a strategy of gradually building upwards. By then the OTP had already recognised that it might need "first to investigate and prosecute a limited number of mid- and high-level perpetrators in order to ultimately have a reasonable prospect of conviction for the most responsible. Moreover that the Office would also consider prosecuting lower level perpetrators where their conduct has been particularly grave and has acquired extensive notoriety". The ISIS situation seems to fall within this policy

Unfortunately, this statement by the Prosecutor did not succeed in clarifying why not even a preliminary examination could be carried out, if indeed it had not been, given that the statement itself confirmed that there was enough information to do so. Instead the statement reads as an excuse for not fulfilling the Prosecutor's statutory duties. As well as an encouragement to those States Parties whose nationals allegedly committed crimes to fulfil their primary duty to investigate and prosecute.

The Prosecutor's strategy of issuing statements that threaten to 'open' a preliminary examination, or statements asserting that a situation is being monitored without a real intention to examine the situation, has muddied the waters further with respect to understanding the preliminary examination process. The Prosecutor is clearly using the powers to conduct preliminary examinations in ways that relate more to the OTP's policy objectives of prevention and deterrence or encouraging national proceedings, than to the task of determining whether a reasonable basis exists to open an investigation. Regardless of the Prosecutor's motives, any public statement issued by the Prosecutor should be strategically-framed if it is to be effective. Statements also present some advantages over reports, allowing for more timely and frequent messaging, whereas reports are lengthy and less adjustable given their annual cycles.

In 2015 the Prosecutor offered to assess the preventive impact of preliminary examination activities, though no methodology to do so has been developed so far.[177] Without convincing evidence that the Prosecutor's statements have a preventive or deterrent impact on crimes, it is premature to attribute so much value to this objective. It would be safer to collect more data in this regard.

and therefore should not have prevented the OTP from pursuing investigations or should have at least made the Prosecutor hesitate before issuing such a statement.

[177] OTP, Strategic Plan 2016-2018, para. 54(3), see *supra* note 1. "Preliminary examinations can also help deter actual or would-be perpetrators of crimes through the threat of international prosecutions. In accordance with its policy, the Office will seek to perform an early warning function by systematically and proactively collecting open source information on alleged crimes that could fall within the jurisdiction of the Court. The Office will also react promptly to upsurges or serious risks of violence by reinforcing early interaction with States, international, regional organisations and non- governmental organisations in order to fine-tune its assessment and coordinate next steps. Such steps may include field visits, public statements and media interviews. *The Office will further develop criteria for guiding such preventive activities*".

24.4.2. Secondary Reasons

It is conceivable that the OTP has secondary reasons for publicising its activities on situations under examination, for example, to mitigate criticism of perceived bias, insufficient workload or marginal outcomes, which will be considered in the following section.

24.4.2.1. To Counter Claims of Geographical Imbalance

The ICC has been consistently characterised by the African Union[178] as anti-African.[179] The alternative position is that the ICC is not unfairly targeting Africans; rather, it is simply and properly targeting alleged war criminals.[180] Pursuant to the 2013 Policy Paper, factors such as geopolitical implications or geographical balance are not statutory criteria or

[178] Of the 60 ratifications needed for the ICC to begin operations in 2002, 34 – of the continent's 55 nations – were African.

[179] Tense relations between African nations and the ICC likely began in 2005 when the UNSC referred the situation in Darfur to the ICC Prosecutor. The African Union called upon its Member States to adopt a policy of non-cooperation in relation to the ICC. See Decision on the Implementation of the Decisions on the International Criminal Court, Doc. EX.CL/639(XVIII), January 2011 (http://www.legal-tools.org/doc/2592b6/); Decision on the Implementation of the Assembly Decisions on the International Criminal Court, Doc. EX.CL/670(XIX), July 2011(http://www.legal-tools.org/doc/3b767f/); Decision on the Progress Report of the Commission on the Implementation of the Assembly Decisions on the International Criminal Court, Doc. EX.CL/710(XX), January 2012 (http://www.legal-tools.org/doc/d20b02/); Decision on the Implementation of the Decisions on the International Criminal Court- Doc. EX.CL/731(XXI), July 2012 (http://www.legal-tools.org/doc/76d96e/); Decision on International Jurisdiction, Justice and The International Criminal Court Doc. Assembly/AU/13(XXI) [Reservation by Botswana to the entire decision], May 2013 (http://www.legal-tools.org/doc/474c18/); Decision on the Progress Report of the Commission on the Implementation of the Decisions on the International Criminal Court Doc. Assembly/AU/13(XXII), January 2014 (http://www.legal-tools.org/doc/8fa4ae/); Decision on the Progress Report of the Commission on the Implementation of Previous Decisions on the International Criminal Court (ICC), Doc. Assembly/AU/18(XXIV), January 2015 (http://www.legal-tools.org/doc/263bf4/); Decision on the Update of the Commission on the Implementation of Previous Decisions on the International Criminal Court, Assembly/AU/Dec.586(XXV), June 2015 (http://www.legal-tools.org/doc/72bc7a/); Decision on the International Criminal Court Doc. EX.CL/987(XXIX), July 2016 (http://www.legal-tools.org/doc/e48950/); Decision on the International Criminal Court (ICC) – Doc. EX.CL/1006(XXX), January 2017 (http://www.legal-tools.org/doc/9645bf/). See also Decision on Africa's Relationship with the International Criminal Court adopted at the Extraordinary African Union Summit of 13 October 2013, *infra* note 188.

[180] W. Chadwick Austin and Michael Thieme, "Is the International Criminal Court Anti-African?", in *Journal Peace Review*, 2016, vol. 28, no. 3, p. 344.

relevant for a determination that a situation shall be investigated by the Court.[181] To examine the validity of allegations of racial selection, it is worth considering how cases make their way to the Court, the process used in selecting them, including whether or not the ICC has inappropriately refused to investigate other comparable offences committed on other continents, and finally, the motivations of those claiming a racial bias in the African Union.[182]

The majority of investigations and prosecutions concerning African States before the ICC have arisen from self-referrals by African States, including acceptance of the Court's *ad hoc* jurisdiction and Security Council referrals. Three African investigations have been initiated by the Prosecutor. Kenya was the first, and only after the Court ruled that domestic action by the Kenyan authorities was insufficient.[183] The 2008 post-election violence in Kenya was the subject of a preliminary examination for less than two years before the Prosecutor sought permission to open an investigation in November 2009.[184] During that period, the Prosecutor visited Kenya and made numerous public statements about the situation.[185] What followed during the investigation and prosecution stages

[181] OTP, *Policy Paper on Preliminary Examinations*, para.11 and 29, see *supra* note 2.

[182] On this last point see Austin and Thieme, 2016, pp. 342–343, see *supra* note 180.

[183] ICC, Situation in Kenya, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute', 30 August 2011, ICC-01/09-01/11-307 (http://www.legal-tools.org/doc/ac5d46/).

[184] The situation in Kenya was under examination since 27 December 2007 until the moment the Prosecutor requested authorisation to proceed with an investigation on 26 November 2009. The *proprio motu* investigation was opened on 31 March 2010.

[185] The Prosecutor pledged that "[w]e will do justice, we will work together to avoid a repetition of the crimes […] It has been two years since the post election violence in Kenya. In two years another election is planned. The world is watching Kenya and this Court". He later stressed that the court would try to proceed on a timetable that could maximise the chances for prevention. "Everyone is worried about the next election in Kenya in 2012", he told the press. "That's why I understand the importance of speed, and I am working to be sure that during 2010 – if the judges authorize investigations – we will be able to complete investigations and to define who are the suspects, who are the accused, that have to have justice in Kenya. And that will clean the situation [so] that you can have peaceful election [seasons] in 2011 and 2012". Voice of America News, "ICC Prosecutor Promises Speed in Kenya Proceedings", 7 November 2009.

with Kenya became one of the most political[186] and legally challenging cases at the ICC.[187] It also led to the Court's biggest confrontation and hostility with the African Union and its members.[188]

While the Kenya situation clearly demonstrated the politically volatile nature of cases dealing with international crimes, the predicament for the ICC is that every situation it is called upon to deal with will contain politically volatile elements. However, an overarching goal of international criminal courts is justice for victims of crimes, which should never be sacrificed at the altar of political expediency. On the dividing line between the political and the legal, the decision to investigate and prosecute is particularly sensitive. Time and again, ICC Prosecutors have strongly affirmed: "I follow the evidence not politics".[189] Sadly, the Prosecutor's actions have belied this assertion and what we have seen until recently is the OTP doing its best to avoid taking difficult decisions because of political sensitivities. In the early years, the OTP strongly relied on self-

[186] In 2013 the Security Council voted on a resolution presented by Rwanda calling for the deferral of the cases involving the President and Deputy President of Kenya. This resolution did not receive the necessary nine affirmative votes with seven members in favour and eight abstaining. This jurisdictional coup failed, but the attempt clearly demonstrated the concern of many African nations.

[187] See interview with Deputy Prosecutor, James Stewart, remarks on the Kenya cases in the *Justice in Conflict* blog, "A Test of Our Resilience – An Interview with the ICC Deputy Prosecutor", 10 August 2016.

[188] The 2013 Decision on Africa's Relationship with the ICC adopted the ruling of the Extraordinary Assembly of the African Union condemning the ICC's investigations of African political leaders and its impact on reconciliation and reconstruction efforts. First, the Assembly called for the cessation of any existing charges or future charges against any Serving African Union Heads of State or government. Second, that the trials of President Uhuru Kenyatta and Deputy President William Samoei Ruto should be suspended until they complete their terms of office. Third, that Kenya should send a letter to the UN Security Council seeking deferral, pursuant to Article 15 of the Rome Statute, of the proceedings against the President and Deputy President of Kenya; and fourth, that President Uhuru Kenyatta would not appear before the ICC until such concerns raised by the African Union and its Member States have been adequately addressed by the UN Security Council and the ICC.

[189] International Peace Institute, "Moreno-Ocampo: "I Follow Evidence, Not Politics"", 20 January 2012 (available on the Institute's web site). *BBC HARDtalk*, "ICC "following" Afghan war crimes claims", 29 June 2017: Fatou Bensouda stated, "I'm following the evidence, I'm following the law". See also interview with Prosecutor, Fatou Bensouda, in the *Justice in Conflict* blog, "Without Fear or Favour – An Interview with the ICC Prosecutor Fatou Bensouda", 15 October 2015.

referrals,[190] because it made it easier to open an investigation and in principle secure co-operation from the referring State. Indeed, for the most part, self-referrals from States are situations referred by States that are willing but not able to carry out their own investigations and prosecutions.[191] As such, these situations appeared obvious and initially no one questioned the Prosecutor's legitimacy in taking up these cases. Other situations have put the OTP's capabilities to the test, for example, the Iraq/UK situation involving a State Party that appears to be both willing and able to handle the situation. Under these circumstances, the legitimacy of the OTP's actions is questionable.

There is no doubt from the list of countries under preliminary examination that the Court has looked beyond Africa in the conduct of these activities. To exemplify the geographical diversity of situations under preliminary examination, the OTP has increased their publicity through statements, reports and other media related activities. This in turn has also highlighted the fact that some of these situations have been under preliminary examination for over a decade. The longer each non-African situation continues to languish in the preliminary examination stage, the more it becomes visible that situations arising from other geographical regions are treated in a vastly different fashion from those arising from Africa. African situations are dealt with swiftly while non-African cases remain stagnant. Disparate timelines between preliminary examinations also lead to the impression that the Prosecutor allocates time and resources unevenly among situations. Not only are unequal classes of preliminary examinations created, but it also makes the OTP come across as if it is the one that is not *willing and able* to move forward. Perhaps the Prosecutor is simply not willing, because it does not want the political backlash in circumstances where the ICC remains a fragile institution, and is unable, because it does not have the investigative capacity to do so. Ironically, in Rome the fears regarding the Prosecutor's *proprio motu* powers were based on

[190] The Draft Policy Paper on Preliminary Examinations encourages self-referrals. This explicit reference was not retained in the revised 2013 Policy Paper although it was not removed completely. OTP, *Draft Policy Paper on Preliminary Examinations*, paras. 16 and 76–78, see *supra* note 17.

[191] At least appearing to be willing. Uganda, a State Party used the Court for its own political purposes securing a one-sided investigation. However, it later withdrew its support for the Lord's Resistance Army investigation because of its impact on the peace process.

the belief that there would be too much activity.[192] And after more than 15 years of operations, victims of crimes falling under the jurisdiction of the Rome Statute in places other than Africa, in situations other than those arising from self-referrals, deserve more than public statements of concern with their plight. They deserve action.

Publicising information about preliminary examinations allows the Prosecutor to showcase geographical diversity. It is also a way of demonstrating that the Prosecutor is committed to following the evidence and is not primarily influenced by political sensitivities in the selection of situations. In this respect, the Prosecutor took bold steps in January 2016 by requesting the opening of its first non-African investigation into the situation in Georgia where the Russian Federation (non-Party) is involved.[193] Similarly, after more than a decade in November 2017, the OTP requested authorisation to open an investigation in Afghanistan, which includes alleged crimes committed by nationals from the United States (non-Party). If we then look at the list of situations under preliminary examinations we find it includes Iraq (non-Party) concerning the United Kingdom, and Palestine concerning Israel (non-Party). Currently it would appear that the OTP is prepared to take on powerful States, even very powerful non-Party States.

24.4.2.2. Perception of Productivity

According to the OTP, preliminary examination activities constitute one of the most cost-effective ways for the Office to fulfil the Court's mission.[194] It is unclear what the basis for this assertion is and how effective or productive preliminary examinations are in relation to their cost. It is also not apparent how the relative costs and outcomes of a preliminary examination compare to different courses of action undertaken by the OTP. On the ICC website, the OTP notes that it enjoys the following options

[192] Insofar as *proprio motu* investigations by the Prosecutor are concerned, both proponents and opponents of the idea feared the risk of politicising the Court and thereby undermining its "credibility". In particular, they feared that providing the Prosecutor with such "excessive powers" to trigger the jurisdiction of the Court might result in its abuse. See Report of the Preparatory Committee on the Establishment of an International Criminal Court, 1996, see *supra* note 11.

[193] Situation in Georgia, Decision on the Prosecutor's request for authorisation of an investigation, see *supra* note 62.

[194] OTP, *Report on Preliminary Examination Activities*, para. 16, see *supra* note 25.

when it comes to preliminary examinations:[195] (1) decline to initiate an investigation; (2) continue to collect information on crimes and relevant national proceedings in order to make a determination as to whether to initiate an investigation; or (3) initiate the investigation, subject to judicial authorisation as appropriate.

This is a generous interpretation of the Rome Statute given that the main function of a preliminary examination is to determine whether there is a reasonable basis to initiate an investigation. Notably, this determination results from the same analytical consideration and represents the potential outcome and not choices on how to proceed. Hence, to interpret the procedure of preliminary examinations as authorising the Prosecutor to monitor national proceedings or gather information for an indefinite period of time in order to amass the necessary legal and factual basis before making a determination is unsubstantiated. Under the Rome Statute, the Prosecutor has a positive duty to seriously examine all information that is communicated to it and the relatively low threshold that needs to be satisfied for the Prosecutor to make a determination cannot justify lengthy examinations. Nor does the long-term collation of information lend itself to cost-effectiveness. The OTP has at least a dozen dedicated analysts working exclusively on preliminary examinations and carries out several on-site missions to monitor situations. It is still hard to imagine what the Situation Analysis Unit can really do with the information received from the IEU[196] considering its limited non-investigative role.

Another aspect is how preliminary examinations are regarded in the context of the Prosecutor's functions.[197] The Prosecutor considers prelim-

[195] See OTP, "Preliminary Examinations" (available on the Office's web site).

[196] The Information and Evidence Unit ('IEU') is entrusted with preparing reports analysing the communications received. The reports are sent to Jurisdiction, Complementarity and Cooperation Division. The reports are supposed to identify: (a) those communications that manifestly do not provide any basis for the Office of the Prosecutor to take further action; (b) those communications that appear to relate to a situation already under analysis, investigation or prosecution; and (c) those communications warranting further analysis in order to assess whether further action may be appropriate.

[197] OTP, Strategic Plan 2016-2018, see *supra* note 1; see also remarks by Prosecutor Fatou Bensouda at the Fourteenth Session of the Assembly of States Parties on the occasion of the Launch of the 2015 Annual Report on Preliminary Examination Activities: "Preliminary examinations are one of my Office's three core activities, alongside investigations and prosecutions. It is an activity I am required to conduct under the Statute, through which I

inary examinations to be one of the Office's core activities. This is agreeable to the extent that preliminary examinations are conducted in accordance with how they are envisaged under the Rome Statute, that is, they can arguably be cost-effective if used to determine whether or not to open an investigation. But, when preliminary examinations are used for purposes beyond what was intended, then the notion that they are cost-effective withers. They actually increase the costs associated with them and make measuring their effectiveness impossible. Some of the recurring tensions between the Court and States Parties are due to a perceived disproportion between the growth of the Court's budget and its results. Undeniably, preliminary examinations allow the OTP to substantiate its workload in a manner that is discernible, complemented by comprehensive reports and frequent public statements. Preliminary examinations are also significant because they constitute the genesis of the OTP budget even though they are a poor basis for budget requests, given that not all preliminary examinations are made public and that some have remained stagnant for well over a decade.

The OTP maintains a public list on the ICC website with a fixed number of situations under examination. Once a preliminary examination advances to the investigation stage, another preliminary examination is added to the list. The tally currently stands at 10.[198] This idea of having a target number of preliminary examinations invites inaction, even where there is no reasonable basis to initiate an investigation. And keeping the list full allows for a perception of productivity.

In this regard, unless preliminary examinations are used more effectively and in the way intended by the Rome Statute, there is a risk that they will be seen as an instrument of perceived productivity to beguile States Parties. While there are many perspectives on how the OTP can demonstrate its productivity, at the very least it should be demonstrated in a way that resonates with the expectations of an international court. Under the Rome Statute, the Prosecutor is expected to establish the truth and to do so efficiently through the investigation and prosecution of cases based on solid evidentiary grounds. An efficient and focused approach to pre-

decide whether to open new investigations". Remarks by Prosecutor Fatou Bensouda at the Fourteenth Session of the Assembly of States Parties, 2015, see *supra* note 85.

198 Preliminary Examinations, ICC website, see *supra* note 90.

liminary examinations, including reasonable time-frames for determining investigations in all situations, would be one step towards demonstrating concrete productivity. In those cases where productivity is contingent upon resource requirements, the onus lies on the OTP to be more forthcoming regarding its needs. It would then be up to States Parties to ensure the Office is equipped to deliver in a timely manner.

24.5. Consequences of Publicising Preliminary Examination Activities

It is generally accepted that preliminary examinations produce effects of their own and that they have had some unforeseen successes. We have seen this effect in the situation of Colombia where national authorities have demonstrated their commitment to the prosecution of their own nationals albeit under the constant watch of the Prosecutor. We have also seen this in the situation of Iraq where the United Kingdom was very quick to affirm its own commitment to the prosecution of its nationals following the Prosecutor's conspicuous announcement of a 're-opening' of the preliminary examination. Undeniably, there is some attractiveness about the idea that, as a result of extending preliminary examinations, States will undertake their own investigations, relieving the burden from the ICC, which is meant to be a court of last resort and is an institution of limited resources. However, the practice of protracted preliminary examinations reduces their impact, derogates from their intended purpose under the Rome Statute and undermines the trust of States Parties, especially those under the OTP's scrutiny.

As such, publicising preliminary examinations has consequences, intended and unintended, positive and negative. The OTP would do well to consider all the factors in play before making a decision to publish its intention to conduct a preliminary investigation.

24.5.1. Positive Consequences

While preliminary examinations do provide a potential avenue for the Court to have a greater impact outside the courtroom, any positive consequences can be undermined by an inconsistent approach to preliminary examinations.

24.5.1.1. Prevention and Deterrence

Prevention of serious international crimes is one of the Court's ancillary objectives.[199] As we have seen, the Prosecutor's public approach towards preliminary examinations broadens the sphere of influence outside the OTP's main function. Publicising preliminary examinations can increase the potential for progress regarding accountability for violations committed during situations of armed conflicts and internal disturbances, though this potential is not always realised. While the Court and the OTP are expected to contribute to the prevention of crimes, they do not to actually have to achieve it.[200]

Also, prevention is a much broader concept than deterrence; it is about sending messages to States not just perpetrators.[201] This is particularly relevant because the preliminary examination stage only entails a general analysis of situations. Whereas deterrence relates more closely to individuals, which are at the periphery of preliminary examinations. Some authors suggest that it is the increased likelihood of accountability, rather than the severity of the punishment, that deters criminal activity.[202]

Prevention and deterrence are intangible, which makes it extremely difficult to ascertain whether preliminary examinations effectively modify

[199] Beth Simmons and Allison Danner argue that the mere ratification of the Rome Statute by a government tends to be correlated with a pause in civil war hostilities. Accepting the Court's jurisdiction presents an opportunity for governments to make costly, credible commitments to peace. According to their research they have also found that the expectation of accountability is sufficient enough that some states will not join the Rome Statute in the first place. See Beth Simmons and Alison Danner, "Credible commitments and the International Criminal Court", in *International Organization*, 2010, vol. 64 no. 2, pp. 225–256.

[200] As the ICC's first President, Philippe Kirsch, said, "By putting potential perpetrators on notice that they may be tried before the Court, the ICC is intended to contribute to the deterrence of these crimes", in Courtney Hillebrecht, "The Deterrent Effects of the International Criminal Court: Evidence from Libya", in *International Interactions*, 2016, vol. 42, no. 4, p. 616.

[201] On the various stigmatizing features of international criminal law, see Frédéric Mégret, "Practices of Stigmatization", 2014 (on file with the author).

[202] Aaron Chalfin and Justin McCrary, "Criminal Deterrence: A review of the literature", in *Journal of Economic Literature*, 2017, vol. 55, no. 1, p. 5; Hunjoon Kim and Kathryn Sikkink, "Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries", in *International Studies Quarterly*, 2010, vol. 54, no. 4, p. 939–963. It should be noted that these authors focus on deterrence in relation to national criminal proceedings.

behaviour or prevent behavioural changes. To some, preliminary examinations act as buffers that stand in the way of ICC investigations, allowing some States to feel at ease with the *status quo*, thinking that nothing will change, particularly as time passes. Accordingly, no matter how powerful the effect of the ICC threat through an initial public statement, it is likely to diminish over time if the preliminary examination process does not lead to any outcome or is perceived as not leading to anything concrete. In fact, an informal proceeding intended to be preliminary that goes on for a protracted period runs contrary to any possible prevention/deterrent effect the institution may have. Unfortunately, protracted preliminary examinations that imply a threat to investigate more often than not simply contribute to perpetuating crimes and promoting impunity. This will likely be factored in by the State in question only if there is a credible threat to actually investigate.[203]

Due to the elusive nature of prevention/deterrence, the OTP would do well to accord less attention to it and focus on actually carrying out investigations where a preliminary examination suggests they should do so. This is mostly so given the difficulty in measuring whether changes in behaviour are attributable to actions or policies of the Court. The prevention/deterrence of crime does not rest on the shoulders of a single institution, much less a judicial one. Prevention should be viewed as a systemic and long-term goal, relying more on non-judicial institutions, such as the United Nations, the Office of the High Commissioner for Human Rights and NGOs.

If we take a look at the preliminary examination in Guinea, now under Phase 3, and ongoing since 14 October 2009 following the violent events of 28 September 2009, it seems to have produced some positive

[203] States Parties have addressed deterrence in the context of the peace and justice debate. "For justice to have an impact, the most important condition is that justice follows its own rules, without interference and without being subject to political considerations. Justice contributes to peace and prevention when it is not conceived as an instrument of either, and on condition that it is pursued for its own sake. If the ICC is contemplated simply as a lever, it will be undermined, as some will expect it to be turned on and off as political circumstances dictate. […]. The ICC would lose legitimacy, which is its strength, and be of little value to peace as perpetrators can also play the game of carrots and sticks. Certainty that law will be applied is the ultimate tool to ensure lasting peace". See Review Conference of the Rome Statute, "The Importance of Justice in Securing Peace", 30 May 2010, RC/ST/PJ/INF.3, paras. 26–27 (http://www.legal-tools.org/doc/5c0efe/).

effects. The national response was immediate prompting an investigation in 2010,[204] and with a trial in the horizon. The OTP moved this situation swiftly to Phase 3 without making public its Article 53(1) analysis. From the information publicly available, the OTP appears to have relied heavily on the findings of the United Nations Commission of Inquiry and the Guinean National Inquiry. Understanding the pace and rationale of the Guinean situation would provide more insight into the OTP's policy on preliminary examinations. Such is the case with the phased approach developed by the OTP. In the Guinea situation we can see it was applied in a linear fashion passing from one filtering phase to the next.[205] However, the Iraq/UK, Colombia and previously Burundi situations reveal a holistic application where the OTP simultaneously assesses subject-matter jurisdiction and admissibility in relation to alleged crimes.

To date, the OTP continues to assess the conduct of the preliminary examination and to encourage Guinean authorities to adhere to their commitment to complete the proceedings within the best possible deadline. It has also announced it will continue to engage with the international community and relevant partners to facilitate international assistance for the organisation of the trial phase.[206] This situation has remained under preliminary examination despite Guinea's significant steps in assuming its national responsibilities to investigate and prosecute the alleged crimes of 2009. For these reasons the situation in Guinea is considered by the OTP a successful example among preliminary examinations of their contribution to preventing/deterring the commission of crimes. Despite Guinea's positive response to the Prosecutor's preliminary examination, it is not evident that it is all due to the ICC. This can be explained by the fact that several accountability mechanisms have been involved in the situation from the

[204] On 8 February 2010, in accordance with the recommendations of the reports of the UN Commission and of the la Commission nationale d'enquête indépendante (CNEI), the Conakry Appeals Court General Prosecutor appointed three Guinean investigative judges to conduct a national investigation into the 28 September 2009 events. Considering the advanced stage of the investigation, during the reporting period, the Guinean authorities have publicly committed on several occasions their wish for a trial to take place in the near future, possibly early 2017.

[205] In the Nigeria Situation, the OTP's Article 5 Report is also useful in illustrating the phased approach applied in a linear fashion, see *supra* note 137.

[206] OTP, *Report on Preliminary Examination Activities*, para. 282–283, see *supra* note 25.

outset.[207] Naturally, if the ICC were to have a positive effect on national accountability efforts, it would be expected to be in relation to situations where the Court works with other actors.[208]

The Guinea situation seems ripe for removal from the list of situations under examination. This does not mean that the OTP should withdraw its support to the national authorities. It could remain engaged in other ways, just not under the umbrella of preliminary examinations.

24.5.1.2. Positive Complementarity

The Prosecutor has come to place particular emphasis on encouraging national investigations and prosecutions. The OTP adopted the term 'positive complementarity'[209] to describe the policy of actively encouraging investigations and prosecutions by national tribunals of crimes potentially falling under ICC jurisdiction.[210] The OTP has insisted for years that its

[207] For example, the UN International Commission of Inquiry for Guinea, CNEI set up by the Guinean authorities, and close follow-up by the UN Secretary-General, the UN Security Council, the European Union, the Economic Community of West African States and NGOs such as Human Rights Watch.

[208] For example, the ICC's involvement in Libya was also quite unique because it was initiated at the behest of the UN Security Council and accompanied by NATO-led military action against Qaddafi. Libya is also the only ICC situation in which significant international military intervention was contemporaneous to the ICC's investigations and indictments. These features set Libya apart from the other situations, but they also reflect the ICC's position within a larger international and national legal and political architecture meant to counter and deter atrocity crimes.

[209] See Address to the Assembly of States Parties 30 November 2007, Luis Moreno-Ocampo Prosecutor of the International Criminal Court: "States and NGOs have expressed an interest on what we call a positive approach to complementarity. My Office will shortly disseminate a concept paper based on our first years of experience". Also, the 2010 Draft Policy Paper on Preliminary Examinations asserts that 'positive complementarity' is based on the preamble and Article 93(10) of the Rome Statute and that this concept is distinct from the principle of complementarity set out in Article 17 of the Rome Statute: "At all phases of its preliminary examination activities, consistent with its policy of positive complementarity, the Office will seek to encourage where feasible genuine national investigations and prosecutions by the State(s) concerned and to cooperate with and provide assistance to such State(s) pursuant to article 93(10) of the Statute". The OTP noted that it had followed this approach with Colombia. OTP, *Draft Policy Paper on Preliminary Examinations*, paras. 93–94, see *supra* note 17.

[210] "The positive approach to complementarity means that the Office will encourage genuine national proceedings where possible, including in situation countries, relying on its various networks of cooperation, but without involving the Office directly in capacity building or

action in Colombia has been a determining factor in the fight against impunity in the country.[211] In political and academic events, Prosecutor Moreno-Ocampo presented the Colombian situation as an example of 'positive complementarity' in action.[212] Nevertheless, the preliminary examination in Colombia continues after more than a decade because national proceedings are ongoing and the Prosecutor has not finalised its assessment as to whether these proceedings are genuine. As mentioned previously, prolonged preliminary examinations weaken not only the Court's ability to deter crimes but also to encourage national proceedings.

The dynamic around admissibility, especially during a preliminary examination, is not always a positive one and can lead to tensions between governments and the Court. Occasionally one can also see an ironic parallelism between failings of the Court and failings in national proceedings. For example, if the Court is unable to protect witnesses in Kenya, then why should the Kenyan national authorities be expected to do so? If the OTP is permitted to sit on a preliminary examination for over a decade without opening an investigation, what is the standard of timeliness that State actions should be measured against? If the Court is unable to lead by example, then this inability impacts its effectiveness and the reasonableness of expectations it places upon national jurisdictions.

Similarly, it is not easy to establish causality when preliminary examination efforts are directed towards positive complementarity. In fact, it becomes quite challenging to gauge both short-term and long-term outcomes of the impact of preliminary examinations on national proceedings. Reforming national judicial systems takes time and is at odds with preliminary examinations, which are meant to be a transitory procedural step potentially leading to investigations. As for the need to wait for local developments to unfold, it does not seem practical, in the case of preliminary examinations, that the pace of local developments should determine

financial or technical assistance". See OTP, Prosecutorial Strategy 2009-2012, para.17, see *supra* note 75.

211 Paul Seils, "Putting Complementarity in its Place", in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015, p. 323. See also Keynote Speech by James Stewart, Deputy Prosecutor of the ICC, "Transitional Justice in Colombia and the role of the International Criminal Court", 13 May 2015 (http://www.legal-tools.org/doc/05d0ce/).

212 OTP, *Report on Preliminary Examination Activities*, para. 84, see *supra* note 94.

the pace of ICC processes. Moreover, the ICC's long-term preliminary examination engagement in situation countries eventually results in the development of relationships with national authorities that may call into question the OTP's impartiality. It is therefore erroneous to believe that the longer the situation remains under examination, the greater the leverage of the OTP on the State in question.[213]

Not even the most advanced societies and legal systems in the world are fully equipped to deal with Rome Statute crimes.[214] States Parties accept that enabling States to prosecute these grave crimes is essential in the fight against impunity given the limited resources of the Court. However, there is no consensus that it is the role of the OTP or the Court to ensure States are equipped to do so. The ICC is not a development agency and, while it can provide technical assistance to States, it does not have a capacity-building mandate. Accordingly, rather than trying to pursue efforts beyond the scope of the Prosecutor's mandate, the Prosecutor should make more use of Article 18.[215] Pursuant to this article, if atrocity crimes have allegedly been committed, and the OTP determines through a preliminary examination that there is a reasonable basis to proceed with an investigation, it would first reach out to the States of jurisdiction in the matter to allow them to respond to those crimes and bring the perpetrators to justice. If the notified State fails to take action in response to the notification, the Prosecutor can take steps under Article 18 to investigate and

[213] The OTP has explained that it will engage with national jurisdictions provided that it does not risk tainting any possible future admissibility proceedings. First of all, it is difficult to ascertain how the OTP can truly assess admissibility when at that juncture the examination process is dealing with situations and not cases. Technically all that is needed is that the alleged crimes are at least being investigated. More importantly where does this relationship stand when the engagement with national authorities develops for several years? What criteria does the OTP use to objectively assess admissibility?

[214] For example, European States have a Network of focal points in respect of persons responsible for genocide, crimes against humanity and war crimes. The aim of the Network is to facilitate cooperation and assistance between the Member States' investigation and prosecution authorities and to exchange information on criminal investigation and prosecution of persons suspected of having committed or participated in the commission of these crimes. In this forum, the national authorities also share investigative, prosecutorial and trial experiences involved with these crimes, related methods and best practices.

[215] Where there has been either a State Party referral or a *proprio motu* Prosecutor investigation, the Prosecutor is required to "notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned".

proceed to prosecute. A notification under Article 18 would send a stronger message to States than a long drawn out public preliminary examination, and is consistent with States' primacy in carrying out their own proceedings. Disappointingly, the 2013 Policy Paper undermines the potential of Article 18 in relation to preliminary examinations conducted under Article 15. According to the Policy Paper, once the OTP determines a reasonable basis to proceed to investigation exists, it will inform the relevant State(s) with jurisdiction of its determination and inquire whether they wish to refer the situation to the Court instead of resorting to Article 18's invitation to deal with the matter themselves.[216]

There is no doubt that the preliminary examination stage offers a first opportunity for the OTP to act as a catalyst for national proceedings. However, if the OTP is committed to stimulating credible national proceedings, it should avoid requesting States to refer the situation to it upon the determination that an investigation is warranted and as a means of securing 'easier' co-operation from that State in the conduct of ICC proceedings. If the OTP instead relied upon the provision of Article 18, the actual need for ICC intervention might be obviated. Such an approach would also underscore the nature of the ICC as a court of last resort, improve transparency and credibility, and foster co-operation with governments. It is envisaged that situation countries would certainly welcome an invitation pursuant to Article 18, which shows more respect for State primacy than a referral request.

24.5.2. Negative Consequences

The policy of using preliminary examinations as advocacy and political tools, along with their extensive publicity, has unfortunately produced unintended consequences, in part because of the dangers of publicising inconclusive results, but also due to the apparent absence of a communications strategy to guide the public profile of the OTP's work.

24.5.2.1. Withdrawals

In 2016, South Africa, Burundi and the Gambia initiated proceedings to withdraw from the Rome Statute.[217] For Burundi the public announcement

[216] OTP, *Policy Paper on Preliminary Examinations*, para. 98, see *supra* note 2.

[217] On 27 October 2016, Burundi deposited its instrument of withdrawal to the Rome Statute with the UN Secretary-General (http://www.legal-tools.org/doc/1bd37c/). On 12 October

that it was being placed under examination contributed to its decision to withdraw.[218] The three African States were joined on 16 November 2016 by the Russian Federation, a non-Party State, which said it was formally withdrawing its signature from the Rome Statute, a day after the OTP issued its preliminary examination activities report qualifying the Russian annexation of Crimea in 2014 as an occupation.[219] In 2018 the Philippines followed suit starting its withdrawal process after the OTP announced a preliminary examination was underway.

In the Burundi situation, it is difficult to assess what really drove this State to take such a measure. Taking into account the Burundian Government's decision to withdraw came at a time when the UN Human Rights Council adopted resolution 33/24, endorsing the United Nations Independent Investigation on Burundi ('UNIIB') report on "gross and abundant" human rights violations in the country between April 2015 and June 2016.[220] That same resolution also established a Commission of Inquiry on Burundi.[221]

2016, the Burundian Parliament voted in favour of Burundi's withdrawal from the Rome Statute and on 18 October, the President of Burundi signed off the bill. The Gambia also followed with a decision to withdraw on 10 November 2016 (http://www.legal-tools.org/doc/fa227a/). This action was later reversed on 10 February 2017 when the new Government took office that year, see Gambia: Withdrawal of Notification of Withdrawal (http://www.legal-tools.org/doc/5675c2/). South Africa was the first to deposit its instrument of withdrawal on 19 October 2016 (http://www.legal-tools.org/doc/9b2054/). On 7 March 2017, South Africa proceeded to withdraw its notification of withdrawal as well, see South Africa: Withdrawal of Notification of Withdrawal (http://www.legal-tools.org/doc/835fda/).

218 South Africa's Declaratory Statement on the Decision to Withdraw submits that there is also "[t]he perception of inequality and unfairness in the practice of the ICC that do not only emanate from the Court's relationship with the Security Council, but also by the perceived focus of the ICC on African states, notwithstanding clear evidence of violations by others". See Declaratory Statement of the Republic of South Africa on the decision to withdraw from the Rome Statute of the International Criminal Court, see *supra* note 217.

219 On 16 November 2016, the Russian Ministry of Foreign Affairs made the announcement on the orders of the President Vladimir Putin, saying the Court had failed to live up to hopes of the international community and denouncing its work as "one-sided and inefficient". See Russian Federation: Communication (http://www.legal-tools.org/doc/c9b51b/).

220 On 20 September 2016, the final report of the United Nations Independent Investigation on Burundi (UNIIB), established pursuant to Human Rights Council resolution S-24/1 on 17 December 2015, was issued as document A/HRC/33/37 (http://www.legal-tools.org/doc/82b600/). The report covers violations and abuses of human rights from 15 April 2015 to 30 June 2016. The recommended actions included the immediate setting up of an interna-

According to the Burundian authorities, the ICC Prosecutor ignored its duty of neutrality in making multiple statements directed against the Government by announcing the "opening of a preliminary examination based on false reports,[222] violating the sacrosanct principle of complementarity by intervening without first informing the Government what the treaty basis for such intervention was, which had a high potential of compromising on-going encouraging efforts by the Government to investigate and prosecute all the crimes within its national territory".[223]

In October, at the time of Burundi's withdrawal, the preliminary examination was under Phase 2 subject-matter assessment. In the subsequent preliminary examination activities report, the OTP provided no further updates on subject-matter jurisdiction or admissibility, despite substantial findings in this regard by the UNIIB.[224] It is important to note that the findings by the UNIIB were established using the "reasonable grounds to believe" standard of proof,[225] a higher threshold than that applied by the OTP when conducting preliminary examinations. With the availability of the UNIIB findings it is difficult to comprehend why at that moment the OTP was still only assessing whether it had subject-matter jurisdiction.

During the Assembly of States Parties general debate in 2016, Burundi criticised the fact that no established ICC policy or process existed, and claimed that verifying the actual fulfilment of the right of complementarity was an "inescapable stage before any publicised intervention of

tional commission of inquiry, the involvement of other independent international judicial processes and reconsideration of Burundi's membership on the Human Rights Council.

221 The Burundian Government rejected the resolution as inapplicable in Burundi in a press communiqué dated 3 October 2016. Immediately after on 10 October, the Government declared the three experts of the independent investigation on Burundi *personae non gratae* in Burundi. Later, on 11 October, the Government announced the suspension of all cooperation and collaboration with the Office of the High Commissioner for Human Rights office in Burundi for 'complicity' in preparing the report of the independent investigation on Burundi.

222 Interview with the Burundi Ambassador to the Kingdom of the Netherlands, "Why Burundi has withdrawn from the Rome Treaty", in *Diplomat Magazine*, 5 November 2016.

223 *Ibid.*

224 UNIIB Final Report, paras. 101–117, see *supra* note 219. Also, Recommendation 154: "In light of the ineffectual accountability institutions set up by the Government, independent international judicial processes must consider whether international crimes were committed".

225 *Ibid*., para. 17.

a preliminary examination".[226] Burundi pointed to the fact that "the November 2016 preliminary examination activities report did not contain any reliable information determining Burundi had failed to fulfil its complementarity obligations before a decision to begin a preliminary examination was taken". These arguments are not entirely unsubstantiated because in its report the OTP acknowledged receiving information on the work of investigative committees set up by the Burundian Prosecutor without saying a word regarding its significance. The report concludes by saying "the Office may also gather available information on relevant national proceedings at this stage of analysis".[227]

Surprisingly, the OTP offered comments to some parts of the UNIIB report, asserting that not all the killings could be attributed to Government security forces alone,[228] and that not all of the reported abuses and injuries could rise to the level of severity required to constitute other inhumane acts under Article 7(1)(k) of the Statute. The OTP noted also that "the legal qualification of the alleged conduct required further analysis in the context of the preliminary examination of the situation". Against this backdrop, the OTP went ahead with announcing it was considering moving forward with an investigation as a response to Burundi's withdrawal from the Rome Statute.[229]

The Burundi situation should not have been prioritised simply due to the State's withdrawal. Certainly, proceeding to request an authorisation is a clear signal that a State Party whose leaders might be defendants cannot avoid the ICC by withdrawing from the Rome Statute.[230] However, even if all factual and legal requirements were satisfied, which according to the 2016 report were not, Burundi's effective withdrawal, one year later negatively impacts the co-operation and enforcement stages. Unfortunately, under the current OTP policy, the feasibility of investigations only becomes relevant after the investigation stage at the moment of the selection

[226] Fifteenth Session of the Assembly of States Parties, Open Bureau Meeting, Relationship between the ICC and Africa, 18 November 2016, 15:00-1800 (copy on file with the author).

[227] OTP, *Report on Preliminary Examination Activities*, paras. 53 and 59, see *supra* note 25.

[228] *Ibid*., para. 44.

[229] *Ibid*., para. 60.

[230] The preliminary examination of the Burundi situation may also cover other crimes committed until such withdrawal becomes effective, namely one year after its notification to the Secretary-General of the UN.

of situations.[231] It is not a factor that is considered when determining whether to open an investigation.[232] The OTP rationale for this position is that weighing feasibility as a separate factor in the determination of whether or not to investigate could prejudice the consistent application of the Statute and might encourage obstructionism by States as a means of dissuading ICC intervention.[233] This logic has some merit, but ignoring this factor as relevant prior to the determination of whether or not to open an investigation may be at odds with the OTP's strategic goals of achieving high performance in relation to its mandate.[234]

Turning to the Russian Federation,[235] it became the focus of ICC activities through the preliminary examinations of the situations in Georgia and Ukraine. Initially, it was the 2016 preliminary examination activities report which sparked Russian backlash, with the reference to the annexation of Crimea as an "occupation" and by qualifying the situation between Russia and Ukraine as an "international armed conflict".[236] Later, in January 2016, the Russian Ministry of Foreign Affairs stated that in the light of the latest decision (the PTC's decision to authorise the investigation relating to the 2008 war between Russia and Georgia), the Russian Federation would be forced to fundamentally review its attitude towards the ICC.[237]

Indeed, the withdrawal of signature by Russia was a symbolic act and similar actions have already been carried out by Israel, the United States and Sudan. On a practical level, many believe such an action does

[231] Feasibility meaning where the OTP can conduct an effective and successful investigation leading to a prosecution with a reasonable prospect of conviction. OTP, *Policy Paper on Case Selection and Prioritisation*, see *supra* note 151.

[232] The OTP has expressed conflicting positions regarding feasibility. See OTP, Annex to the 'Paper of some policy issues before the Office of the Prosecutor', see *supra* note 13.

[233] OTP, Strategic Plan 2016-2018, para. 70, see *supra* note 1.

[234] *Ibid*., paras. 4 and 40. Strategic goal 1: conduct impartial, independent, high quality preliminary examinations, investigations and prosecutions; Strategic goal 3: further improve the quality and efficiency of preliminary examinations, investigations and prosecutions.

[235] The Russian Federation signed the Statute on 13 September 2000. It is fair to say it cooperated with the ICC on an *ad hoc* basis. In addition, it was regularly in contact with the ICC's leadership in its capacity as a Permanent Member of the Security Council, which was seised of the two referrals to the ICC concerning Darfur and Libya.

[236] OTP, *Report on Preliminary Examination Activities*, para. 158, see *supra* note 25.

[237] "On the beginning of ICC's investigation of events in South Ossetia in August 2008", in "Briefing by Foreign Ministry Spokesperson Maria Zakharova Moscow", 29 January 2016 (http://www.legal-tools.org/doc/afeaf2/).

not make any difference.[238] However, it does matters in that it signifies that Russia no longer has any intention of joining the Rome Statute in the future. But more important is what this represents in terms of international co-operation – not only bilaterally in relation to the situations under preliminary examination, but also multilaterally as a Permanent Member of the Security Council and the impact the Russian position may have for effective follow-up of existing ICC referrals and on the possibility of any potential future referral.

The departure of any State Party is regrettable and contrary to the Rome Statute's overarching goal of universality. Notwithstanding, these situations carry lessons learned, especially for the OTP. They should serve as a warning sign that public statements at the preliminary examination stage may have negative consequences. To be successful in the discharge of its mandate the ICC needs to find more constructive ways to consolidate its authority and attract greater support for its activities. The current preliminary examination practice does not seem to be contributing towards this aim.

24.5.2.2. Undermining Future Investigations

The OTP's strategic decision to highlight and publicise preliminary examination activities could create complications for the methodical building of a case against perpetrators. A high degree of publicity about prosecutorial activities might lead perpetrators to cover up evidence, destroy documentation, and intimidate potential witnesses, steps that could complicate construction of a case for trial.

Publicity may also complicate the ultimate enforcement of any arrest warrant, as individuals who expect to be investigated may go into

[238] Mark Ellis, Director of the International Bar Association, said: "Russia's decision to 'withdraw' its signature from the Rome Statute will have little or no impact on the court. Contrary to the government's statement, Russia has never engaged with the court in any meaningful way and, in fact, has violated the prohibited crimes provisions of the Statute through its military actions in both Georgia and Ukraine. The more serious threat to the [ICC] is the withdrawal of African countries. Unless this alarming tide can be reversed, the court's own legitimacy will be in peril". Tanya Lokshina, the Russia Program Director at Human Rights Watch described the act as a: "[s]ymbolic gesture of rejection, and says a lot about Russia's attitude towards international justice and institutions". "Russia withdraws signature from international criminal court statute", in *The Guardian*, 16 November 2016 (http://www.legal-tools.org/doc/a01c8f/).

hiding or make preparations to do so. There is also a duty, albeit at the investigation stage, that measures must be taken to preserve evidence under Article 56(3) of the Statute, as well as to protect victims pursuant to Rule 87 of the RPE. The longer preliminary examinations run, the more pressing these duties become. Focusing on preliminary examinations as a means of deterrence rather than on whether there is a reasonable basis to proceed to investigation may also negatively eliminate the prospect of an investigation being brought forward as the passage of time impacts on memories of events, other evidence may deteriorate and relevant witnesses die.[239]

Overwhelmingly, it is the victims that stand to lose the most from this prosecutorial strategy of preliminary examinations as advocacy tools. Long delays in preliminary examinations without any indication of whether the ICC will initiate an investigation represent an offence to one of the Court's primary constituencies. Although one advantage of publicising preliminary examinations is that it may help with victims and witnesses coming forward with more information, this is not the most compelling argument, considering that evidence collection is not the priority at the preliminary examination stage.

A further risk of widely publicising information about situations under preliminary examination is that it may reveal the OTP's prosecutorial strategy. For example, the 2016 preliminary examination activities report states, for the first time, in relation to Afghanistan, that the alleged crimes were committed not only on the territory of Afghanistan, but also on the territories of Poland, Lithuania and Romania (all States Parties).[240] The OTP's suggestion that there could be investigations into crimes of

[239] OTP Regulations, Regulation 8, see *supra* note 15 establishes that the Investigations shall be responsible for: (a) the preparation of the necessary security plans and protection policies for each case to ensure the safety and well-being of victims, witnesses, Office staff, and persons at risk on account of their interaction with the Court, in adherence with good practices and in cooperation and coordination with the Registry, when required, on matters relating to protection and support; (b) the provision of investigative expertise and support; (c) the preparation and coordination of field deployment of Office staff; and (d) *the provision of factual crime analysis and the analysis of information and evidence, in support of preliminary examinations and evaluations, investigations and prosecutions.*

[240] OTP, *Report on Preliminary Examination Activities*, paras. 194, 199 and 200, see *supra* note 25.

torture by the CIA of detainees in these territories is reckless.[241] It is hard to believe that this is new information, which only surfaced in 2016. Also this expansion deflects attention from what should be the main focus of this situation and provides opportunities for more of those involved to cover their tracks.

24.6. Practical Recommendations to Enhance and Improve Public Communications of the OTP during Preliminary Examinations

From the preceding sections, it would appear to be a paramount necessity for the OTP to develop a coherent communications strategy. Indeed, a diverse array of practitioners and policy documents have advocated for a more strategic approach to public communication.[242] For the sake of consistency in communications, it is key to develop methodology that is adaptable to each situation, which restates the function of the preliminary examination process, sets out its limitations and what can be accomplished through the procedure in order to manage expectations. More careful thought should go into the messaging produced by the OTP and the terminology crafted to convey it. Having a strategy in place would help to mitigate selectivity in the OTP's publicity practices by having clear standards available.

Within the OTP, the Executive Committee makes the decision on when and how to make something public. In this regard, the Executive Committee should enhance its decision-making process by agreeing on guidelines addressing what the OTP should communicate publicly regard-

[241] *Ibid.*, para. 200 of the 2016 OTP *Report on Preliminary Examinations* states that the information available provides a reasonable basis to believe that at least some crimes within the Court's jurisdiction were committed on the territory of Poland prior to 1 May 2003 and would encompass not only alleged crimes committed in Afghanistan since 1 May 2003, but also other alleged crimes that are sufficiently linked to the situation in Afghanistan and that were committed outside of Afghanistan since 1 July 2002.

[242] For example, as an Office of the High Commissioner for Human Rights policy document states: "[I]t is important that the commission/mission discusses early on and decides on a media strategy, and does not simply react to events and media pressure". See Office of the High Commissioner for Human Rights, International Commissions of Inquiry and Fact-finding Missions on International Human Rights Law and International Humanitarian Law: Guidance and Practice, 2013 p. 94. The Siracusa Guidelines state that there is no "one size-fits-all strategy". See M. Cherif Bassiouni and Christina Abraham, (ed.), *Siracusa Guidelines for International, Regional and National Fact-finding Bodies*, Intersentia, 2013, pp. 37–38.

ing the preliminary examination process and what should remain internal, when the information should be communicated publicly and how the Office should do so. Clear parameters should be developed to present more accurate projections of when preliminary examination decisions will be taken instead of using words such as "imminent" and "in the near future". It should also identify what factors should shape OTP communications strategies and how these factors should influence the way in which reports and statements are drafted. A useful source in this connection is the Guidance and Practice document developed by the Office of the High Commissioner for Human Rights' which presents several factors to consider – ensuring that the public and relevant governments are informed about the mission's work, avoiding the perception of prejudged conclusions, countering misinformation, determining the likely impact of a public statement, and responding to key events.[243] Another relevant factor is clarifying the preliminary examination's uniqueness as a separate and distinct process from other accountability mechanisms, including commissions of inquiry.

In addition, the OTP should only make Article 53(1) reports public, refraining from publicising annual, interim or other-related reports. If the OTP continues to believe these other reports are useful, they should be produced for every situation and not just for some. If other reports, such as Article 5 reports, are to remain part of the practice, then they need to be more consistent. The OTP should also consider adopting a more discreet approach, either through full confidentiality or simply by providing limited factual information on a gradual basis.[244] Alternatively, the OTP could just use the Court's annual activities reports, complemented by periodic statements. Greater attention should be given to the announcement of next steps and there should be enough safeguards in place to ensure that the information publicised is accurate and realistic. More importantly, all the actors who have a role to play in the process should be kept well informed from start to finish.[245]

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[243] International Commissions of Inquiry and Fact-finding Missions on International Human Rights Law and International Humanitarian Law: Guidance and Practice, p. 86, see *supra* note 242.

[244] Rob Grace, "Communication and Report Drafting in Monitoring, Reporting, and Fact-finding Mechanisms", July 2014, p. 12 (on file with the author). See *infra* note 248.

[245] *Ibid*., pp. 11–17. Commissioners also sometimes use public engagement to pressure governments to cooperate with the mission, though this form of public advocacy has not prov-

Second, the OTP needs to improve the quality of its reporting with respect to their content, reporting cycles and their frequency. The OTP should avoid undermining its work through duplications in reports and inconsistencies. For instance, the OTP's preliminary examination activities report and the Court's annual activities reports contain overlaps and, more alarmingly, contradictions concerning the exact same situations. It appears that the drafters of these reports worked independently from each other and contradictions between reports evidence lack of a unified collaborative process. In relation to the content of reports and statements, the public information on preliminary examinations does not need to be detailed because, prior to the determination on whether to open an investigation, it will be mostly inconclusive information. During this initial step of preliminary examinations, it would suffice to include in reports the relevant statistics on Article 15 communications, overall and by year, how many of them are manifestly outside jurisdiction, what type of alleged crimes they cover and what regions are involved. For those situations under examination that are already public, it would be useful to know where and with what frequency missions are conducted. With respect to public statements, the OTP is quite swift in issuing early and loud calls for accountability, but less dynamic when it comes to moving forward. In this respect, public statements will be less effective if they are not followed up with swift and decisive action.

There is also a need to harmonise terminology used for public reports and statements. This would contribute to a better understanding of OTP policy and the application of the different phases of the preliminary examination process. More clarity should be brought to the use of terms referring to the supposed opening, conclusion, completion, re-opening and reconsideration of situations under examination. As it has already been explained, preliminary examinations are compulsory on the receipt of an Article 15 communication and it is therefore inaccurate to announce their opening as if they were investigations. The OTP's monitoring functions are also ambiguous and not easily detectable during the preliminary examination stage. Furthermore, when a situation does not meet the requirements of Article 53, the OTP should be more straightforward referring to the examination as completed with a decision not to investigate rather

en successful in terms of securing co-operation. Therefore, the danger always exists that public statements can backfire.

than closed. Ultimately, a decision not to investigate is a decision not to proceed. These situations would still remain 'on the books' and can be reverted to at a later time, when more information or facts arise as provided in Article 15 of the Rome Statute.

Third, the OTP should consider alternative ways to build trust. Although the field of criminal law investigations is unique, the OTP can benefit from looking at the established working methods and dynamics of monitoring, reporting and fact-finding ('MRF') missions,[246] as well as the confidentiality approach used by the International Committee of the Red Cross ('ICRC').[247] Notable research has been carried out relating to how, when and to what extent MRF mechanisms mandated to investigate alleged violations of international human rights and international humanitarian law should engage in public communication.[248]

In relation to monitoring,[249] reporting and fact-finding[250] mechanisms, these refer to bodies mandated to investigate alleged violations of

[246] Harvard Humanitarian Initiative, Research conducted by the Program on Humanitarian Policy and Conflict Research on monitoring, reporting, and fact-finding ('MRF') (available on the Initiative's web site).

[247] The ICRC is a humanitarian organisation established in Geneva, Switzerland, in 1863 that adheres strictly to the Fundamental Principles of neutrality, impartiality and independence in its operations. The ICRC's mandate is set out in the 1949 Geneva Conventions and in the 1977 Additional Protocols. See "The ICRC: Its Mission and Work", 2009 (available on its web site).

[248] This fascinating paper examines how MRF practitioners have responded to challenges such as what should be communicated publicly, what information should be kept private, when a mission does communicate publicly, how should practitioners do so? What factors should shape practitioners' communications strategies, and how should these factors influence the ways that practitioners approach drafting MRF reports. It also focuses on how fifteen MRF missions have dealt with these matters over the past decade, including some of the most politically sensitive ones. Grace, 2014, see *supra* note 244.

[249] Monitoring entails examining contextual information in search of patterns that indicate the potential perpetration of international law violations. Rob Grace and Claude Bruderlein, "Building Effective Monitoring, Reporting, and Fact-finding Mechanisms", Working Paper, Program on Humanitarian Policy and Conflict Research at Harvard University, 2012 (on file with the author).

[250] Fact-finding means any activity designed to obtain detailed knowledge of the relevant facts of a dispute or situation, which the competent UN organs need in order to exercise effectively their functions in relation to the maintenance of international peace and security. Fact-finding should be comprehensive, objective, impartial and timely. Declaration on Fact-Finding by the United Nations in the Field of the Maintenance of International Peace and Security, A/RES/46/5, 9 December 1991, paras. 2 and 3.

international human rights law and international humanitarian law.[251] MRF missions abide by three guiding principles: impartiality, neutrality and independence, that allow its technical and political aspects to operate in congruence with one another to further accountability and conflict resolution.[252] Similarly, the preliminary examination process is conducted in the context of the overarching principles of independence, impartiality and objectivity.[253] MRF missions have the potential to feed into investigations conducted by courts and tribunals, either by helping to generate political support for initiating an investigation or by gathering evidence that can be incorporated into different phases of future investigative and prosecutorial processes.[254]

According to some authors, monitoring and institutional fact-finding are the best way of bringing the weight of the community to bear on each Member State.[255] Indeed, MRF reports can directly influence the behaviour of government actors.[256] However, preliminary examination activities must not be managed as MRF mechanisms. While both preliminary examinations and MRF missions are announced to the public at the

[251] MRF emerge from various sources and assume multiple forms in areas such as UN peace operations, Security Council mandated commissions, sanctions committees, monitoring and expert groups, the UNHRC Special Procedures, truth commissions, regional organisation mechanisms, as well as the International Humanitarian Fact-finding Commission, established by Additional Protocol I to the Geneva Conventions in 1977.

[252] Grace and Bruderlein, 2012, p. 17, see *supra* note 249.

[253] OTP, Report on Preliminary Examination activities, paras. 25–33, see *supra* note 25.

[254] For example, UNHRC resolution S-19/1, the mandate specified that the mission should "preserve the evidence of crimes for possible future criminal prosecutions or a future justice process".

[255] Antonio Cassese, "Fostering Increased Conformity with International Standards: Monitoring and Institutional Fact-finding", in *Realizing Utopia: The Future of International Law*, Oxford University Press, Oxford, 2012, p. 303.

[256] As one article mentions of NGO fact-finding work: The strategy – promoting change by reporting facts – is almost elegant in its simplicity. And there is growing evidence that it works. Governments frequently have adopted reforms in response to critical reports by NGOs, and former political prisoners who had been subjects of Amnesty International letter writing campaigns have often attributed their release from detention to Amnesty International. Country reports prepared by the more prominent NGOs often receive front page news coverage abroad, and in the Untied States, such reports have prompted Congress to adopt legislation suspending foreign aid or conditioning future aid on a country's compliance with international human rights standards. See Diane F. Orentlicher, "Bearing Witness: The Art and Science of Human Rights Fact-Finding", in *Harvard Human Rights Journal*, 1990, vol. 84, p. 3.

outset, one difference is that the latter derive their mandates from governments, international and regional bodies or NGOs. In the case of preliminary examinations, unless they result from a referral by a State Party or the Security Council, it is really only the countries concerned and the sender(s) of communications who have a legitimate interest in being informed of the conduct and progress of a preliminary examination prompted *proprio motu*. At least until the moment that a decision has been taken and the OTP determines that a reasonable basis exists to proceed with an investigation.[257]

MRF missions take into account various factors in relation to public engagement while they carry out their mandates. Regarding what type of information to release to the public, most MRF mechanisms strive forcefully to bring the mission's findings to the public eye.[258] In this respect, some have argued that keeping reports confidential contributes to an environment of impunity.[259] As with the OTP's publication of preliminary examinations, disagreements have arisen in relation to what should be made public stemming from different perceptions about what the mission should aim to accomplish and how it should strategically pursue these ends. While NGOs see MRF reports as a way to publicly advocate at the national level, diplomats from donor governments are hesitant in this re-

[257] The OTP's work overlaps with several accountability mechanisms such as: the International Commission of Inquiry on Libya, the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident, the Independent, International Commission of Inquiry on Côte d'Ivoire, the International Commission of Inquiry for Guinea, the Independent International Fact-Finding Mission on the Conflict in Georgia, the United Nations Fact-Finding Mission on the Gaza Conflict, and the International Commission of Inquiry for Darfur.

[258] Either in accordance with their mandated reporting cycles or until the findings and recommendations are final.

[259] UN News & Media, "Council Hears Reports on Côte d'Ivoire and Syria, Holds General Debate on Human Rights Situations that Require its Attention", 15 June 2011 (http://www.legal-tools.org/doc/cd6612/). Also HRW, "Because They Have the Guns…I'm Left with Nothing: The Price of Continuing Impunity in Côte d'Ivoire", 2016, vol. 18, no. 4, p. 30 which states: "[T]he U.N. Security Council has yet to make public or discuss the findings of the report (Commission of Inquiry), which was handed to the U.N. Secretary General in November 2004 and transmitted to the Security Council on December 23, 2004. The failure to discuss the findings of the report, l*et al*one act on them, sends the wrong signal to abusers". Conversely, the members of the Darfur Commission did little to no publicity upon the release of the mission's report. Regardless, the report wound up being quite impactful, since the mission was followed by a Security Council referral of the situation to the ICC, as the Darfur Commission's report recommended.

gard, believing that closed-door sessions with parties to the conflict are more effective.[260] The general trend is for MRF mechanisms to make their final reports public, to distribute them widely and ensure translations are available in the relevant languages. These missions are normally mandated to operate within prescribed timeframes contributing to a more expedient process of collecting and securing key information and potential evidence.

With respect to the ICRC, this body carries out a diverse range of activities that are mostly field-based. Yet, some parallels can be drawn: (i) the ICRC acquires and collects information that is relevant to proceedings of a judicial, quasi-judicial, public inquiry, fact-finding or similar nature; and (ii) the ICRC's activities have been described as "preventive"[261] which in turn is one of the OTP's policy objectives.[262]

ICRC policy dictates that in order to carry out its mandate and fully assume its operational role in the protection and assistance of victims in armed conflict and other situations of violence, confidentiality is an essential tool that allows them to build the necessary trust to secure access, open channels of communication, influence change and ensure the security of its staff.[263] Some critics argue that the organisation is too secretive and should share its findings publicly. When explaining why ICRC refuses to share its findings with the public, their representatives assert that "confidentiality does not equal complacency". The fact that they do not speak out publicly does not mean they are silent. Moreover, the ICRC

260 Grace, 2014, p. 20, see *supra* note 244.

261 ICTY, *Prosecutor v. Simić*, Decision on the Prosecution Motion Under Rule 73 for a Ruling Concerning the Testimony of a Witness, 27 July 1999, IT-95-9, paras. 76, 79 (http://www.legal-tools.org/doc/17bad5/): "The ICRC's activities have been described as 'preventive', while the International Tribunal [ICTY] is empowered to prosecute breaches of international humanitarian law once they have occurred. The same rational underpins the relationship with the ICC in which the OTP is empowered to establish the truth, while any preventive objective can only be aspirational but not operational". See also ICRC, 'The role of the ICRC in preventing armed conflict: its possibilities and limitations', 2001, no. 844, p. 923–946.

262 OTP, *Policy Paper on Preliminary Examinations*, paras. 16, 93 and 104–106, see *supra* note 2.

263 In this regard, the ICRC has developed a Memorandum that explains the rationale for and broad practical context of confidentiality as the ICRC's working method. See Memorandum on the ICRC's privilege of non-disclosure of confidential information, International Review of the Red Cross, 2016, 97 (897/898), pp. 433–444.

does not share confidential information with the media or other third parties, nor does it consent to the publication of such information, because there is always risk that their observations could be exploited for political gain or instrumentalised by one side or another. By discussing serious issues, such as abuse or ill-treatment, away from the glare of public attention, governments and non-State actors are often more likely to acknowledge problems and commit to taking action.[264] At the same time, they recognise that confidentiality is not unconditional and reserve the right to speak out or publish findings when their recommendations are not taken seriously and all other avenues of discourse have been exhausted.[265]

The ICRC's strategy is based on combining 'modes of action' and on selecting the appropriate activities depending on the approach(es) chosen.[266] Faced with an authority that has chosen to neglect or deliberately violate its obligations, persuasion (even with the mobilisation of support from influential third parties) may not be effective. In certain circumstances, therefore, the ICRC may decide to break with its tradition of confidentiality and resort to public *denunciation*. This mode of action is used only as part of the protection approach, which focuses on the imminent or established violation of a rule protecting individuals.[267]

24.7. Conclusion

As set out in this chapter, there are several issues with the OTP's policy on preliminary examinations. One of the most problematic relates to transparency and the Office's largely unregulated use of publicity during the preliminary examination process. The idea is not to encourage less transparency but rather, to advocate for the right type of transparency. Also, this contribution should not be read as being against publicity; instead it is suggesting less of it and handling it more strategically. The OTP

[264] Interview with ICRC Deputy Director of operations Dominik Stillhart, "Confidentiality: key to the ICRC's work but not unconditional", 20 September 2010 (available on ICRC's web site).

[265] *Ibid.*

[266] Modes of action are the methods or means used to persuade authorities to fulfil their obligations towards individuals or entire populations. Persuasion aims to convince someone to do something that falls within his area of responsibility or competence, through bilateral confidential dialogue. This is traditionally the ICRC's preferred mode of action. The ICRC: Its Mission and Work, 2009, p. 19, para. 1.a, see *supra* note 247.

[267] *Ibid.*, pp. 19–20 paras. 1 and 1.c.

will often be unable to satisfy all critics; still, the way it publicly communicates (or chooses not to publicly communicate) can mitigate and contain the effects of critiques that have the potential to inflict public perception damage on the ICC.[268] Support and buy-in for the preliminary examination process hinges on the OTP's ability to foster positive public perceptions of the Court's credibility as an impartial and independent institution committed to ensuring accountability for the worst crimes known to humankind.

While taking account of variations in mandates, the ICC could benefit from best practices on how other bodies handle the information they acquire or collect, including the advantages of not sharing inconclusive findings with the public and targeting only concerned parties in the sharing of that information. The Prosecutor should therefore adopt a gradual approach with regard to the disclosure of information before issuing public warnings or reporting prematurely findings in the context of preliminary examinations. No State likes to have a public finger pointed at it. States and other groups that are publicly under examination will naturally attempt to delegitimise the preliminary examination process by formulating critiques geared toward discrediting the Office if they have been publicly called out by the OTP at a time when the factual situation is less than clear. These critiques, credible or not, are harmful to the integrity of the Court as an institution and impact on the ability of the Court to achieve its mandate.

Purposefully using preliminary examinations in a different manner from what the Statute intended can be a legitimate means for the ICC Prosecutor to enhance the efficiency and effectiveness of his or her work. However, if the Prosecutor is afforded too much discretion in determining how to prioritise his or her duties under the Rome Statute, he or she may act in ways that, while arguably consistent with the Statute, do not fully take into account the interests of the ICC as a whole.

Although the OTP may not be facing a real 'deterrence or withdrawal' dilemma, some of the consequences discussed above should persuade it to review its preliminary examination process. This requires reconsidering fundamental aspects of its policy and practice. The OTP

[268] See Darryl Robinson, "Inescapable Dyads: Why the International Criminal Court Cannot Win", in *Leiden Journal of International Law*, 2015, vol. 28, pp. 323-347.

should advance more readily to investigations, instead of sitting on preliminary examinations for years. If the OTP's activities prevent future crimes or promote national accountability efforts, then these are side-effects, but should not be at the heart of ICC preliminary examinations, as they currently appear to be. The OTP should make the determination it is mandated to make, as efficiently as possible, and leave it in the hands of the judges to decide on the future of *proprio motu* investigations.

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